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Public Procurement and Human Rights:

A Challenge and Opportunity for Public and Private Actors to Foster Responsible Business Conduct along Global Supply Chains

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1. Introduction

1.1 General Overview: Why a Human Rights Lens on Public Procurement?

In the context of the current global economy, shaped by complex transnational supply chains, with fragmented dynamic organizational structures[1] and subcontracting cascades,[2] human rights risks and adverse impacts may arise throughout global supply chains of goods, works, services purchased by both private and public entities. Although value chains form common features of production, investment and trade unleashing socio-economic development, the exposure to human rights risks has been extensively documented,[3] impinging fundamental human rights, international labour standards and access to decent work. The International Labour Organization (ILO) reports that 152 million people are still victims of child labour; widespread informal employment persists, with 24.9 million people victims of forced labour and 780 million workers receiving inadequate wages.[4] Emblematic cases, as the Rana Plaza collapse in Bangladesh in 2013 and a flourishing case law[5] in different jurisdictions, have gradually raised awareness on the opaque, unsecured and untraceable nature of complex supply chains, evidencing a *duty of care* about human rights hold by parent companies to their subsidiaries, contractors and subcontractors[6].

Considering possible ways to prevent and mitigate such impacts, public procurement should not be neglected. Indeed, the State has multiple roles, as regulator (conducting *acta iure imperii*), and also as employer, consumer and market player (conducting *acta iure gestionis* and public management functions). Not only private actors, but also public ones, when purchasing, are immersed in the global supply chains context.[7] As a matter of fact, the State conducts procurement activities on a regular basis to achieve public management functional purposes and to provide citizens with essential public services, through public tender procedures and public contracts.[8] The public purchase of goods, works, (physical and consultancy) services and its procedures are referred to as *public procurement*. Accounting for 15-20% GDP and nearly 30% of general government expenditures, public procurement is a complex regulatory instrument of economic transactions.[9] States, purchasing via the global supply chains, like any other consumers, are immersed in the global supply chains context and they may encounter risks of human rights adverse impacts, which could be constantly perpetrated by their irresponsible consumption and buying. Multiple legal dilemmas inevitably arise given current regulatory gaps, not addressing such matter in depth. Particularly, questions on role and responsibility of both public buyers and private suppliers and on how to include human rights considerations in the procurement process emerge, requiring further scrutiny from both a human rights law and a public procurement law perspective.

Therefore, bridging human rights and public procurement is a core challenge and opportunity to raise awareness on the need to a paradigm shift, as promoted by the United Nations *2030 Agenda for Sustainable Development.*[10] As a premise, human rights, being minimum universal entitlements inherent to all human beings, create essential conditions to realize sustainable development[11] and inclusive economies fostering more

[1] Delautre, G (2019) Decent work in global supply chains: An internal research review. Working paper 47. Geneva: ILO;
[2] Sack D, Sarter E. (2022) To comply or to be committed? Public procurement and labour rights in global supply chains. Global Social Policy.
[3] Ulfbeck, V. G., Andhov, A., & Mitkidis, K. (2019) Law and Responsible Supply Chain Management: Contract and Tort - Interplay and Overlap. Routledge. Routledge Research in Corporate Law
[4] ILO (2016), Decent work in global supply chains - Report IV to the 105th ILC. Geneva; UN Global Compact, (2018), Decent Work in Global Supply Chains, Baseline report.
[5] Some examples are: UK Supreme Court rulings in Okpabi v Royal Dutch Shell Plc and Lungowe and Ors. v Vedanta Resources Plc and Konkola Copper Mines Plc and the Hague District Court's decision in Milieudefensie et al. v. Royal Dutch Shell plc case. For other cases see: ECCJ (2021) "Suing Goliath: An analysis of civil cases against EU companies for overseas human rights and environmental abuses"
[6] Bernaz, N. (2016) Business and human rights: History, law and policy - Bridging the accountability gap. Taylor and Francis;
[7] Hughes, A, Morrison, E & Ruwanpura, KN (2019), 'Public sector procurement and ethical trade: Governance and social responsibility in some hidden global supply chains', Transactions of the Institute of British Geographers, vol. 44, no. 2, pp. 242-255.
[8] Arrowsmith S. (2020) Law of Public and Utilities Procurement, vol. 1, Sweet & Maxwell.
[9] OECD (2021), "Governments at a glance", ch. 8 Size of public procurement; OECD National Accounts Statistics (database)
[10] UN GA Res 25/09/2015.
[11] Defined by the UN Bruntland Commission "Our Common Future" (1987) as "meeting the needs of the present without compromising the ability of future generations to meet their own needs".

responsible business conduct.[12] Thus, public procurement constitutes a key and powerful instrument of strategic regulation to influence more responsible production and consumption, creating benefits for both public buyers and private suppliers. However, evidence in the literature and practice shows poorly adequate responses by procuring entities and suppliers of the State to human rights risks in a context that is highly unregulated. So far, the tendency has been to a paradoxical inaction, despite an evident duty to protect, respect and fulfil human rights hold by States, applicable also to State purchasing activities. Further scrutiny is required to better understand this dilemma and paradox.

So far, the *Business and Human Rights* (B&HR) subfield of international law has tried to address corporate human rights impacts and risks, gaining increasing *momentum* since the start of the new millennium. Such process has been consolidated especially after the endorsement of the United Nations *Guiding Principles on Business and Human Rights* (UNGPs)[13]. Rooted in the *Protect, Respect and Remedy Framework*, the UNGPs structure rests on three main normative pillars: the (1) State Duty to Protect against human rights abuses by third parties; the (2) Corporate Responsibility to Respect human rights, through human rights due diligence; (3) Access to Effective Remedies, both judicial and non-judicial, for victims. Notwithstanding the steps ahead in the proliferation of new voluntary legal instruments, challenges of legal unclarity and structural gaps[14] dominates this field. Evidence, indeed, shows that the inherent *soft law* nature of existing mechanisms is not sufficient to foster a full enforcement of human rights legal guarantees along supply chains. Indeed, qualitative and quantitative studies suggest that adherence to the UNGPs and due diligence amongst businesses remains marginal, even in high-risk sectors, outlining existing enforcement gaps.[15]

In the UNGPs, a limited attention has, also, been devoted to commercial transactions between the State and business enterprises, referred to as the "*State-business nexus*". More specifically, public procurement activities and contractual relationships between public contracting authorities and private suppliers are integrated as one dimension of the State-business nexus. In this regard, the UNGPs Commentary recommends public authorities when playing the role of procuring entities not to underestimate the risk of human rights violations by State authorities and their chains of contractors.[16] However, multiple ambiguities and legal uncertainties surround this subject, risking to foster irresponsible States' consumption which could inevitably feed a vicious cycle of abuses.[17] Indeed, public buyers have limitedly addressed human rights risks and adverse impacts in practice, and clarifications on who is responsible for what are lacking from a human rights law perspective. Thus, this thesis aims at deeply analysing public procurement under a human rights' legal lens, disentangling legal implications and dilemmas on the existence of obligations and responsibilities when the State is the public buyer acting as contracting authority, and private enterprises participate to public tenders as private suppliers and economic operators.

In details, linking public procurement and human rights law, although inspired by distinct principles, objectives, regulatory frameworks, constitute a core challenge but also an opportunity in the current globalized economy. Thus, adopting risk-opportunity perspective is necessary to substantially disentangle the phenomenon in all its facets.

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[12] As defined by the Organization for Economic Cooperation and Development (OECD) "Responsible business makes a positive contribution to economic, environmental and social progress by avoiding and addressing adverse impacts related to an enterprise's direct and indirect operations, products or services" OECD (2018), OECD Due Diligence Guidance for Responsible Business Conduct.

[13] UNCHR (2011), "Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy Framework"

[14] Ruggie, J.G. (2013), Just business: multinational corporations and human rights. First edition. New York: W. W. Norton & Company.

[15] Methven O'Brien, C., Botta, G. (2022), The Corporate Responsibility to Respect Human Rights: An Updated Status Review, João Luiz da Silva Almeida (ed), Corporate Social Responsibility and Social and Environmental Governance: Greenwashing and Human Rights, Rio de Janeiro, Lumen Iuris; for data check: Business and Human Rights Resource Center (2019), "List of large businesses, associations & investors with public statements & endorsements in support of mandatory due diligence regulation. Business and Human Rights Resource Centre (2022), "Closing the gap: Evidence for effective human rights due diligence from five years measuring company efforts to address forced labour" McCorquodale, R., Nolan, J. (2021), "The Effectiveness of Human Rights Due Diligence for Preventing Business Human Rights Abuses", Neth Int Law Rev, Vol.68, pp. 455–478

[16] Russo, D. (2018), The Duty to Protect in Public Procurement: Toward a Mandatory Human Rights Clause?

[17] Methven O'Brien, C, and Martin-Ortega, O. (2019), Public Procurement and Human Rights: Opportunities, Risks and Dilemmas for the State as Buyer. Corporations, Globalisation and the Law series, Edward Elgar.

From a risk perspective, evidence of reported human rights risks and adverse impacts[18] linked to public purchasing of goods,[19] services,[20] works[21] have been increasingly documented in recent years. This applies especially to sectors characterized by complex value chains and low-skilled labor, for instance the textiles production (workwear, personal protective equipment), electronics (office devices), healthcare procurement (surgical instruments, plastic gloves), food (catering services), extractive (materials for infrastructures and public works). So, procured goods, works, services entail both domestic and foreign inputs added at different levels of production and in different jurisdictions. Reflecting on core legal implications, including questions on extraterritoriality, human rights abuses constitute a risk for both public (contracting authorities) and private (suppliers) actors, which all have (different) layers of responsibilities towards human rights along supply chains.

Regarding the state of art, so far, the attention of the international legal scholarship on the matter results particularly limited. Gaps at regulatory level require to clarify to what extent the positive obligations of States influence the way in which procurement is regulated, also because the integration of provisions on protection of human rights in public procurement procedures is still an under-researched issue[22].The literature and case-law has limitedly addressed the "State-business nexus", mainly clarifying the *State-owned Enterprises* legal status.[23] Notwithstanding this, foundations and clarifications on the existing legal implications on public procurement activities are needed. Particularly, regarding international State responsibility[24], the responsibility of non-State actors (private contractors)[25] has been extensively researched in terms of control and attribution to the State in specific circumstances, however more comprehensive explanation on the responsibility of the State as buyer and on the corporate responsibility of economic operators is lacking. For instance, State due diligence obligations[26] when procuring and possible *human rights due diligence* (HRDD) requirements for suppliers require a careful scrutiny to reflect on ways to overcome enforcement and accountability challenges. This research tries to, partially, fill such gaps to provide a comprehensive understanding of the problem.

From an opportunity side, public procurement provides a possibility for States and their contractors to foster sustainable and responsible supply chains while increasing public value, using public contracts as means of *strategic regulation.*[27] Public procurement represents a potential tool available to all States and public entities with high economic leverage to foster human rights respect throughout global supply chains, realizing *Sustainable Public Procurement* (SPP)[28]. Contracting authorities are, thus, important market players to influence commercial behavior through their purchasing decisions, encouraging responsible supply chains.[29]

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18 DIHR (2016) "Public Procurement and Human Rights: A Survey of Twenty Jurisdictions". Morris, D., (2020), Driving Change through Public Procurement: a toolkit on human rights for procurement policy makers and practitioners, DIHR; Ortega, O'Brien, (2017), Advancing Respect for Labour Rights Globally through Public Procurement, Politics and Governance. Oliphant K (2016), The Liability of Public Authorities in Comparative Perspective. Evidence has been collected by NGOs, such as Denwatch, Swedwatch, the British Medical Association, the US Worker Rights Consortium

19 Methven O'Brien, C, and Martin-Ortega, O. (2020), "Human rights and public procurement of goods and services", in Deva S. and Birchall D. (eds), Research Handbook on Human Rights and Business, pp. 245–267

20 Methven O'Brien, C., (2015), Essential Services, Public Procurement and Human Rights in Europe. University of Groningen Faculty of Law Research Paper No. 22/2015

21 Treviño-Lozano, L. (2021) "Sustainable Public Procurement and Human Rights: Barriers to Deliver on Socially Sustainable Road Infrastructure Projects in Mexico" Sustainability 13, no. 17: 9605.

22 Rossi, E. (2020), Human Rights Clauses in Public Procurement: New Tool to Promote Human Rights in (States)Business Activities?

23 Russo, D. (2018), The Duty to Protect in Public Procurement: Toward a Mandatory Human Rights Clause?
Barnes M (2021), State-Owned Entities and Human Rights: The Role of International Law
Catà Backer L., (2020), Human Rights Responsibilities of State-Owned Enterprises, in Deva, Birchall (2020) Research Handbook on Human Rights and Business.

24 ILC Draft Articles on Responsibility of States for Internationally Wrongful Acts, extract from the Report of the ILC on the work of its fifty-third session, November 2001, Supplement No. 10 (A/56/10), chp.IV.E.1

25 Monnheimer, M. (2021) Why to Analyze State Responsibility for Human Rights Violations: The Flawed Debate on Direct Human Rights Obligations for Non-State Actors. In Due Diligence Obligations in International Human Rights Law (pp. 9-46). Cambridge: Cambridge University Press

26 Baade, B. (2020). Due Diligence and the Duty to Protect Human Rights. In Due Diligence in the International Legal Order: Oxford University Press Monnheimer, M., 2021. Due Diligence Obligations in International Human Rights Law. Cambridge: Cambridge University Press.

27Valaguzza, S., (2016), Sustainable Development in Public Contracts: An example of Strategic Regulation; Valaguzza S, (2018), Procuring for value, Governare per contratto, Centre of Construction Law and Management; Valaguzza S, Mosey D. (2019) Alliancing in public sector, collaborare nell'interesse pubblico

28 UN Marrakech Task Force on SPP: "a process whereby organizations meet their needs for goods, services, works and utilities in a way that achieves value for money on a whole life basis in terms of generating benefits not only to the organization, but also to society and the economy, whilst minimising damage to the environment"

29 Caranta, R. (2021) Public procurement for the SDGs – Rethinking the basics (2021). Sjaffel, B., Wiesbrock A., (2016), Sustainable Public Procurement under EU Law: New Perspectives on the State as Stakeholder, Cambridge University Press, Cambridge.

The SPP field has been, increasingly, consolidated in the past two decades. It is emblematic the case of the European Union (EU) Public Procurement Directives reformed in 2014[30] including a greater integration of "horizontal policy objectives" into public procurement procedures.[31] More legal possibilities have been provided to use public procurement in support of broader social and environmental goals.
Currently, most academic efforts and public buyers' practices have been on including environmental considerations throughout the procurement cycle, namely on *Green Public Procurement*[32]. Although including social aspects under public procurement law is not a new phenomenon at all and has a long history of examples[33], the focus on human rights risks raising along global supply chains from a public procurement perspective has been pretty marginal so far. Focusing on the EU context, the EU Commission has coined the term *Socially Responsible Public Procurement* promoting the use of public contracts as a tool for pursuing social objectives[34]. Under such field, the attention has been primarily from a labour law perspective,[35] rather than from a broader international human rights law one. Limited scholarship has focused on procurement potentials for regulating international labour standards[36] and for driving more corporate social responsibility (CSR)[37] and social justice, as in the case of the seminal monograph *Buying Social Justice* by McCrudden[38] and the volume *Human Rights and Public Procurement*[39] edited by O'Brien and Ortega (2020). A comprehensive monograph with insight on public procurement from a Business & Human Rights perspective, addressing both regulatory and procedural challenges would fill gaps in such context, addressing both public and private entities' role and responsibility and reflecting on developments at regional and national level with peculiar attention to the European Union landscape. Furthermore, the opportunity to use public procurement procedures to promote HRDD requirements, fostering a Business & Human Rights based procurement is a fundamental novelty of this work.

1.1 The Research Scope

Having mentioned the EU public procurement legal framework, it is important to clarify that although an international law look to public procurement is adopted in this work, the existence of multi-level legal frameworks substantially regulating procurement is recognized. The proliferation of legal and institutional regulatory approaches at national, regional, international level has been intensive in the last twenty years. This includes the diversification of multiple national, regional and international instruments of public procurement regulation described as a "Global Revolution" by Arrowsmith.[40] Regarding the research boundaries, this thesis addresses public procurement from an international law perspective, with specific attention to the EU public procurement legal context to substantiate the application of reflections on roles and responsibility an existing

[30] Directive 2014/24/EU of the European Parliament and of the Council of 26.02.2014 on public procurement and repealing Directive 2004/18/EC Text with EEA relevance (Public Sector Directive) OJ L94/65 ; Directive 2014/25/EU of the European Parliament and of the Council of 26.02.2014 on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC Text with EEA relevance(Services Directive) OJ L94/243; Directive 2014/23/EU of the European Parliament and of the Council of 26.02.2014 on the award of concession contracts Text with EEA relevance (Concessions Directive) OJ L94/1.
[31] Arrowsmith S, Kunzlik P.(2009) Public procurement and horizontal policies in EC law: general principles, Arrowsmith, S., & Kunzlik, P., (eds.), Social and Environmental Policies in EC Procurement Law: New Directives and New Directions. Cambridge University Press.
[32] UNEP, 2017, Global Review of Sustainable Public Procurement
[33] Williams-Elegbe (2022), Public procurement as an instrument to pursue human rights protection, in Marx, A. et al, (eds) Research Handbook on Global Governance, Business and Human Rights, Edward Elagar, pp. 143–161 McCrudden, C., (2007) Buying Social Justice: Equality, Government Procurement & Legal Change. Buying Social Justice: Equality, Government Procurement & Legal Change, Oxford University Press, 2007, Oxford Legal Studies
[34] Wiesbrock, A. (2016), Socially responsible public procurement: European value or national choice? in Sjafjell & Wiesbrock, 2016, Sustainable Public Procurement under EU Law: New Perspectives on the State as Stakeholder, Cambridge University Press, Cambridge.
[35] Corvaglia M.A. (2017) Public Procurement and Labour Rights: Towards Coherence in International Instruments of Procurement Regulation. Hart Publishing, Oxford;
[36] Caranta & Trybus, (2010) The law of green and social procurement in Europe, Djof Publishing Copenhagen, EU Procurement Law Series.
[37] McCrudden, C. (2007), Corporate Social Responsibility and Public Procurement. The New Corporate Accountability: Corporate Social Responsibility and The Law, Doreen McBarnet, Aurora Voiculescu, Tom Campbell(eds) Cambridge University Press,
Ankersmit, L. (2020), The contribution of EU public procurement law to corporate social responsibility. Eur Law Journal 2020; 26: 9– 26
OECD (2020), Integrating Responsible Business Conduct in Public Procurement, OECD Publishing, Paris.
[38] McCrudden, C., (2007a) Buying Social Justice: Equality, Government Procurement & Legal Change. Buying Social Justice: Equality, Government Procurement & Legal Change, Oxford University Press, 2007, Oxford Legal Studies
[39] Methven O'Brien, C, and Martin-Ortega, O. (2019), Public Procurement and Human Rights: Opportunities, Risks and Dilemmas for the State as Buyer. Corporations, Globalization and the Law series, Edward Elgar.
[40] Arrowsmith S., (1998) "National and International Perspectives on the Regulation of Public Procurement: Harmony or Conflict?" in Arrowsmith, Davies(eds) Public Procurement: Global Revolution (Kluver Law International), pp. 3-26

public procurement regulatory framework. Therefore, after having set-up a theoretical framework from an international law perspective, foundations are applied to the EU Public Procurement context. The choice of the EU is justified by the fact that the EU jurisdiction is one of the most experimental in promoting sustainability considerations in public procurement. Indeed, the EU Public Procurement Directives (2014) provide an important common supra-national legal framework to the different EU Member States, one of the most advanced in terms of *legal possibilities* to include sustainable and social considerations. EU Public procurement law, thus, provides a potential springboard to foster increased application of Business & Human Rights considerations, which could help its enforcement process throughout the public procurement cycle phases and contractual provisions.

Nevertheless, the application of public procurement as means of strategic regulation to harden Business & Human Rights is still at embryonal level. The efforts at EU level appear marginal and fragmented and lacking coherence. Potential synergies can be drawn between Business & Human Rights legislative proposals, as the EU Directive on Corporate Sustainability Due Diligence[41] approved in March 2024, sectoral legislations [42]and public procurement, however such link has not been addressed explicitly at regulatory level, being a missed opportunity. Thus, a focus on domestic contexts is required to better understand the status of development and legal possibilities to embrace public procurement from a human rights perspective in practice. In the EU panorama limited examples of domestic practices have emerged showing that States are currently consolidating strategies to *buy by example* towards *B&HR based public procurement*.

In this analysis, the attention will be on experimental efforts by two specific countries. In details, Sweden, being the most advanced example of existing practice in EU, having set up a comprehensive methodology at national level, requiring human rights criteria for procurement categories selected as risky from a human rights perspective.[43] Other examples of potentials developments are in Italy. Italy has an advanced legislation on Sustainable Public Procurement, being the first country to have required to all contracting authorities the application of mandatory minimum sustainability requirements in the procurement of specific categories of goods, works, services[44]. The integration of social and human rights criteria in this framework is under current development[45], providing opportunities for more responsible business conduct in public procurement which worth to be followed for the purposes of this research. Such experimental approaches and potentials will be unpacked throughout the thesis, assessing the current *status* in specific jurisdictions.

Notwithstanding the legal uncertainty surrounding both the regulatory and procedural spheres which raise multiple dilemmas, several opportunities and emerging developments suggest a road ahead in the consolidation of a link between public procurement and human rights. Therefore, systematizing a theoretical framework becomes necessary to build more legal coherence and to reverse human rights risks in opportunities for both public buyers and suppliers.

1.2 The Research Questions

In a context of legal uncertainty and ambiguity, as irresponsible State purchasing may inevitably feed a vicious cycle of transnational abuses, key research questions emerge. The public procurement phenomenon, specifically referring to the public purchasing regulations in the EU context, will be deeply scrutinized from an international human rights law perspective, replying to the following underlying question:

1. Is there an international obligation and consequent responsibility of public procurement stakeholders (public buyers and private suppliers) to prevent human rights harms in public procurement?

[41] EU Commission, (2022), Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence

[42] Semple, A (2015) 'The Link to the Subject Matter: A Glass Ceiling for Sustainable Public Contracts?' in Sjåfjell and Wiesbrock (eds.) Sustainable Public Procurement under EU Law. New Perspectives on the State as Stakeholder Cambridge University Press, pp. 50-74

[43] Gothberg, P. 2019, "Public Procurement and human rights in the healthcare sector: the county councils' collaborative model"
Loaneus, K., 2018, Sustainable Public Procurement, Hållbar Upphandling, PIANOO

[44] Fiorentino L., La Chimia A. (2021) Il procurement delle pubbliche amministrazioni, tra innovazione e sostenibilità, Astrid.
Caranta R., Marroncelli S., (2021), Gli appalti pubblici tra mitigazione e resilienza: il contributo del GPP alla lotta contro i cambiamenti climatici, Riv. giuridica dell'ambiente, vol. 23.i

[45] Cellura L. et al, (2022) Manuale per l'applicazione dei criteri sociali negli appalti pubblici – Strumenti e procedure per l'attuazione del Sustainable Procurement, Appalti & Contratti, Maggioli Editore

2. Does public procurement have a legal relevance in *hardening* Business & Human Rights *soft* law mechanisms?
3. How to leverage more responsible supply chains in practice throughout the public procurement process?

Potential answers to the three questions represent necessary pieces to draw a comprehensive theoretical framework aimed at filling existing gaps and reversing human rights risks into opportunities for both public and private actors involved in public procurement.

The first question constitutes the starting point and core dilemma of this analysis. From this question, a set of subsequent ones can be extracted on what is the role and responsibility of public procurement stakeholders- both public buyers and suppliers- under international human rights law. This will be possible by identifying potential obligations that could potentially apply and exploring the application of International State Responsibility theory in such situation.

Table n.1.1: Exploring Roles and Responsibilities in Public Procurement and Human Rights

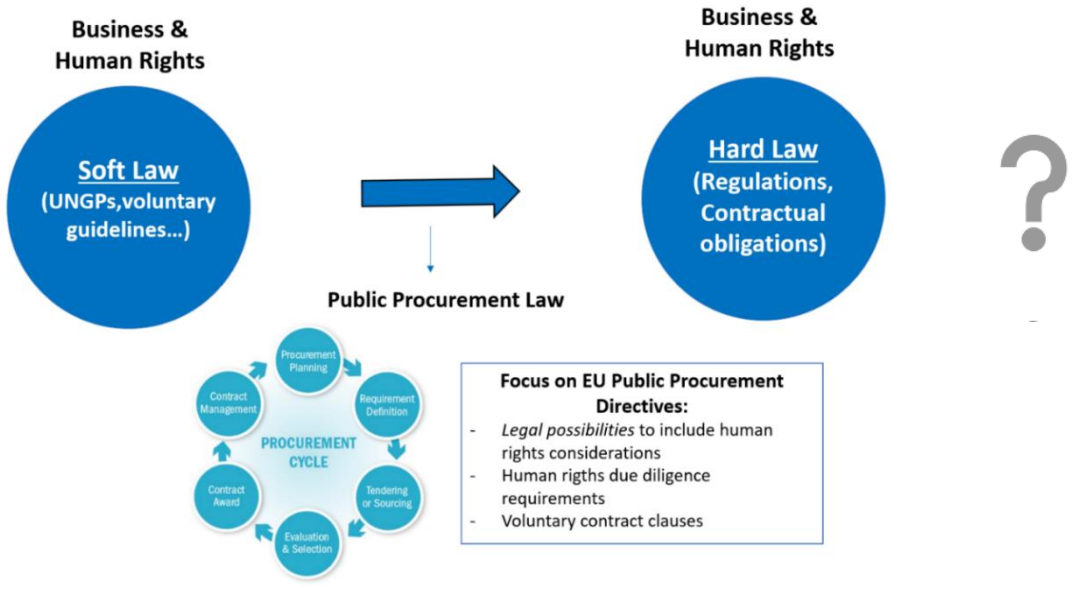
1. **Role**
2. **Responsibility**

States
Business

	(i) Role (Applicable Law – Primary norms)	(ii) Responsibility (Secondary norms)
(a) States (Public Buyers)	Human Rights obligations while purchasing? Duty to protect, respect, fulfil human rights?	International State Responsibility?
(b) Business (Private Suppliers)	Human Rights Due Diligence? Voluntary Contract Clauses?	Corporate responsibility to respect human rights? Liability regimes under national law and extraterritorial law?

The second question concerns exploring, whether public procurement and public contracts could have a legal relevance in *hardening* Business & Human Rights *soft* law mechanisms, given the role and responsibility assessed in the first question. Narrowing down the research focus to the regional context of the European Union (EU), legal uncertainty and current evolution of new legal initiatives, such as the proposed EU Directive on Corporate Sustainability Due Diligence, are considered, reflecting further on the potential inclusion of Business & Human Rights considerations in public procurement. Indeed, public procurement procedures, contracts, strategies, may play an important role in the process of *hardening the soft*, fostering legal requirements to buyers and suppliers, which require further scrutiny.

Image n.1.1: *Hardening the soft* mechanisms through public procurement

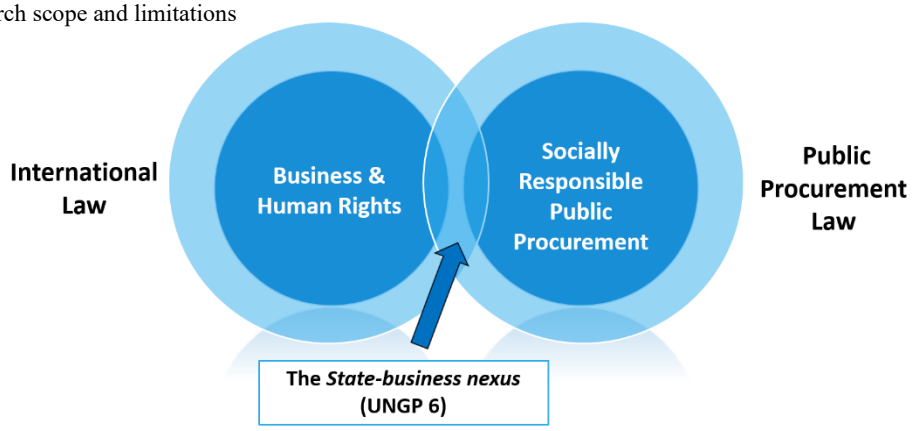


The third step is to understand in practice how to leverage more responsible supply chains throughout the public procurement cycle, looking at existing approaches in domestic jurisdictions – in EU - particularly when procuring goods, works, services in human rights risky sectors. Through selected case studies at national level in EU – focusing on Sweden and Italy as good practices- examples of the introduction of human rights criteria and human rights due diligence requirements are at stake, as potential source of reflection on existing application challenges but also as source of inspiration for developments in other jurisdictions and to promote a more comprehensive application.

1.3 Methodology

The research purports to explore spaces of interconnection among the two apparently separate legal fields, public procurement and human rights law, inspired by distinct primary objectives, regulatory frameworks, legal sources. The challenge is to intersect the Business & Human Rights subfield with the Sustainable Public Procurement sphere – in details the Socially Responsible Public Procurement stream- to explore legal implications, human rights risks and opportunities. The intersection between these two spheres constitutes the aforementioned "State-business nexus".

Image n.2: Research scope and limitations



In order to bridge the two normative dimensions, a qualitative methodological approach is adopted, justified by the legal and qualitative nature of the subject matter. The research dilemmas suggest the centrality of law in this research, conducive to a legally-oriented perspective. In details, public procurement is scrutinized under an international law standpoint, given the potential transnational dimension of public purchasing immersed in the global supply chain context. Notwithstanding the predominant international law perspective, as public procurement matters are traditionally analyzed from administrative and contract law regimes and are regulated by multiple regulatory frameworks – at international, regional, domestic levels – this research will envisage a multi-level and multi-disciplinary approach.

Key assumptions underlying the research have influenced the selected research methods, configuration and strategy. First of all, procurement regulatory frameworks are not conceptualized as static legal *corpora* and mere formal rules. In this analysis, law is conceived as *cement of society* and *essential medium of change* serving the function of social ordering.[46] It results from a set of dynamic concrete social phenomena, where normative, social, ethical, economic factors are all interrelated and evolve quickly in new trends.[47] Neglecting *informal*[48] processes deeply rooted in the social fabric which shape legal phenomena at international, regional, local level, would hinder the validity of this research. Thus, considering the dynamicity and fluidity of legal systems at different levels and approach them in a systemic way is essential to provide a genuine *"thick*

[46] Glanville Williams, (2013), Learning the Law 1 (15th ed.)
[47] Shoenbaum T., What is Law?, p. 5
[48] Voigt S. (2018), How to measure informal institutions, Journal of Institutional Economics; North, D. Institutions, Institutional Change and Economic Performance.

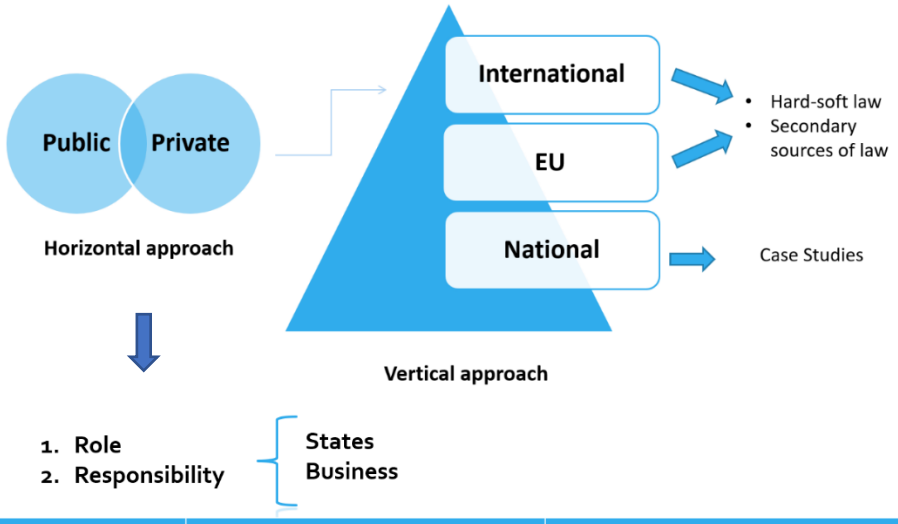
description"[49]of legal phenomena. The attention is, particularly, on the grassroots of law-making processes, hybrid sources of law and flourishing streams under current consolidation – as Business & Human Rights and Sustainable Public Procurement. Dilemmas on compliance and enforcement challenges[50] raise in a context of increasing fragmentation and proliferation of subfields of law.[51] Given the aforementioned context, reflecting on compliance to instruments, mainly of voluntary nature, inevitably induces a reflection on the *hard* and *soft* law[52]dichotomy and their blurred boundaries. It is, thus, relevant to shed lights on processes of "hardening soft regulations" through public procurement.[53]

Furthermore, complex globalization dynamics are central in this analysis, considering the increasing proliferation of spatial and institutional normative pluralism[54], fostering reflections on the dialectic between international, regional and national dimensions[55] of public procurement. Considering public procurement as immersed in a context where centrifugal and centripetal[56] forces make legal systems polycentric, multi-layered and interrelated. This inspires debates on international dynamics also when addressing subject-matters traditionally regulated mainly at national level, also considering that according to global governance theories we are witnessing the emergence of a 'global administrative space'. Namely, a space in which the strict dichotomy between domestic and international has largely broken down, domestic and regional and international elements are all interwoven in these processes of regulation[57].It is, thus, fundamental to focus on interlinkages between different layers of regulation that should not be conceived in silos.

Given such premises, to reply to the underlying research questions, and to systematize a coherent theoretical framework, doctrinal methods of legal analysis are adopted. Doctrinal review of normative regulatory and procedural frameworks has been conducted, supported by case law interpretation and relevant literature. In details, the research strategy, namely the structure guiding the research method execution and the analysis of the subsequent data, envisages mixed methods with doctrinal legal analysis and multiple case-studies. The latter are functional to explore the current consolidation of the theory in the practice. In details, the research envisages a cross-sectional design with a combination of horizontal and vertical approaches. Indeed, given the normative pluralism and dynamicity, a cross-cutting and multi-level legal analysis is undertaken: a horizontal approach considers both public and private actors under a bipartite and cross-cutting research matrix following two main research axes on: (i) the main applicable norms, (ii) the responsibilities, raising for both public (i) and private (ii) actors. Such research approach is combined with a vertical perspective envisaging multiple levels of legal analysis: international, regional (EU) and national. Such approach - from macro to micro – aims at depicting an overview of public procurement and human rights legal instruments and frameworks from international, regional, national level.

[49] Hirshl R. (2014), Comparative Matters: The Renaissance of Comparative Constitutional Law. Oxford Press
[50] Cryer, R, Hervey, T., Sokhi-Bulley, B., (2011), "Introduction: What is a 'Methodology'?." Research Methodologies in EU and International Law. London: Hart Publishing, 1–6. Bloomsbury Collections
[51]Koskenniemi M., (2007), Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law, ILC Study Group Report
[52] See Weil P. (1983), Towards Relative Normativity in International Law? American Journal of International Law 413; Klabbers J.,(1996),The Redundancy of Soft Law', Nordic Journal of International Law 167; D'Aspremont, J. (2008),'Softness in International Law: A Self-Serving Quest for New Legal Materials' European Journal of International Law 1075; Besson, S. (2010), Theorizing the Sources of International Law', The Philosophy of International Law (2010), 170. Brunnée J., (2017), Sources of International Environmental Law Interactional Law in the Oxford Handbook on the Sources of International Law 978; Boyle, A. (2010), 'Soft Law in International Law-Making' in Malcolm D. Evans (ed), International Law122. D'Argent, P. (2017),'Sources and the Legality and Validity of International Law: What makes Law International in Besson S. and d'Aspremont J., The Oxford Handbook on the Sources of International Law (oup 2017) 552.
[53] Rossi E., (2020),"The EU Directive on Public Procurement has brought about a 'hardening trend', which consists in the incorporation of social standards established by international and European soft law within tender documents and public contracts"
[54] Giddens, A. (1990), The Consequences of Modernity, Cambridge: Polity
Eriksen T., (2007), Globalization: The Key Concepts, Oxford Press
[55] Shiff Berman P., (2012) Global Legal Pluralism, A jurisprudence of Law beyond borders. Klabbers J., Piiparinen T., Normative Pluralism: An Exploration
56 Gabriel Palma J.,(2006) "Globalizing Inequality: 'Centrifugal' and 'Centripetal' Forces at Work," Working Papers 35, UNDESA
[57] Krisch n., Kingsbury B, (2006) Introduction: Global Governance and Global Administrative Law in the International Legal Order

Image n.1.3: A combination of horizontal and vertical research approach



	(i) Role (Applicable Law – Primary norms)	(ii) Responsibility (Secondary norms)
(a) States (Public Buyers)	Human Rights obligations while purchasing? Duty to protect, respect, fulfil human rights?	International State Responsibility?
(b) Business (Private Suppliers)	Human Rights Due Diligence? Voluntary Contract Clauses?	Corporate responsibility to respect human rights? Liability regimes under national law and extraterritorial law?

At macro level, the supranational legal sphere is addressed considering international human rights law as foundational in this analysis, integrating also limited insights on global administrative law[58] aspects. From an international law angle, it is crucial to encapsulate the public procurement discourse within the *State Responsibility*[59] theory, clarifying core legal obligations and possible consequences for both public buyers and suppliers as reasons to act in the direction of human rights integration throughout the procurement process.

Then, shifting to the regional level, the focus is narrowed down to public procurement in the European Union context: taking EU as benchmark, *hard* and *soft law* instruments are reviewed[60], complemented by relevant case law insights on the link between human rights and public purchasing. EU public procurement legal framework is selected due to innovative entry points on Sustainable Public Procurement and Socially Responsible Public Procurement provided by the reformed Public Procurement Directives (2014). Furthermore, initiatives on mandatory human rights due diligence requirements have gained *momentum* in the last years in EU. Thus, EU constitutes a relevant springboard to reflect on the potentials to interconnect public procurement law and Business & Human Rights law. The focus on this specific regional legal framework will be, particularly, functional to reflect on dilemmas related to *hardening soft law* through the public procurement legal framework.

Finally, given the fact that public procurement is, usually, highly regulated at domestic level, dealing with public procurement presupposes inevitably to address State practice. Specific EU countries are sampled after having mapped the *status quo* on the intersection between public procurement and human rights in EU. Thus, lights are shed on national specific jurisdictions, to zoom-in existing practices for future inspiration and

[58] Kinsbury B., Krish N., (2005), The Emergence of Global Administrative Law, Duke University School of Law
[59] Crawford, J, (2013), State Responsibility, Cambridge University Press
[60] EU Commission (2011), *Buying Social A Guide to Taking Account of Social Considerations in Public Procurement*. EU Commission 2016, *Buying green! A handbook on green public procurement*. EU Commission 2020, *Making Socially Responsible Public Procurement Work, 71 Good Practice Cases*

increased harmonization of approaches. In details, Italy and Sweden are selected as case studies, having mainstreamed human rights criteria and human rights due diligence requirements for different procurement categories. In details, Sweden represents a frontrunner country experiencing current consolidation and standardization on human rights criteria in procurement; while Italy is selected as example of country with potentials in the consolidation on social and human rights considerations in public procurement, given an advanced regulatory framework on sustainable public procurement, requiring minimum sustainability criteria under the Public Contracts Code.

The research strategy entails not only doctrinal legal methods but also social research methods that will complement the theoretical analysis with insight from practice in the selected jurisdictions, considered necessary to better grasp a field of study under current consolidation. Data are collected through desk analysis and also semi-structured interviews to central purchasing bodies and other contracting authorities which have used such experimental approaches. The *rationale* behind the choice of such method is to offer non-exhaustive examples of patterns of development, functional to better grasp a field which is still embryonal. This method has the benefit to explore behind the procedures and search for more comprehensive answers on the current development in practice, capturing elements that may escape from a mere doctrinal review. The aim is to display representative elements for a broader generalization, always being aware of the uniqueness of contexts and potential flaws of interviews.

Specific research limits are intrinsic to this thesis and must be outlined. First of all, the inherent qualitative nature of the methodology, characterized by interpretivist epistemological basis and constructivist ontological considerations, has specific limits that influence the modelling of the findings. Indeed, the aim of qualitative research to achieve an in-depth understanding of social phenomena and their subjective motivations, focusing on small selected samples rather than large probabilistic ones, having an inevitable impact on the results. Particularly, the difficulties in operationalizing concepts and variables on public procurement and human rights may limit the *generalization*, *replicability* and *measurement validity* of the study. Potential limits are, thus, linked to the specific design of this research in conferring adequate control, commutativity and possibility of comparison[61]. An unstructured, and open-ended nature of the qualitative data entail general difficulties to replicate the research procedures and interpretation may be easily influenced by subjective leanings. Nonetheless, benefits of flexibility and fluidity of interpretation can have positive impacts on my project, especially in an interdisciplinary and not-yet systematized field of study. In this regard, a multi-level legal analysis tries to guarantee more control to produce a systematic research of public and collective character.

Further limits are inherent to the choice to include case-studies and use semi-structured interviews method. Indeed, limits of generalization may rise from sampling cases and selecting organizations. Further, when conducting interviews, it is difficult to generalize findings to other settings due to contextual factors and uniqueness of interviews models, despite following a standardized procedure. Nonetheless, qualitative research can produce *"moderatum generalizations"* where aspects of the focus of enquiry "can be seen to be instances of a broader set of recognizable features"[62]. Thus, the project would provide a so-called *thick description"*[63] of legal phenomena which could "provide others with a *database* for making judgements about the possible transferability of findings to other *milieaux*"[64].

Finally, despite the intrinsic limits and methodological obstacles, the research may contribute to the current literature, systematizing a link between public procurement and human rights for multiple actors with instrumental and inspirational value for public procurement stakeholders. The ambition of the research is not to draw objective laws, rather to shed lights on probabilistic correlations and trends, exploring spaces of

[61] Bechhofer, F. & Paterson, L.(2000), Principles of Research Design in the Social Sciences,
[62] Williams, M. (2000), 'Interpretivism and Generalisation', Sociology, 34: 209 –24
[63] Geertz, C. (1973), 'Thick Description: Toward an Interpretive Theory of Culture', in C. Geertz, The Interpretation of Cultures. New York: Basic Books.
[64] Guba, E. G., and Lincoln, Y. S., (1994), 'Competing Paradigms in Qualitative Research', in N. K. Denzin and Y. S. Lincoln (eds), Handbook of Qualitative Research. Thousand Oaks, CA: Sage
Bryman, A., (2016), Social Research Methods, 5th Edition, Oxford University Press

interconnection through *bridge-laws* and interdisciplinary approach, being inspirational for future enquires and for practice.

1.4 Research Structure

The theoretical framework is clustered into four main Parts inspired by the guiding research questions. The structure of the research, indeed, entails *Part I-The Interlink between Public Procurement and Human Rights*, building the foundations of the analysis and disentangling the rationale behind the intersection between human rights and public procurement, particularly throughout Chapter 2 on *Bridging Human Rights and Public Procurement as framework of analysis: Risks and Opportunities along the Global Supply Chains*.
Part II - An International Law Perspective on Roles and Responsibility is the next step, adopting an international human rights law perspective to explore roles and responsibility of the public and private parties involved in public procurement transactions. In details, Chapter 3 on the *Role and Responsibility towards Human Rights: International Legal Perspective on Public Buyers* aims at clarifying key roles and responsibilities when considering the State as public purchaser. A similar approach is mirrored in Chapter 4 on *Role and Responsibility towards Human Rights: International Legal Perspective on Private Suppliers*, focusing instead on obligations and responsibilities of the suppliers of contracting authorities. The further step, indeed, is to build on the derived argumentations expanding further reflections on hardening the soft mechanisms, exploring existing regulatory frameworks and practices at regional and national level. *Part III: Hardening the Soft through Public Procurement at Regional Level* envisages application of the previous reflections to the EU public procurement legal context. Chapter 5 on *A Human Rights Lens on Regional Public Procurement Frameworks: Hardening the Soft through EU Public Procurement Law* is specifically devoted to understanding the EU legal context on the intersection between Business & Human Rights and public procurement. Finally, *Part IV: Exploring Practices at National Level* includes a more practical chapter concluding the analysis: Chapter 6 on *Insights from Practice on B&HR-based Public Procurement at EU Member States Level – the case of Sweden and Italy.* The concluding chapter investigates the possible inclusion of human rights considerations and human-rights due diligence requirements along the public procurement framework - as technical specifications, award criteria and contract performance conditions - focusing on experimental efforts in selected EU Member States to showcase and reflect further on challenges and opportunities. The case-studies at stake are collected from Sweden and Italy, providing a non-exhaustive list of examples in the EU context and providing a method to focus on the issue in other domestic settings.

PART I
The Interlink between Public Procurement and Human Rights

2. Bridging Human Rights and Public Procurement as Framework of Analysis: Risks and Opportunities along the Global Supply Chains

In the current global economy, shaped by complex transnational supply chains, multiple risks and human rights adverse impacts may arise throughout global value chains of goods, works, services purchased by public buyers. Bridging human rights and public procurement represents a fundamental challenge and opportunity. Indeed, public procurement constitutes a key and powerful instrument of strategic regulation that can influence more responsible production and consumption, creating benefits for both public buyers and private suppliers. However, evidence in the literature and practice shows poorly adequate responses by procuring entities to human rights risks. So far, the tendency has been to a paradoxical inaction, despite an evident duty to protect, respect and fulfil human rights hold by States, applicable also to State purchasing activities. Further scrutiny is required to better understand this dilemma and paradox.

This introductory chapter provides a foundational insight on the interlink between public procurement and human rights law, serving as a springboard for the next chapters substantive legal analysis, disentangling dilemmas from an international law standpoint (Chapter 3 and 4) and scrutinizing regulatory frameworks and practices in regional and domestic jurisdictions (Chapter 5 and 6). The purpose of the chapter is to shed lights on foundational concepts of public procurement and human rights law, to understand the research problem and potential interlinks, entry points and status of development. Key characteristics and main dimensions of what could be conceived as a *public procurement system* are delineated, to explore further the phenomenon of internationalization of public procurement and how such system relates to the current global economy (*2.1 Public Procurement and Global Supply Chains).* Then, the focus shifts to the human rights law field. Lights are shed on multiple human rights risks, adverse impacts and systemic drivers of violations that may arise in the business context, impinging civil, political, economic, social and cultural rights, fostering patterns of discrimination and exclusion. Considering the State as *public buyer* and business as *suppliers* in public procurement transactions, there are multiple human rights implications – such as legal obligations, reputational, policy, and economic factors – justifying action towards a more responsible public procurement. A core question of the overall thesis is on understanding whether human rights obligations apply also to the State as buyer and business as supplier in procurement context. This critical point will be introduced in this chapter and then unpacked in depth in the next Chapters. Moreover, systemic drivers of violations may emerge in any industry and sector, thus some (non-exhaustive) examples of high-risk sectors are selected to showcase in the following: the textiles industry, the healthcare supplies procurement, the electronics sector, public food procurement and intensive agriculture *(2.2 Human Rights Risks in the Business Context while Procuring).* To further complete the introductory analysis, how to bridge public procurement and human rights law? The entry point for human rights considerations in public procurement can be found under the *Sustainable Public Procurement* (SPP) paradigm. Reflections will follow on how human rights are located in the newly emerged SPP landscape, considering its recent consolidation and legal implications. Thus, SPP, as conceptualized by the United Nations in the international agenda, is explored addressing key developments, shades and sub-categorizations, with peculiar attention to opportunities and barriers surrounding human rights in public procurement *(2.3 Sustainable Public Procurement and Human Rights: Strategic Tools and Opportunities).*

2.1 Public Procurement and Global Supply Chains

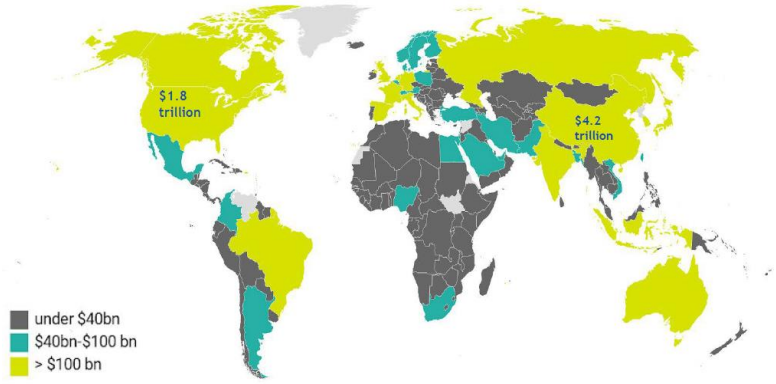
2.1.1 Preliminary Concepts of Public Procurement Law and System

Public procurement refers to the purchase and contracting of goods, works, services (consulting and physical services) by the public sector, needed to carry out public management functions, deliver services to citizens and maximize public welfare.[65] Public procurement is an essential component of the public financial management system, comprising laws, institutions and frameworks that govern public purchases.

[65] Arrowsmith S, Kunzlik P. (2009). Public procurement and horizontal policies in EC law: general principles, Arrowsmith & Kunzlik, (Eds.) *Social and Environmental Policies in EC Procurement Law: New Directives and New Directions*. Cambridge University Press.

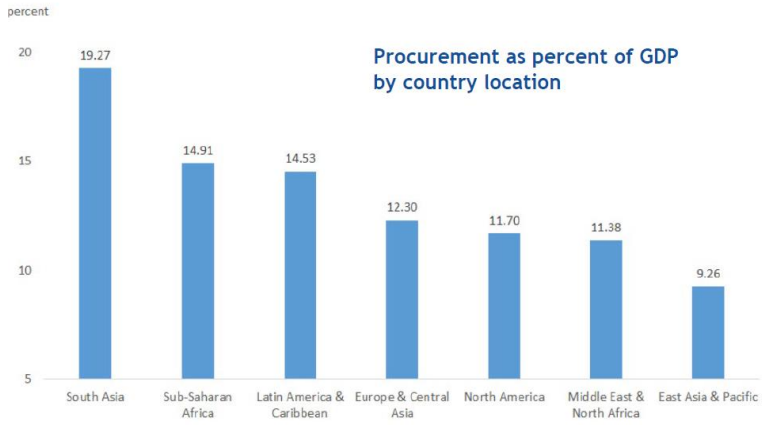
The size of public procurement market in the overall global economy is important, accounting for a significant proportion of the GDP. Globally, governments spend on average USD 13 trillion a year on public contracts for goods, works and services, being "the largest consumers in the global marketplace through the acquisition of goods, services and works", thus important costumer to the private business.[66] The OECD estimates that public procurement constitutes approximately between 12% to 20% of a country's GDP:[67] 12 % in OECD countries[68], while the highest rates are in developing and least-developed countries, often reaching up to 25% of their GDP.[69] Most often, public procurement falls under domestic regulation domains, nonetheless the international relevance and impact of public procurement in the global economy is undeniable, with significant implications on the international trade.[70]

Figure n.2.1: Size of Public Procurement Market in 2018 (Source: Open Contracting Partnership: How Governments Spend, 2020)



Over the last century, government spending has grown exponentially. The range of services offered by governments has increased and consequently the volume of public procurement resulting from it.[71] Therefore, due to the significant monetary flows involved, public procurement constitutes also a key determinant of socio-economic development, going beyond purchasing items. As a matter of fact, it is also a way through which governments materialise their policies and objectives, being a possible driver for strategic regulation, including towards sustainable development and human rights standards.[72]

Figure n. 22: Procurement as percentage of GDP by country location (Source: Djankov et al, 2016, How large is Public Procurement in Developing Countries?)



Williams-Elegbe S. (2022) Public procurement as an instrument to pursue human rights protection in Marx A. et al (eds.) 2022, *Research Handbook on Global Governance, Business and Human Rights,* Edward Edgar Publishing, p. 143

[66] Open Contracting Partnership and Spend Network (2020), How governments spend: Opening up the value of global public procurement

[67] OECD MAPS (2016) Methodology for Assessing Procurement Systems (MAPS)

[68] OECD, 2017, Government at glance

[69] Audet (2002), "Government Procurement: A Synthesis Report", OECD Journal on Budgeting, 149.

[70] Corvaglia M. A. (2017). Public Procurement and Labour Rights: Towards Coherence in International Instruments of Procurement Regulation. *Hart Publishing, Oxford.*

[71] Westring G., Jadoun G. (1996), Public Procurement Manual, ITCILO and SIGMA

[72] Valaguzza S.(2016), Sustainable Development in public contracts: an example of strategic regulation, Editoriale Scientifica, Napoli

Figure n.2.3: Procurement Spend as percentage of GDP (Source: Open Contracting Partnership: How Governments Spend, 2020)

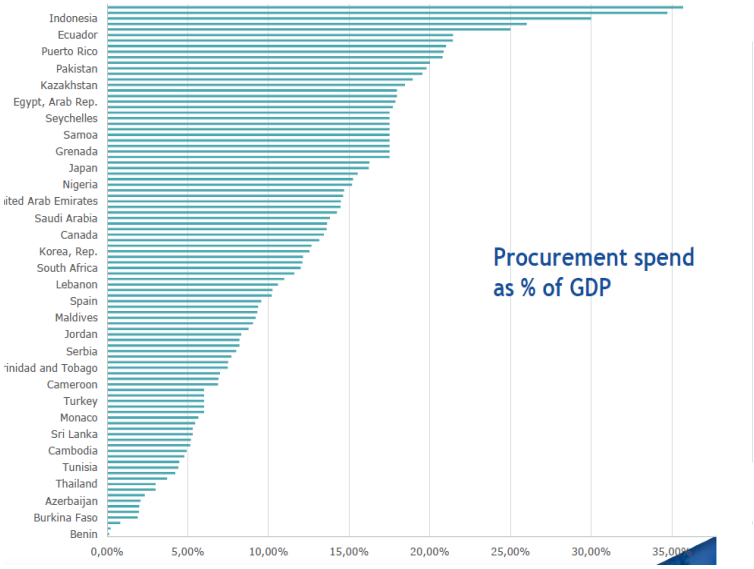
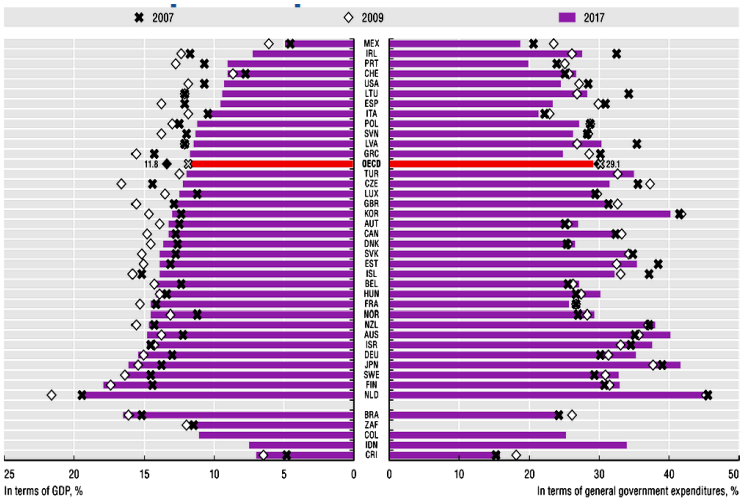


Figure n.2.4: OECD General government procurement spending as percentage of GDP and total government expenditures in 2007, 2009, 2017 (Source: OECD, National Accounts Statistics database)



What to Procure?

The scope of public purchase ranges widely, considering a large portfolio of government spending categories, including healthcare, education, defence, mobility, social protection among others (Figure n.5). Diverse types of procurement transactions exist, referring to three core procurement categories characterized by specific features and related procedural peculiarities:[73]

- Goods are inherently useful and relatively scarce tangible items (article, commodity, material, merchandise, supply, wares etc.) purchased or manufactured on request.[74] They include raw materials, products, equipment and other physical objects of every kind and description. Examples range from more simple items as stationery and office supply, furniture, uniforms, medical supplies, vehicles to the acquisition of more complex devices, as ICT systems and equipment, among others.
- Works refer to all public works associated with construction, reconstruction, demolition, repair or renovation of infrastructures, including public construction, infrastructures commissioning and urban development projects.[75]

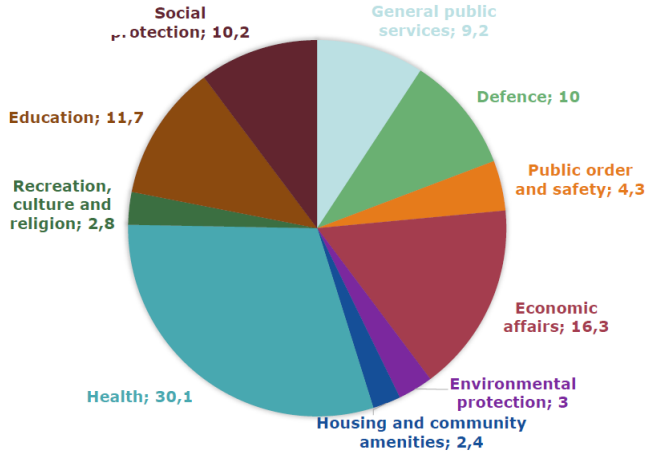
[73] Arrowsmith S. (2020), *Law of Public and Utilities Procurement*, 2nd edn, London: Sweet & Maxwell.
[74] UNCITRAL (2010), UN Convention on Contracts for the International Sale of Goods, No. E.10.V.14
[75] Ortega O., Trevino Lozano L. (2023), *Sustainable Public Procurement of Infrastructure and Human Rights: Beyond Building Green*, Edward Elgar

- Services are classified as consulting and non-consulting (or physical) services. The distinguishing factor between the two is the measurable physical output of the requirement. Consulting services are, indeed, intellectual in nature (as feasibility studies, legal, finance and accounting services, etc.). Conversely, physical services refer to technical and/ or mechanical assignments conducted by firms contracted on the basis of performance of measurable outputs, and for which performance standards can be clearly identified and consistently applied. Examples of non-consulting services are: equipment maintenance and repair, utility management, drilling, catering, cleaning, insurance, security, driving, travel services, among others.[76]

Thus, procuring entities could purchase:

- Goods and related services from suppliers through tenders
- Works and related physical services from contractors through tenders
- Intellectual and professional services from consultants through proposals

Figure n.2.5: Size and nature of public procurement market: general government procurement spending % per category (Source: OECD, 2017, National Accounts Statistics database)



How to Procure? The Procurement Cycle

In its broadest definition, the term public procurement captures an entire process entailing multiple steps and related activities necessary to satisfy what is needed.[77] From a legal and procedural standpoint, the *procurement cycle*, also known as *procurement process*, envisages three macro-steps[78]: the planning phase, the bidding process and the contract management phase.

1. Procurement planning is the process of identifying and consolidating requirements and determining the time frames to procure them as and when they are required. Planning, indeed, means identifying the goods, works, services to be contracted, so deciding what to buy, when and how. When planning procurement and projects activities, risk and risk management are essential for a strategic approach. Thereby any obstacle and risk can be anticipated, plans can be developed to overcome obstacles, mitigate risks, ensuring that the outcome of the process meets the needs of all of the parties involved.[79]

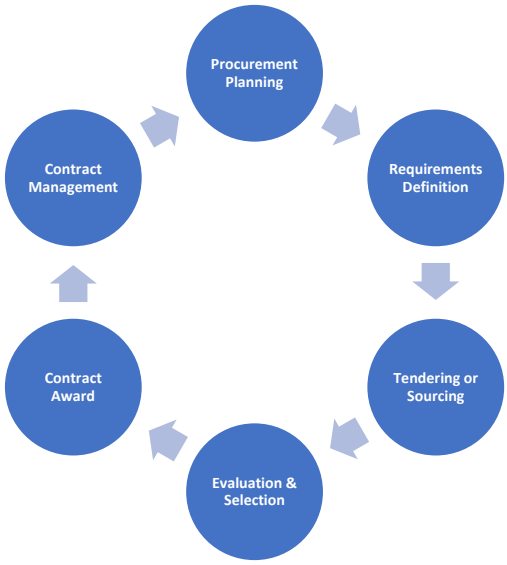
   During the planning stage, a specific procurement method and arrangement is chosen, requirements and criteria (technical specifications, qualification and evaluation criteria) are defined to select the winning bid and to decide to which supplier the contract should be allocated. Planning includes also delineating contract types and contract performance conditions, namely criteria to be fulfilled for the delivery of the goods, services and works in question.

[76] Heinis S. et al (2021) Services procurement: A systematic literature review of practices and challenges, British Academy of Management
[77] Quinot, G., Arrowsmith, S. (2013). Introduction.in Quinot, Arrowsmith (Eds.), *Public Procurement Regulation in Africa*, Cambridge: Cambridge University Press, pp. 1-22. Arrowsmith, J. Linarelli and D. Wallace, (2000) Regulating Public Procurement: National and International Perspectives, The Hague; London: Kluwer Law International, pp.1-2.
[78] Arrowsmith S. Public Procurement: An Introduction, EU Asia InterUniversity Network, pp. 1-4
[79] World Bank (2017) Project Procurement Strategy for Development, Long Form, p.15

2. The *bidding process* phase concerns the actual tendering and awarding the contract to a selected bidder. A series of steps are envisaged, including setting up the terms on which goods, works or services are to be acquired, which are provided and advertised with public notice. Detailed technical and financial specifications are made available, which usually further narrows the pool of eligible suppliers. Bidders submit their bids, quotations or initial expression of interest, which is used by the contracting authority to pre-screen bidders. After that, the tender procedure to solicit bids from potential suppliers is executed, bids are opened and examined and one supplier is selected following a comparative evaluation of bids received in line with the pre-established award criteria. After that the contractor is selected, contractual terms and conditions are drafted, including the specific performance conditions established in the planning phase.
3. The final phase is *contract administration* or *contract management*, whose ultimate objective is securing effective contractual performance through monitoring and evaluation.[80] Indeed, the procurement process does not end with the award of the contract. Rather, it entails careful contract management and performance monitoring to ensure a successful procurement achievement. After that the supplier has been awarded, this phase entails further contract negotiation between the contractor and the supplier, the checking of payments and deliverables, the execution of the project, and the possible renegotiation of the contract, among others.

These three stages are all closely integrated, being part of a single cohesive "cycle" at procedural level.[81] The specific phases of the procurement cycle are captured under figure n.2.6 below and will be unpacked in depth in Chapter 5- with attention to the EU public procurement framework. It will be explored how sustainability considerations and human rights-related concerns could be fostered throughout the different stages, from planning, to tendering, to contract management.

Figure n.2.6: Understanding Procurement Cycle



The Public Procurement System and its Core Dimensions

Public procurement is more than a single purchasing action, rather to understand its complexity it can be conceived as a coherent system composed of different dimensions, all essential for the existence and functioning of the whole. A system is a regularly interacting and interdependent set of elements, all working together as parts of an interconnecting network and unified whole.[82] Some core dimensions shape the public procurement system[83]:

[80] Trepte P. (2005) *Regulating Procurement: Understanding the Ends and Means of Public Procurement Regulation*, Oxford: Oxford University Press
[81] Ortega O., O'Brien, C. (2017), Advancing Respect for Labour Rights Globally Through Public Procurement, in Politics and Governance, vol. 5, Issue 4, pp. 69–79
[82] Meadow D, (2008), *Thinking in Systems: A Primer*, Chelsea Green Publishing
83 Adapted from OECD MAPS (2016)

- Legal dimension: composed of a legislative, regulatory and policy framework.
- Institutional dimension: characterized by an institutional framework and management capacity.
- Market dimension: where market practices and procurement operations practically happen.
- Principles' dimension: inspiring the correct functioning and accountability of the entire system.

Every system, is influenced by its surrounding environment and is described by its boundaries, structure and purpose and expressed in its functioning. The procurement system is, indeed, immersed into a *macro-environment* where multiple forces and *environmental influencers* (political, economic, social, technological, legal, environmental ones) shape processes and structures over time through continual evolutions, changes, resistances. Furthermore, each dimension forming the overall structure of the public procurement system is characterized by its own *microcosmos* and rules. Thus, the complexity of public procurement phenomena going beyond the mere purchasing of items and services is evident. The features of each dimension are unpacked, with a focus mainly on the regulatory dimension and the market dimension, to understand interconnections with human rights law in the business context.

The Legal Dimension: Regulatory Frameworks

The legal dimension refers to the set of procurement policy, rules and legal framework regulating and affecting the procurement process. Unlike commercial transactions in the private sector, public procurement is governed and, thus, structured by specific rules forming a peculiar field of law: public procurement law. The development of this field and its academic study has gained significant *momentum* globally in the last two decades.[84] In details, legal frameworks include the following legal sources:

- The supreme legal instruments governing procurement operations in the country, whose form and legal nature vary depending on a country's legal system and tradition (common law, civil law, etc.).[85]
- Implementing regulations, executing acts, operational tools and other instruments of administrative nature supporting the legal framework.
- Procurement provisions of other laws and regulations, derived from memberships in international and/or regional treaties or organizations.
- International obligations to ensure consistency and policy coherence.

It emerges that multiple levels - national, regional, international - of regulations and legal protection regimes apply to public procurement. At national level, public procurement normally falls under the scope of specific domestic legal regimes and national regulations in addition to relevant areas of general law, such as private, administrative, contract, anti-corruption and environmental law provisions. For instance, in Italy public procurement is regulated under public administrative law, specifically by the Public Contracts Code.[86] At regional level, an example of supranational regime is the EU law and the EU Public Procurement Directives package[87] - analysed in depth in Chapter 5- inevitably shaping EU Member States' public procurement acts or codes. At international level, depending on the monetary value, subject matter and specific obligations of the State, procurement may fall under international regulatory frameworks providing common guidelines and supranational standards. Examples of two major international regulatory regimes are: the WTO Agreement on Government Procurement (GPA)[88] and the UNCITRAL Model law on Public Procurement. In details, the WTO GPA is a Plurilateral Agreement within the WTO framework, characterized by limited membership, applying only to WTO members that have additionally acceded to it.[89] Its core objectives are to advance liberalization and expansion of international trade and non-discrimination in public procurement, ensuring

[84] Quinot, G., & Arrowsmith, S. (2013). Introduction. In G. Quinot & S. Arrowsmith (Eds.), *Public Procurement Regulation in Africa*. Cambridge: Cambridge University Press. pp. 1-22
[85] Trepte P. (2005), pp. 18-19
[86] Codice dei Contratti Pubblici (2016), adopted with Legislative Decree 50/2016.
[87] Directive 2014/24 on Public Procurement and Repealing Directive 2004/18 (EU Procurement Directive) [2014] OJ L 94; Directive 2014/25 on Procurement by Entities Operating in the Water, Energy, Transport and Postal Services Sector and repealing Directive 2004/17/EC (Utilities Directive); Directive 2009/81/EC on Defence and Security Procurement; Directives 89/665/EEC and 92/13/EEC on Remedies (amended by Directive 2007/66/EC).
[88] WTO (2012) Revised Agreement on Government Procurement, entered into force on 6 April 2014.
[89] GPA comprises 20 parties (48 WTO members as the EU and its Member States constitute one party). 36 WTO members participate in the GPA Committee as observers. Out of these, 12 members are in the process of accession, see WTO website.

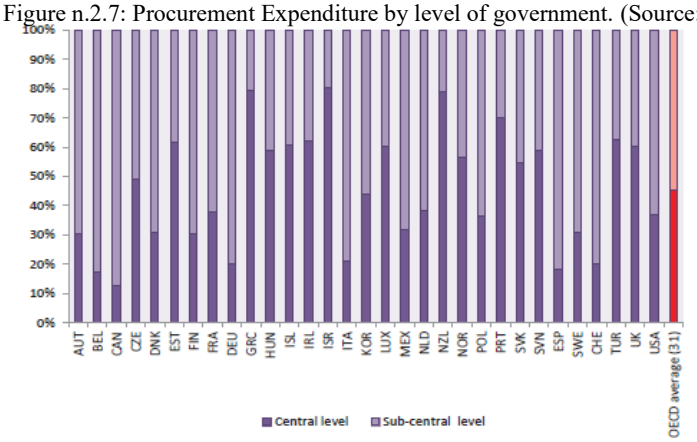
efficient and effective management of public resources. The UNCITRAL Model Law on Public Procurement (2011)[90] provides an outline to promote alignment of procurement laws across jurisdictions, fostering procedures and principles aimed at achieving competition, value for money and avoiding abuses in the procurement process. The Model Law is adopted by 23 States and 6 organizations and Multilateral Development Banks (MDBs), shaping their procurement regimes. Finally, within the international regulatory frameworks umbrella, also procurement policies and regulations of International Financial Institutions (IFIs) – including MDBs - can be enumerated, particularly in case of project procurement funded by international donors, adding layers of regulatory complexity.[91] Indeed, such international actors have their own procurement rules, policies, guidance, setting out principles that apply to borrowers' procurement. An example is the World Bank revised policy and regulations (2016) and its Project Procurement Strategy for Development (PPSD), providing guidance and methodology to set-up and plan procurement strategically.[92]

The Institutional Dimension

A well-functioning public procurement system is influenced by how the legal and regulatory framework is operating in practice in a country, through its public institutions and management functions. The institutional framework and management capacity, indeed, refers to the overall governance of the procurement system by the public sector and, particularly, its institutional, technical and managerial and financial capacity.[93] In terms of institutional set-up and administrative settings, public procurement can be centralized, decentralized or hybrid. Public purchasing is, indeed, carried out by the central government through procuring agencies, but also by procuring entities at sub-central level. It is estimated that, in OECD countries, the local governments are responsible for more than half of public procurement expenditure.[94]

In details, full centralization refers to procurement where all relevant purchasing decisions (what, how, when), also related to specific procurement methods, are taken by a central public unit, adopting contract conditions that are the same throughout the local public administration. The opposite case is full decentralization: local administrations are delegated the total power to decide how, what and when to procure. Between full centralization and full delegation there is a wide range of hybrid and intermediate procurement models where central and local purchasing units share the power on purchasing decisions. An example of hybrid model are framework agreements increasingly stipulated by central procurement agencies (central purchasing bodies) on behalf of public administrations. In recent years many countries have increased their degree of hybrid centralization through framework agreements.[95] In such a mildly centralized arrangement, contracts are made available to all public administrations several items for a given period of time at a certain price. Public administrations are recommended to use such contracts unless what they need is not available or local suppliers are able to provide the relevant items under better price-quality conditions.

Figure n.2.7: Procurement Expenditure by level of government. (Source: OECD, 2012)



[90] The 2011 Model Law replaces the 1994 UNCITRAL Model Law on Procurement of Goods, Construction and Services.
[91] Williams-Elegbe, S., (2017) Public Procurement and Multilateral Development Banks: Law, Practice and Problems, Bloomsbury & Hart Publishing.
[92] World Bank (2016), Project Procurement Strategy for Development Development (PPSD), 2nd Edition, Washington: World Bank
[93] The importance of considering the institutional dimension of public procurement has been also highlighted by the OECD MAPS (2016)
[94] OECD (2012) Public Procurement for Sustainable and Inclusive Growth Enabling reform through evidence and peer reviews
[95] Dimitri N., Piga G., Dini F (2015) When should procurement be centralized in Piga G., Spagnolo G (eds.) *Handbook of Procurement*

The Market Dimension

Public procurement activities and transactions do not happen in the vacuum, rather they are immersed in the market context in which procurement is processed. A market is a place where two parties can gather to facilitate the exchange of goods, works, services.[96] The parties involved are usually buyers and sellers, who are the public purchasers (procuring entities or contracting agencies) and private suppliers or contractors in the public procurement context, forming a so-called *State-business nexus*[97]- addressed in *Chapter 3* in depth. Market dynamics, market structures, levels of competition, price fluctuations, supply chains configuration and possible disruption risks are all elements that may influence the overall public procurement process and optimal results. Indeed, constantly global economic conditions affecting market prices and production and consumption patterns, ultimately influence also public procurement operations in multiple ways. The influences in the *Sate-business nexus* are inevitably bi-directional. The market environment may influence the procurement activities shaped by suppliers/contractors, for example providing availability or lack off of a required product/services. Conversely, also the market may be influenced by a correct contracting strategy and strategic procurement planning. Depending on how many suppliers are in the market, how they interact with each other (for example, if they compete in prices), and on the type of the services/works or goods (homogeneous or differentiated) there can be different market structures. Throughout this analysis, more insights will be on unpacking the *State-business nexus* considering that public procurement is immersed in the current global economy shaped by the global supply chains model.

The Principles Dimension: Inspiring Values and Objectives of Public Procurement

Inside the public procurement system, different principles guide and inspire the overall system, affecting its functioning and direction. In this regard, developing effective, accountable and transparent institutions at all levels is pivotal, as recognized by the 2030 Agenda for Sustainable Development, under SDG Target 16.6.

As a premise, a fundamental aim of the public sector is to provide public services to its citizens and organizations. Thus, public procurement is a functional activity to the achievement of public management functions. Public procurement transactions occur in a market-based context characterized by public budget constraints and limited public resources, where the efficient and effective management of public spending has a crucial impact on the optimal achievement of government objectives.[98] Each public procurement system and its regulatory and institutional frameworks are characterized by multiple universally shared and peculiar objectives and principles, inspiring the procuring entities in conducting their purchasing. This is the result of multifaceted nature and complex economic and political implications of procurement activities[99], in which the identity of the purchaser is composed of multiple government actors operating through an articulated bureaucratic apparatus and bound by national, regional, international commitments.[100] Indeed, every procurement regulatory regime is naturally the result of different influences, principles, objectives evolving and adapting to the specific regulatory context. In terms of legal status, public procurement principles are guidelines and rules governing the public procurement process, designed to ensure mainly transparency, competition and integrity in the public procurement process. Most of the time, they codified within public procurement regulatory frameworks – such as the EU Public Procurement Directives package and various national public procurement codes in EU Member States. Reflecting on international law sources, procurement principles are not necessarily codified in specific international treaties, but are often reflected in international agreements and conventions, such as in trade agreements that include provisions on access to public markets. Moreover, many international bodies, such as the World Trade Organisation (WTO) and the World Bank, have developed guidelines and recommendations to promote the adoption of transparent and competitive public

[96] O'Brien R., Williams M. (2020) Global Political Economy Evolution and Dynamics
[97] OHCHR (2011) UN Guiding Principles on Business and Human Rights, HR/PUB/11/04, p. 6
[98] Lindskog, H. et al (2012), How public procurement can influence business and social development? Departement of Management and Engineering Linköping University
[99] Corvaglia (2017)
[100] Trepte P. (2005) p. 59

procurement practices. Thus, while procurement principles are not necessarily customary in international law *strictu senso*, they rather constitute a set of general principles that guide the behaviour of states and international organisations in the field of public procurement.

A number of primary objectives shared by most public procurement systems and regulatory frameworks- whether national, regional, international - have been extensively explored in the literature and systematized in various classifications.[101] They include principles such as non-discrimination, equal treatment, transparency, fair competition, prevention of corruption and achieving best value for money. The most commonly recognized procurement principles are explored below. Understanding how such objectives and values are balanced and relate to each other in a procurement system is essential also to explore newly emerged interests in public procurement, as the protection of human rights and the concept of sustainable development.

- **Value for money***:*

Value for money (VfM) has been conceived as a primary goal of each procurement activity and fundamental objective of all domestic procurement systems and most public procurement regulations.[102] It is described by three "*Es"- economy, efficiency, effectiveness*[103]- meaning that goods, works, services must be acquired under the best available terms regarding quantity, quality and time.[104] VfM entails different aspects[105]: firstly, it assures that purchased goods, services, works fulfil certain prerequisites, respecting the specific governments' needs[106]. Secondly, it guides the procurement process so that it is concluded on the best available terms not only regarding lowest price but also considering the total life-cycle costs (LCC) of a product.[107] Indeed, despite the public budget constraints in a market-based context, procurement frameworks are transitioning towards the pursuit of VfM on a lifetime basis, integrating the concept of LCC, rather than focusing only on lowest price.[108] Thirdly, this principle implies that the contractor is capable to deliver the required goods, works, services according to the conditions agreed upon in order to successfully complete the contract.

- **Efficiency***:*

The principle of efficiency is one of the primary internal goals of each procurement systems. This principle is strictly linked to the nature of public procurement as an economic activity, based on the idea of the "Pareto-efficient allocation of society's scarce resources" in the market.[109] Pareto efficiency refers to an economic state where resources are allocated in the most economically efficient manner and cannot be reallocated to make one individual better off without making at least one individual worse off. Government procurement consists in the economic transaction of the acquisition of goods, works, services from the market to achieve economic welfare through an efficient allocation of budgetary resources.[110] Thus, the effective realization of the entire procurement process means meeting the government's needs without inappropriate waste of government resources[111], entailing a careful balance between the benefits and the costs of the procurement procedure.[112]

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[101] Among others see: Whenlan J., Pearson E. (1961), Underlying values in Government Contracts, Journal of Public Law 298; In Kelman S. (1990) Procurement and Public Management and in Dekel O. (2009) The Legal Theory of Comparative Bidding for Governments Contracts economy, efficiency, equity and integrity are identified as key objectives. Arrowsmith S., Linarelli J, Wallace D. (2000) Regulating Public procurement: National and International Perpectives, ch. 1-2 and Arrowsmith (2010) Public Procurement. Basic Concepts and the Coverage of Procurement Rules identifies eight key objectives: value for money, integrity, accountability, equal opportunities and treatment of providers, fair treatment of providers, efficient implementation of industrial, social and environmental objectives, openness to international trade, efficiency. See also Schooner S. (2002), Desiderata: Objectives for a System of Government Contract Law, Public Procurement Law Review 103 listing: competition, integrity, transparency, efficiency, customer satisfaction, best value, wealth distribution, risk avoidance, uniformity. Trepte P. (2005), p.63, identifies promotion of social and political objectives as key value; and includes reducing corruption as aspect of economic efficiency.

[102] On the state as commercially distinct from other market participants, see G. Quinot (2009) State Commercial Activity: A Legal Framework, Cape Town: Juta & Co., pp. 155–7, 224–9, 268–9.

[103] OECD (2012), Value for money and international development: Deconstructing myths to promote a more constructive discussion

[104] Arrowsmith et al (2000) see n. 11, pp. 28-31

[105] Corvaglia (2017) see n. 7, p. 30

[106] Dimitri N, (2013) Best Value for Money in Procurement, 13 Journal of public procurement 149

[107] Arrowsmith et al, 2000, see n. 11, p. 29

[108] Andhov M., Caranta R., Wiensbroke (2020) *Cost and EU Public Procurement Law: Life-Cycle Costing for Sustainability*, Routledge

[109] Trepte P. (2005) see n. 13, p. 63. Pareto efficiency means that an economic state where resources cannot be reallocated to make one individual better off without making at least one individual worse off. Pareto efficiency implies that resources are allocated in the most economically efficient manner, but does not imply equality or fairness.

[110] Arrowsmith et al, 2000, see n. 11, p. 31

[111] Trepte P. (2005) see n. 13, p. 63-66

[112] Albano G. et al (1994) Procurement Contracting Strategies in Dimitri et al (ed) *Handbook of Procurement*, Cambridge University Press, pp. 82-120

Furthermore, it must be considered that the principle of efficiency in the procurement process is closely linked to the goal of VfM, which are complementary and mutually supporting good governance in public procurement.

- **Integrity and Accountability***:*

Integrity can be defined as the use of funds, resources, assets, and authority, according to the intended official purposes and in line with the public interest.[113] Integrity is also connected to accountability and ethics: anyone involved in the procurement process is responsible for her actions and decisions.[114] Indeed, public procurement operations happen in a complex political framework of the procurement decision-making process, where governments are not single identities but collections of individuals organized in hierarchical and administrative structures[115]. In such context, the exposure to the risk of corruption, fraud, collusion, coercive and obstructive practices is high. Indeed, public procurement has been recognized as one of the most vulnerable government activities to fraud and corruption. The OECD has outlined that more than half of foreign bribery cases occur in relation to public procurement contracts, more frequently rather than in utilities, taxation, and the judicial system.[116]

Integrity is complementary to the objective of efficiency. Indeed, bribery may arise through asymmetric information and constitutes a relevant cost, adding 10-20% to total contract costs[117], with the risk to considerably undermine the achievement of efficiency. Governments cannot benefit from the most efficient and non-competitive offer if their public contracts are awarded on the basis of corruption and bribery. Enhancing integrity in selection, creating disincentives and designing enforcement measures to curb the risk of corruption are core priorities in each procurement system and regulations. [118]

- **Transparency**

A procurement system is transparent when it sets up clear rules and compliance mechanisms, when competition rules are clearly laid out and predictable, and when records are publicly open to inspection by public auditors and others. Through transparency the confidence of taxpayers and all stakeholders in the public procurement system is reinforced, creating a virtuous cycle. Transparency is, indeed, a fundamental component in the achievement of good governance in public procurement and in the fight against corruption.[119]

Transparency encompasses different complementary elements[120]: (1) it consists in the public advertisement of all the contract opportunities available on the market and offered by the public administrations;[121](2) it refers to public accessibility for the competing suppliers and the publicity of the relevant procurement laws and administrative regulations necessary to fulfil to compete for the award of the public contracts;[122] (3) it also constitutes the main limitation to the broad discretion available to the procuring entities, for example imposing the requirement to use formal competitive tendering procedures;[123] (4) it is linked to the mechanisms of monitoring and enforcing procurement rules.

- **Fairness and Equal Treatment of Providers**

The principle of fairness is often interpreted as procedural fairness and described as an essential component of the "due process" in public procurement practice. This principle addresses the selection phase and award procedure, often translated into strict procedural obligations.[124] The aim of procedural fairness is to ensure that public procurement processes are conducted without favor or discrimination. Namely, all potential suppliers

[113] OECD (2009) Principles For Integrity In Public Procurement, OECD Publications, p. 19
[114] Cesi, B. (2020), Instruments of Procurements
[115] Tirole J., The internal organization of government, Oxfird Economic Papers 1
[116] OECD (2014) Foreign Bribery Report, OECD Publications
[117] Eigen, P. (2002) Transparency International
[118] Transparency International (2006) Handbook for Curbing Corruption in Public Procurement, Transparency International Publications
[119] OECD (2003) Transparency In Government Procurement: The Benefits of Efficient Governance, OECD Publications
[120] Corvaglia (2017), see n.7, p. 33-34
[121] OECD (2003), see n. 52
[122] Arrowsmith et al (2010) EU Public Procurement Law, pp. 20-23
[123] Evenett and Hoekman (2005) Government Procurement, p. 170
[124] Arrowsmith et al (2000) see n. 11, p. 61

should be provided with the same information and procurement procedures should be designed and implemented ensuring that each bid is given fair and equal consideration. Together with fairness, the equal treatment of providers constitutes a core objective of public procurement regulations in most procurement systems, connected to non-discrimination of tenderers. Both fairness and equal treatment are functional and complementary to other procurement objectives, as VfM, integrity, non-discrimination.[125]

- **Non-discrimination:**

Similarly to the principle of fairness, the principle of non-discrimination is realized at procedural level fostering an open and fair procurement process. This principle has been frequently addressed in the literature outlining the economic benefits deriving from trade liberalization, based on the theory of comparative advantage[126]. Non-discrimination is generally translated in negative commitments and positive procedural regulations in the award of public contracts, to avoid the creation of non-trade barriers and distortive effects in international trade in public procurement. Indeed, in the context of increased internationalization of public procurement, also referred to in the literature as the "Global Revolution" of public procurement[127], the incentives and economic benefits resulting from the liberalization of the international procurement markets and the use of international trade agreements are high. Particularly, in the international trade regulatory architecture of public procurement, as the WTO GPA, this principle represents the cornerstone instrument to liberalize the procurement market, implying the absence of protectionist practices in the international procurement market.

- **Competition:**

Connected to the objective of achieving fairness and transparency, competition is an important goal of public procurement alongside the achievement of efficiency and VfM. Competition is fostered by multiple demands for limited resources and helps ensuring that taxpayer money are well spent. In public procurement, competition is translated into the opportunity to admit the largest numbers of qualified competitors to a bid with the aim of awarding the contract to the offer that provides best VfM and respecting the following requirements: (1) a transparent publication of tenders and circulation of information, (2) equal treatment of all bidders, (3) non-discrimination in bid offers' assessment, using objective qualification criteria, neutral technical specification, clear evaluation criteria.

Various authors have underlined the functional role of competition as a method for the achievement of the maximization of VfM and efficiency and trade liberalization, rather than regarding it as a procurement goal per se.[128] Indeed, limiting competition would add costs: collusion in public procurement markets may add up to 20% to the price that would be paid in competitive markets.[129] That is 20% of taxpayer money that could be spent elsewhere.[130] Furthermore, competition is linked to non-discrimination as an instrument for promoting the liberalization of the international procurement markets. Procurement regulations can have a direct impact on the level of competition in the procurement market. An example is the concept of competition as incorporated in the EU Public Procurement Directives. [131] Oriented towards the construction of a common market, the principle of competition represents a clear obligation on Member States to avoid any procurement practice that potentially restricts or distorts the fundamental freedom of movements, in order to preserve competition as an institution in its own.[132]

[125] Corvaglia (2017), see n.7, p. 32
[126] Tronfetti, F (2000), Discriminatory public procurement and international trade, 23, The World Economy, 57
[127] Arrowsmith S., Davies A. (1998) Public procurement: Global Revolution, Kluwer Law International, 5
[128] Kunzlik, P. (2013) Neoliberalism and the European Public Procurement Regime, Cambridge Yearbook of European Legal Studies 283
[129] European Commission (2017), Efficient and Professional Public Procurement, Questions & Answers
[130] Anderson and Kovacic (2009) Competition Policy and International Trade Liberalisation: Essential Complements to Ensure Good Performance in Public Procurement Markets, PPLR, 18: 67.
[131] Corvaglia (2017), see n.7, p. 37-39
[132] Graells A.S. (2010) More Competition-Oriented Public Procurement To Foster Social Welfare, in Khai Thai (ed) *Towards New Horizons in Public Procurement*, PrAcademics Press

- **Sustainability principle: enforcement of socio-environmental policies**

Considered as newly emerged principles, *complementary*, *secondary* or *horizontal* objectives, including socio-environmental considerations, have been increasingly recognized in different regulatory systems and included under the list of core procurement principles by different scholars.[133] More insight will be in the next paragraph.

When analysing the principles of a procurement system and how they are balanced, it is possible to distinguish between *regulatory* objectives and *instrumental* or *functional* principles which are crucial to the achievement of the latter.[134] For instance, transparency and competition are fundamental to the implementation of internal procurement objectives[135]. In details, the combination between the main regulatory objectives, together with their instrumental principles influences the connotation of each procurement regulatory regime.

Another major distinction is between *internal* and *external* objectives. For example, the goal of achieving efficiency, transparency, accountability, value for money is *internal* to the procurement process: internal principles focus on the conduct of the procurement process itself, the selection process and the performance of the public procurement activities. Conversely, the achievement of competition and socio-environmental policies is often interpreted as an *external* objective, revolving around the external context of the public purchasing activities. Such objectives concentrate on the political and economic environment in which the procurement activities happen, focusing on the political and economic role of the government[136] in domestic and international markets.[137]

All aforementioned procurement principles are equally important, and they shape most procurement systems, also at international level. For example, considering the WTO GPA framework, core objectives are related to advance liberalization and expansion of international trade, non-discrimination - namely measures applied to public procurement must not afford greater protection to domestic suppliers, goods, or services, or discriminate against foreign suppliers, goods, or services - integrity and predictability in public procurement to ensure efficient and effective management of public resources. Further, WTO framework advocates transparency, impartiality, avoidance of conflicts of interest and corruption as key principles. The UNCITRAL Model Law sets out six main objectives in its *Preamble*: economy and efficiency, international trade, competition, fair and equitable treatment, integrity, fairness, and public confidence in the procurement process, transparency. As outlined in the *Guide to Enactment* accompanying the Model Law, integration of socio-economic criteria into the procurement processes is allowed to promote, *inter alia*, accessibility of procurement to SMEs or disadvantaged groups, environmental criteria, ethical qualification requirements, outlining that human rights can feature as social aspects of sustainable procurement, and can be addressed through socio-economic evaluation criteria. [138]

In conclusion, the *principles dimension* is fundamental in shaping the whole public procurement system at multiple levels, imparting the right direction. Nonetheless, a pivotal challenge in any procurement system, including international, regional and national settings, is addressing the potential trade-off between principles when they cannot be achieved all simultaneously. Such situations necessarily imply a trade-off

[133] See: Trepte (2005) p. 152-76; McCrudden C. (2004) Using public procurement to achieve social outcomes, Natural Resources Forum; Kattel R., Lember V. (2010) Public Procurement as Industrial Policy tool: an Option for Developing Countries? Working papers in technology governance and economic dynamics, Tallinn University; Caranta R and Trybus M (eds) (2010) The Law of Green and Social Procurement in Europe. Copenhagen: DJØF Publishing; Corvaglia (2017) see n.7; Donaghey J, Reinecke J, Niforou C, et al. (2014) From employment relations to consumption relations: Balancing labor governance in global supply chains. Human Ressource Management. Sjåfjell B and Wiesbrock A (eds) (2016) Sustainable Public Procurement under EU Law: New Perspectives on the State as Stakeholder. Cambridge: Cambridge University Press; Valaguzza S. (2016) see n.9; Scherrer C. (2017) Enforcement Instruments for Social Human Rights along Supply Chains.Labor and Globalization, vol. 9. Augsburg; München: Rainer Hampp.

[134] In the procurement legal doctrine there is a considerable terminological confusion between the concept of "objectives", "means", "principles" of public procurement. Schooner S (2002) merges the differences in 9 categories of objectives. For a comprehensive analysis of the conflicting categorization of different procurement objectives and principles see Bourdon P. (2011), Essay of the public procurement law principles, Nottingham: Public Procurement Research Study Conference.

[135] Arrowamith et al (2000), pp. 28-44

[136] Schooner S (2001), "Fear of Oversight: the Fundamental Failure of Business-like Government", American University Law Review 627

[137] Trepte, (2005), pp. 63-129

[138] UNCITRAL Model Law Art. 9.2.b

analysis and a proper balancing act between them[139], which is essential especially when reflecting on the emergence of new procurement principles as sustainability and human rights-based considerations.[140]

The Increasing Room for Complementary Principles and "Horizontal" Aims

Alongside the aforementioned traditional principles, new ones have emerged, becoming increasingly influential in many public procurement frameworks: examples, *among others,* are sustainable development, social responsibility, proportionality, fit for purpose, innovation, green purchasing. As anticipated above, public procurement systems are often influenced by *external* objectives to the purchasing activity itself. Stepping back from a pure economic approach, governments when engaging in public procurement may not only be concerned with economic goals as the achievement of VfM, efficiency and competition. Rather, public procurement has been increasingly identified as a means for achieving policy objectives going beyond the mere act of purchasing[141]. It is, thus, possible to orient procurement regulation towards the support or achievement of non-economic objectives – including social, economic and environmental objectives - by implementing strategic, protective and proactive political economic policies through various methods and at various stages of the procurement process – from the technical specifications to the award criteria[142].

Industrial, social, environmental objectives pursued in public procurement have been variously and collectively defined as "secondary, "complementary" or "horizontal" policies by scholars[143] and regulatory frameworks.[144] The label "secondary" explains that such objectives are not necessarily connected with public buying's "primary" functional goal of obtaining services and products at the lowest price or best VfM. The "complementary" connotation highlights that they represent external regulatory goals, in addition to the primary objective of value for money in the acquisition of goods and services[145], but also fundamental pieces to foster procurement as strategic driver for broader governance goals and governments duties, as the respect of human rights and the protection of the environment[146]. Some scholars- Arrowsmith and Kunkliz- claimed that the term "horizontal" policies is preferable to embrace all types of policies, including the primary economic ones, and does not imply that such policies are necessarily illegitimate or subservient to commercial aspects.

The tendency in governments to use public procurement to promote subsidiary objectives is observed across several jurisdictions. Governments have been using procurement to promote local or national industrial and economic development, by supporting small, medium and micro enterprises (SMEs) or domestic suppliers or goods to support domestic economic development. In this sense, procurement has been used to support the economic development of disadvantaged groups of society or regions of the country, by setting aside some public contracts for those groups and regions. Procurement has been adopted also to promote social inclusion, by integrating vulnerable and marginalized groups into the labour market, guaranteeing basic labour rights for supply chain workers[147], including welfare provisions related to minimum wage, exclusion of child labour, preference to disadvantaged groups, fair treatment of workers. Public procurement is increasingly identified as a means of enhancing environmental protection and climate change mitigation objectives from carbon

[139] Schooner S., Gordon D, Clark J. (2008), Public Procurement Systems: Unpacking Stakeholder Aspiration and Expectations, GWU Law School, Public Law Research Paper.

[140] Andhov, M. (2019). Contracting authorities and strategic goals of public procurement – a relationship defined by discretion? In S. Bogojević, X. Groussot, & J. Hettne, (Eds.), Discretion in EU Public Procurement Law Hart Publishing.

[141]Williams-Elegbe (2022). Public procurement as an instrument to pursue human rights protection. In Marx, A. et al. (Eds.), Research Handbook on Global Governance, Business and Human Rights, Edward Elgar.

[142] McCrudden C. (2004) Using public procurement to achieve social outcomes, Natural Resources Forum, 25.
Attel, R., Lember V.(2010) Public procurement as an industrial policy tool an option for developing countries?, Working papers in technology governance and economic dynamics, Tallinn University.

[143] O'Brien, C. M. & Martin-Ortega, O. (2019), Public Procurement and Human Rights: Opportunities, Risks and Dilemmas for the State as Buyer. Corporations, Globalisation and the Law series, Edward Elgar.

[144] Procurement policies of this kind can be industrial, social, environmental or political in nature and are referred to generically as "secondary" policies (common terminology in the EU), "collateral" policies (US terminology), socio-economic policies or "horizontal" policies.

[145] Arrowsmith S. (2010), Horizontal Policies In Public Procurement: A Taxonomy, Journal of Public Procurement 150

[146] McCrudden, C. (2007) Buying Social Justice: Equality, Government Procurement and Legal Change, Oxford: OUP; Arrowsmith, Kunzlik (2009), see n. 1, pp. 3-54; M. Corvaglia, (2017), p. 46.

[147] Outhwaite, O., Martin-Ortega, O. (2016) Human rights in global supply chains: Corporate social responsibility and public procurement in the European Union. Human Rights and International Legal Discourse, 10 (1). pp. 41-70; Martin-Ortega O., O'Brien, C. (2017) see n. 14; Ludlow, A. (2016) Social Procurement: Policy and Practice, 7(3) European Labour Law Journal, pp.479–97.

reduction to green and circular economy aiming to foster a more innovative, resilient, and inclusive economy[148]. Examples of regulatory systems promoting environmental and societal goals through procurement are common in some jurisdictions, especially in the European Union whose legislative and policy framework will be unpacked in Chapter 5.

It must be considered that the achievement of non-economic policies in public contracts generally implies a trade-off between the economic objective of efficiency and the political priorities of these external goals.[149] Indeed, constraints on public spending increase pressure on procuring entities to demonstrate greater value for money and, in some cases, to champion local or national suppliers. For example, allowing entities to consider horizontal benefits as well as "commercial" benefits in a procurement may increase the degree of discretion in the procurement process in a way that may make it easier to favour particular firms, to the detriment of the objective of integrity; or may make the procurement process more complex and so increase procedural costs for both the procuring entity and suppliers. It may also have the effect of limiting access to markets for foreign suppliers to the detriment of the objective of opening up markets to trade – for example a set-aside of a proportion of governments contracts for firms in a region of high unemployment in order to increase regional equality in the country will have the effect of shutting out firms from abroad. Thus, policies which aim to leverage procurement must take account of these multiple strings pulling in different directions.

Focusing on human rights considerations in this analysis, as outlined by the literature and practice, the implementation of social objectives in procurement may be particularly controversial, thus it is essential to bear in mind possible trade-offs that could hinder their implementation. Indeed, the inclusion of social goals imply an increase in the overall complexity of the procurement process and in the transactional costs between the procuring agency and the suppliers, with a considerable impact on the efficiency of the entire procurement process.[150] Moreover, the implementation of non-economic policies may undermine the level of competition in the procurement markets, such as restricting market access to only those suppliers guaranteeing respect for certain social standards or favouring domestic suppliers for the industrial development of a specific sector or a disadvantaged region[151].

In conclusion, as many services traditionally provided by government are now carried out by external contractors, public contracts and public procurement procedures are a powerful leverage to influence the wider market delivering societal needs[152] and directing suppliers towards more respect of human rights throughout global supply chains, which shape the global economy in which procuring entities and contractors operate.

2.1.2 The Internationalization of Public Procurement: Global Supply Chains and Human Development

Public procurement activities and transactions, entailing both public and private parties, do not happen in isolation. Rather, they are immersed in the context of the current globalized economy. As anticipated above, the market context and its structure constitute a key dimension shaping the overall public procurement system. Procuring entities, as any other consumer, purchase goods, works, services from suppliers via transnational supply chains. Thus, when adopting a market perspective on public procurement, it is crucial to focus on the implications of globalization phenomena and global supply chains on public purchasing.

Globalization dynamics have significantly affected nowadays economy and society with a consequent intensification and increasing relevance of cross-border social relations caused by the deregulation tendencies of politics, rapid technological developments, increase in transnational migration, intensification of international trade and foreign investments.[153] Globalization has, also, fostered the proliferation of spatial and

[148] Semple A. (2021) A Practical Guide to Public Procurement, Oxford.
[149] Trepte (201)5, p.205
[150] McCrudden (2007), see n. 78, pp. 63-93
[151] Furneaux C., Barraket J. (2014) Purchasing Social Goods: A Definition and Typology of Social Procurement, Public Money and Management 265
[152] Sjåfjell and A. Wiesbrock (2016) "Why should public procurement be about sustainability?" in B. Sjåfjell and A. Wiesbrock (eds) *Sustainable Public Procurement under EU Law,* p.4.
[153] Beckers (2018), *Enforcing Corporate Social Responsibility Codes, On Global Self-Regulation And National Private Law*, Hart Publishing, Oxford and Portland, Oregon. p. 9

institutional normative pluralism[154] increasing a dialectic on the international, regional, national dimensions of public procurement.[155] Indeed, public purchasing is immersed in a context where centrifugal and centripetal[156] forces make legal systems polycentric, multi-layered and interrelated. This has inspired arguments from a global administrative law perspective[157] on the necessity to shift from considering public procurement as a mere domestic subject to embrace its transnational nature. According to global governance theories we are witnessing the emergence of a *global administrative space*. Namely, a space in which the strict dichotomy between domestic and international has largely broken down and domestic and regional and international regulatory elements are interwoven.[158] In such context, it is fundamental to focus on interlinkages between different regulatory layers, that should not be conceived in silos.

In the last decades, the global supply chain model has constituted a pervasive feature of the overall international economy, becoming a common feature of production, investment and trade. Since the 1980s, technological, institutional, and political developments have fuelled a significant globalization of production processes across countries, inducing suppliers to organize production on a global scale, starting to offshore parts, components, services to producers in foreign countries. Indeed, the attribute *global* reflects the cross-border nature of supply chain organization, which has inevitable implications on trade. Indeed, approximately 70% of international trade involves global value chains, growing significantly in the 1990s and 2000s. Starting from the 1980‘s, enterprises have outsourced production to contract manufacturers that have located factories in low wage locations across the globe. Regarding the geographical distribution, some regions of the world are deeply involved rather than other areas, with factor endowments playing a relevant role in shaping specialization and affecting the positioning of countries.[159]

Figure n. 2.8: The importance of global value chains in world trade. (Source: WDR, 2020)

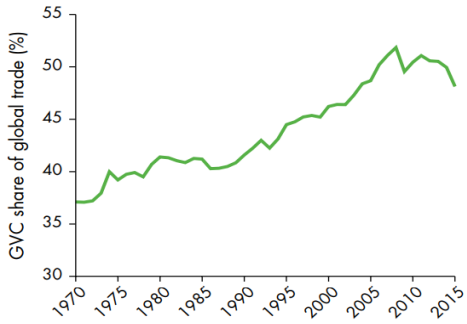
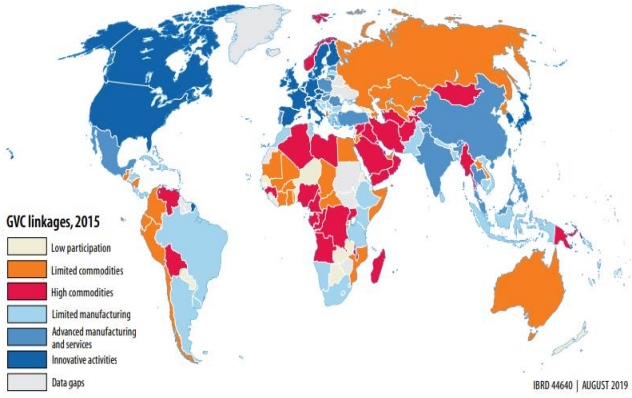


Figure n. 2.10: Uneven sectoral specialization in supply chains (Source: WDR 2020, IBRD 2019)

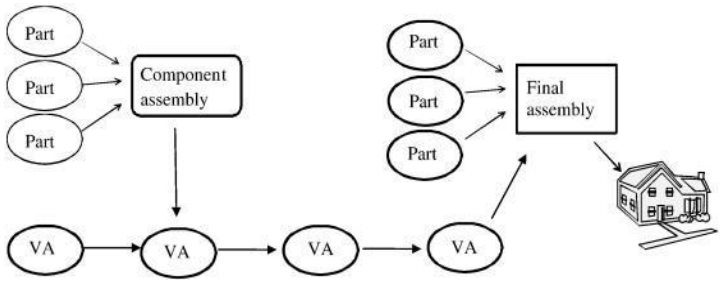


Defining supply chains in details, they are networks between companies and their suppliers entailing different phases - raw material collection, production, manufacturing, distribution, consumption, disposal - involved in producing a good or service sold to consumers, where each phase adds value to the final output. *Global* means that at least two stages are located in different countries. Overall, supply chains form “complex, diverse, fragmented, dynamic and evolving organizational structures”[160] characterized by subcontracting *cascades* with variegated ownership structures and employment relations.[161] Complexities result from different

[154] Giddens, A.(1990), The Consequences of Modernity, Cambridge: Polity. Eriksen T., (2007), Globalization: The Key Concepts, Oxford Press
[155] Shiff Berman P.(2012) Global Legal Pluralism, A jurisprudence of Law beyond borders. Klabbers J., Piiparinen T., Normative Pluralism: An Exploration
[156] Gabriel Palma J.(2006), Globalizing Inequality: ‘Centrifugal’ and ‘Centripetal’ Forces at Work, Working Papers 35, UNDESA
[157] Kinsbury B., Krish N., (2005), The Emergence of Global Administrative Law, Duke University School of Law
[158] Krisch n., Kingsbury B, (2006) Introduction: Global Governance and Global Administrative Law in the International Legal Order
[159] Some countries have largely specialized in agricultural global supply chains (Ethiopia) or in the natural resource segments of supply chains (as Chile or Norway). Other countries are largely involved in the manufacturing segments, with relatively less developed economies (such as Tanzania) specializing in low-tech (or limited) manufacturing, and more developed economies (such as Mexico, Slovakia or China) participating in high-tech (or advanced) manufacturing processes. In addition, it is useful to distinguish a subset of countries (e.g., India) that have largely specialized in the services, and a small set of very advanced economies (e.g., US, Germany or Japan) playing a significant role in the provision of innovative goods and services.
[160] Delautre, G (2019) Decent work in global supply chains: An internal research review. Working paper 47. Geneva: ILO
[161] Sack D, Sarter E. (2022) To comply or to be committed? Public procurement and labour rights in global supply chains. Global Social Policy

configurations and structures. Some examples are "spider-like" structure, where multiple parts and components converge to an assembly plant, or the "snake-like" one, where value is created sequentially in a series of downstream and upstream stages.[162] However, it must be stated that most production processes are a complex mixture of the two.[163]

Figure n. 2.11: Spider and snake configurations (Source: Baldwin and Venables, 2013)



Supply chains, fragmenting production across borders, produce inevitable benefits from an economic growth perspective. They are likely to reduce costs and enhance competitiveness in the business landscape, they foster higher international division of labor and greater gains from specialization. They allow resources to flow to their most productive use, not only across countries and sectors, but also within sectors across the different stages of production. Thus, as outlined by scholars, global supply chains magnify growth, employment, opportunities for socio-economic development and distributional impacts of standard trade.[164] Indeed, 80% of global trade passes through supply chains, contributing to economic growth, job creation, poverty reduction, entrepreneurship, workers' transition from the informal to the formal economy, thus fostering *development*. But what does development substantially mean? *Development* refers to a multidimensional concept with distinct meanings depending on the adopted normative standpoint. It may be defined as a multi-sectoral process, [165] involving social, economic and political change aimed at satisfying human needs and improving people's *quality of life*, a core determinant to capture a country wellbeing and crucial economic policy objective for socio-economic progress.[166] Often development is reconducted to material prosperity as dominant normative framework. The economic growth paradigm focuses on the increase in wealth over time, usually measured in terms of Gross Domestic Product (GDP) variations, as conventional income measure.[167] However, it has been recognized that GDP has some drawbacks and limitations in capturing development, therefore distinct paradigms,[168] with different objectives, measurement techniques and policy implications, have emerged to capture socio-economic progress, challenging a view of economic growth as synonymous of development. In this regard, the concept of *human development* has flourished, as an economic paradigm and social philosophy for advancing human wellbeing, embracing a people-cantered perspective.[169] The main philosophical underpinnings rest on the notion of wellbeing as *human flourishing* linked to the Aristotelian concept of εὐδαιμονία, meaning "flourishing" as accomplishment of a goal in itself. The Capabilities Approach theorized by the economist Amartya Sen constitutes a core conceptual and foundational framework beneath the human development approach, applying *functionings* and *capabilities* as theoretical cornerstones, defining human development as a "process of enlarging people's choices and opportunities, by expanding human *functionings* and *capabilities*[170], being a process as well as an end".[171]

[162] Antràs, P., de Gortari A. (2020) "On the Geography of Global Value Chains." Econometrica 84 (4): 1553–1598.
[163] Baldwin, R., J. Venables A. (2013) Spiders and snakes: Offshoring and agglomeration in the global economy, Journal of International Economics, Vol. 90, Issue 2, pp 245-254.
[164] Antras, P., Davin C. (2022) Global Value Chains, in Antras (ed) Handbook of International Economics. Vol. 5. Elsevier.
[165] Trebilcock M., (2011), The Ends and Means of Development, in Trebilock (ed) *What makes poor countries poor?,* ch. 1.
[166] Deneulin, Shanani (2010) *An Introduction to the Human Development and Capability Approach: Freedom and Agency*, Taylor and Francis
[167] Chiappero-Martinetti E., Von Jacobi N. (2016), Human Development and Economic Growth, in Holscher and Tomann (eds), Palgrave Dictionary of Emerging Markets and Transition Economics, Palgrave Macmillan, London, pp. 223-244
[168] Stiglitz, Sen, Fitoussi, (2008) *Report of the Commission on the Measurement of Economic Performance and Social Progress*.
[169] Fakuda-Parr, S., (2003) *The Human Development Paradigm: Operationalizing Sen's Ideas on Capabilities*, Routledge
[170] On definition of "functionings" and "capabilities" see Sen, A.(1979) *Equality of What? the Tanner Lecture on Human Values*, Stanford University; Sen, A (1994) Freedoms and Needs. New Republic. Chiappero-Martinetti, E., Osmani, S., Qizilbash, M. (2020). *The Cambridge Handbook of the Capability Approach*. Cambridge: Cambridge University Press.
[171] HDRO (2019) Human Development Report: Beyond income, beyond averages, beyond today, UNDP, New York

Therefore, the main aim of human development is to provide people with more freedom to live lives they value, developing their abilities and expanding the chance to activate and use them to become *agents* in their own lives and in their communities.

Adopting a human development perspective on the current global economy and on the global supply chains model, allows to shed lights also on potential and actual negative implications and risks impinging human flourishing internationally.[172] Global supply chains may unleash economic development, employment opportunities, higher competitiveness but also increased exposure to risks, such as human rights adverse impacts[173]. Indeed, current production and consumption models, complexity, short-time-to-market, costly delays in supply chains, downward price pressure reducing margins for error, are all responsible for production stresses absorbed by workers. Factories may demand excessive overtime hours to complete orders on time, and use temporary or contract workers, often the from vulnerable groups of society, to deal with flexible production demands. Thus, fast and low-cost production often cause friction with workers' fundamental human rights and labour rights, increasing their vulnerability and hindering full human development. Scholars[174] studying the global supply chain model have identified multiple social issues that are frequent throughout supply chain phases, requiring further scrutiny by both States-also when purchasing- and suppliers: labour conditions, human rights, health and safety, minority development, disabled and marginalized people inclusion, gender discrimination.[175] The focus of the following subchapter will be specifically on identifying human rights risks that may be impinged throughout public procurement supply chains, to ultimately understand what is the role and responsibility of the State and business in such a context. This requires further scrutiny on the nature and implications of such risks and their related adverse impacts.

2.2 Defining Human Rights Risks in the Business Context while Procuring

Far-flung and complex supply chains are ubiquitous in the current global economy, extending to most industries in every continent, affecting also public buyers when purchasing goods, works, services for public management purposes.[176] In many countries, particularly developing ones, such model has created positive impacts reducing poverty and unleashing economic growth, productivity, and job opportunities. The World Bank[177] estimates that per capita income is more boosted by integration into global supply chains rather than by standard trade.[178] However, in the last two decades, evidence of NGOs advocacy, judicial cases and statistics collected by various international organizations and institutes,[179] have shed lights on the frequent exposure of business to human rights risks, showing also governments' lack of risk awareness on such aspects along their own supply chains.[180] Global production has led companies to operate in and source from countries with varying regulatory frameworks related to the protection of human rights. Lax human rights standards have proved to be an influencing factor in corporation's location and manufacturing decisions. This, coupled with host countries frequent unwillingness or incapacity to enforce the protection of human rights has increased the exposure to adverse impacts.[181] Furthermore, lack of transparency is a crucial factor in perpetrating such risks. Global supply chains are opaque by design[182] and their complexity together with lack of transparency perpetuates and hides practices that may be harmful to workers and communities, impacting them directly or

[172] Hoejmose et al (2014), The effect of institutional pressure on cooperative and coercive 'green' supply chain practices, Journal of Purchasing and Supply Management 20(4) Oxford University Press
[173] Ulfbeck, V., Andhov, A., Mitkidis, K. (2019). Law and Responsible Supply Chain Management: Contract and Tort Interplay and Overlap, Routledge.
[174] Yawar and Seuring (2019), A framework for managing social issues in supply chains
[175] Klassen and Vereecke (2012) Social issues in supply chains: Capabilities link responsibility, risk (opportunity), and performance, International Journal of Production Economics, 2012, vol. 140, issue 1, 103-115
[176] World Bank (2020) World Development Report: Trading for Development in the Age of Global Value Chains, p. 17.
[177] World Bank (2020) Trading for Development in the Age of Global Value Chains, p. 3.
[178] OHCHR (2022) Sustainable Global Supply Chains: G7 Leadership on UNGP Implementation, Report for the 2022 German Presidency of the G7
[179] Danish Institute for Human Rights, Business & Human Rights Resource Centre, Shift, International Corporate Accountability Roundtable, Institute for Human Rights & Business, etc.
[180] Ranney, Griffeth, Jha, (2020) Critical Supply Shortages the Need for Ventilators and Personal Protective Equipment during the Covid-19 Pandemic
[181] Marx A. et al (2022) *Research Handbook on Global Governance, Business and Human Rights*, Research Handbooks on Globalisation and the Law series, Edward Elgar Publishing
[182] Fraser E, van der Ven H. (2022) Increasing Transparency in Global Supply Chains: The Case of the Fast Fashion Industry. Sustainability, 14(18):11520

indirectly.[183] Thus, in a context of mounting evidence of adverse impacts of business activities on human rights and environmental degradation, concerns have grown on harmful corporate practices and human rights risks potentially arising throughout all supply chain phases[184] also of public suppliers. A*mong others*, concerns are on rising inequalities and exclusion risks,[185] discrimination, precarious and informal forms of work,[186] increasing vulnerability of workers, international labour standards violations, all impinging fundamental human rights and the right to a decent work.[187]

Urgency to act to hold business accountable is revealed by statistics: 49.6 million people were living in modern slavery in 2021, with 27.6 million in forced labour and 17.3 million of which exploited in the private sector. 152 million people are still victims of child labour; widespread informal employment persists, with 780 million workers receiving inadequate wages.[188] Therefore, evidence shows that business enterprises can and do violate human rights all over the world. The problem is that they are often not held accountable due to a combination of factor as the so-called "corporate veil" device, poor access to justice for victims and the debated role of business as non-traditional human rights duty bearer. All such aspects will be explored in depth in Chapter 4. Particularly, emblematic cases with disrupting consequences, as the Rana Plaza garment factory collapse in Bangladesh killing over 1500 people or the Ali Enterprises factory fire in Pakistan, have shed lights on the existence of a shared responsibility of States and companies towards human rights in business, increasingly legitimized at international legal level.[189] Facing the urgency to act to hold business accountable, questions on extraterritoriality and corporate liability creates doubts and enforcement gaps. Notwithstanding, a flourishing case law in different jurisdictions[190] has pointed out the existence of a *duty of care* held by parent companies towards their subsidiaries, contractors and subcontractors related to human rights risks.[191] A growing attention to environmental damages and interrelated human rights abuses is showed by some landmark cases as the *Bophal* case (1984), the deadliest industrial disaster in history and the long-lasting damages by Shell in the Niger Delta area. Mentioning a recent relevant case law on the matter, the UK Supreme Court ruling in *Okpabi v Royal Dutch Shell Plc*[192]and the Hague District Court decision in *Milieudefensie et al. v. Royal Dutch Shell plc*[193] are landmark decisions.

Given such premises, concerns on human rights in the global business context have become an increasingly prominent feature on the international agenda since the 1990s, leading to a process of consolidation into a new legal field: *Business & Human Rights.* This recently consolidated subfield of international law seeks to enhance the accountability of business in the human rights area, especially to bridge such accountability gap both setting standards and holding business accountable if violations occur. More is to be disentangled on the role and responsibility of both the State as buyer and suppliers in the public procurement operations, which will be addressed in Chapter 3 and 4.

What are Human Rights and What Obligations?

What are human rights? What human rights risks suppliers may encounter in their operations and which should be taken into consideration in public procurement transactions?
Human rights refer to universal legal guarantees - not granted by any State or at the discretion of others – inherent to all human beings without any discrimination, regardless of nationality, sex, national or ethnic

[183] Martin-Ortega O., (2022) Transparency and human rights in global supply chains: from corporate-led disclosure to a right to know, in Marx et al (2022), pp. 100-120.
[184] Bernaz, N. (2016). Business and human rights: History, law and policy - Bridging the accountability gap. Taylor and Francis.
[185] Wilshaw R.(2014) Steps Towards a Living Wage in Global Supply Chains, Oxfam International.
[186] ILO (2016) Achieving Decent Work in Global Supply Chains", Report IV to the 105th ILC. Geneva. para. 34. ITUC (2021) Global Rights Index
[187] UN Global Compact (2018) Decent Work in Global Supply Chains, Baseline report.
[188] ILO (2022) Global Estimates of Modern Slavery: Forced Labour and Forced Marriage, ILO and IOM Publications
[189] Rahim, M. (2020), Humanizing the Global Supply Chain: Building a 'Decent Work' Environment in the Ready-made Garments Supply Industry in Bangladesh in Deva & Birchall (2020) *Research Handbook on Human Rights and Business*. Edward Elgar Publishing
[190] Recent landmark cases litigated in UK and the Netherlands: the UK Supreme Court rulings in *Okpabi v.Royal Dutch Shell Plc* and *Lungowe and Ors. v Vedanta Resources Plc and Konkola Copper Mines* Plc and the Hague District Court's decision in *Milieudefensie et al. v. Royal Dutch Shell plc*.
[191] Bonfanti A. (2019) *Business and Human Rights in Europe: International Law Challenges*, Routledge.
[192] In February 2021, the UK Supreme Court allowed the claims brought by Nigerian citizens on oil spills environmental damages devastating the Niger Delta area, impinging human rights of the local communities, to proceed against Shell UK parent company.
[193] In May 2021, the Court ruled that Shell must reduce its global net carbon emissions by 45% by 2030

origin, color, religion, language, or any other status. The simplicity and power of human rights reside in the idea that every person is endowed with "inherent dignity" and "equal and inalienable rights". They are listed within the *UN Bill of Human Rights* composed of the *UN Declaration on Human Rights* (UDHR) (1948) and the two International Covenants - the *International Covenant of Civil and Political Rights (ICCPR)* and the *International Covenant on Economic, Social and Cultural Rights* (ICESCR). The Covenants, adopted in 1966 and entered into force a decade later, turned the Declaration's aspirational commitments into legal obligations for the States parties as the duty-bearers within their respective jurisdiction. In addition, the UN Bill of Human Rights is supplemented by core human rights conventions[194], elaborating upon prohibitions against racial discrimination, discrimination against women and torture, affirming the rights of the child, migrant workers and persons with disabilities, and prescribing national prosecution or extradition for the crime of forced disappearance and others. Furthermore, the International Labour Organization (ILO), specialized agency of the United Nations, has adopted a series of fundamental conventions. The *ILO Declaration on Fundamental Principles and Rights at Work*, a cornerstone source recognizing international workplace rights, define fundamental rights also recognized as International Labour Standards (ILS): freedom of association and the effective recognition of collective bargaining, elimination of all forms of forced and compulsory labor; effective abolition of child labor; and elimination of discrimination in respect to employment and occupation.

Core characteristics of human rights are universality and inalienability, indivisibility and interdependence, equality and non-discrimination.[195] In details, the principle of universality refers to the fact that individuals are all equally entitled to human rights, as emphasized in the UDHR and repeated in many international human rights conventions, declarations, and resolutions.

Then, all human rights are indivisible and interdependent, meaning that one set of rights cannot be enjoyed fully without the other. This is valid regardless of the binary classification of civil and political rights and economic, social and cultural rights fostered by the adoption of the two International Covenants. The UDHR, indeed, made no distinction between these rights. This division appeared lately in the context of cold war tensions, leading to the negotiation and adoption of the two separate covenants. Nonetheless, since the Vienna Declaration on Human Rights (1993), there has been a return to the original architecture of the UDHR, reaffirming the indivisibility of all human rights, requiring to overcome a rigid approach in silos. For example, making progress in civil and political rights makes it easier to exercise economic, social and cultural rights. In turn, violating economic, social and cultural rights can negatively affect many other rights.

Two further fundamental principles common to all human rights are equality and non-discrimination. Article 1 of the UDHR states: "All human beings are born free and equal in dignity and rights". Freedom from discrimination, set out in Article 2 is a cross-cutting principle, present in all major human rights treaties, being central in the International Convention on the Elimination of All Forms of Racial Discrimination, and the Convention on the Elimination of All Forms of Discrimination against Women.

Human rights do not only create legal entitlements for rights-holders but also obligations for duty-bearers under international law. All States that have ratified at least one of the nine core human rights conventions[196] as well as one of the Optional Protocols have three specific obligations to respect, protect and fulfil human rights:

- *The obligation to respect*: States must refrain from interfering with or curtailing the enjoyment of human rights, such as by denying or impeding access or enforcing discriminatory practices.
- *The obligation to protect*: States have to protect individuals and groups against human rights abuses, taking measures that prevent third parties from interfering with the right. For instance, by adopting specific legislations or other measures ensuring equal access to a service, as healthcare.

[194] ICESCR; ICCPR; Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW); Convention on the Rights of the Child (CRC); International Convention on the Elimination of All Forms of Racial Discrimination (ICERD); International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (ICMW); Convention on the Rights of Persons with Disabilities (CRPD); International Convention for the Protection of All Persons from Enforced Disappearance (CPED); Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT).

[195] OHCHR (2022), What are Human Rights, accessed 19/03/2023

[196] 80% of States worldwide have ratified four or more

- *The obligation to fulfil*: States must take positive action to facilitate the enjoyment of human rights, through the adoption of appropriate legislative, administrative, budgetary, judicial, promotional and other measures.

A fundamental question that will be scrutinized throughout the next chapters is on understanding whether those human rights obligations apply also to the State as buyer and business as supplier in public procurement transactions. context.

What Risks?

The theory of risk management is based on the fact that the future is unknown to us. The notion of risk refers to the "likelihood of an unfavourable event affecting the achievement of set objectives to occur"[197], or "combination of likelihood for a certain problem to occur (an unwanted situation) with corresponding value (impact) of the damage caused".[198] A fundamental feature of risk is *probability*, namely an event is risky if there is no certainty of its future occurrence and it happens when there is either: the possibility of a loss or damage and/or a gap of knowledge over a potential loss. Furthermore, a risk is a contingency that can have either a positive or a negative connotation, being either a threat or an opportunity. A negative risk (threat) is characterized by the likelihood of suffering detriment, conversely a positive risk (opportunity) is based on the likelihood of gaining an advantage.

Reflecting on the current business trends based on transnational and dynamic supply chains, increasing product and service complexity, out-sourcing and globalization processes have enhanced risks[199], threats and also opportunities. Focusing on risky events that may lead to a damage[200], in the business and public purchasing context, human rights risks may represent key threats for both private and public parties, but also opportunities when carefully addressed and prevented.

First of all, from a business and suppliers' perspective, risks may be divided into three broad categories: *operational, reputational* and *legal risks*. All of them may be linked to potential human rights adverse impacts. In details, human rights risks refer to human rights-related violations and incidents creating threats to the business itself. Risks can have multiple impacts, affecting a supplier's bottom line impacting key value drivers, such as profitability, through increased costs that lead to lower margins or a drop in revenues. They may also hinder a company's growth prospects in new markets and increase its risk profile, ultimately influencing a supplier's value and attractiveness to investors. In details, at *operational level*, examples of human-rights related risks include project delays or cancellation, supply chain disruption, community grievances, increased difficulty to obtain or renew permits, loss of the license to operate, etc. Further, *reputational risks* are higher when companies are involved in human rights violations, since this is often accompanied by negative media coverage, resulting in consumer boycotts, loss of brand value, difficulty to attract new talent, etc. In addition, a company's reputation can be damaged as a result of an alleged or perceived human rights violation, regardless of whether it took place. Regarding *legal* risks, a failure to respect human rights may also have legal ramifications for companies, including drawn-out lawsuit or punitive fines stemming from the government's enforcement of domestic legislations.[201]

Shifting to the public buyers' perspective, it is crucial to consider that public procurement operations are immersed in the market context, exposed to multiple external factors of different nature. Public procurement is, thus highly exposed to risks. Examples of potential risks are several, depending on different factors, such as the complexity of a specific purchase and the context of a specific project and target group. For instance, an optimal procurement result can be impinged by budget overruns, lack of quality, delayed delivery, even complete failure because of a lack of acceptance. Further risks refer to the market, finance, integrity, reputation of the procuring entity and others that may be encountered throughout the procurement cycle: inefficiency

[197] European Commission (2010) Risk management in the procurement of innovation, EUR 24229 EN
[198] British Standard Institution definition
[199] ILO (2016), see n. 120.
[200] Rafele, C. (2015) Choosing project risk management techniques. A theoretical framework
[201] RobecoSam, (2017), Sustainability Yearbook 2017

risks, market risks, financial risks, operational risks, reputational risks, fraud and corruption related risks, technological risks and many others.[202] Risks related to human rights violations in the supply chain of suppliers may pose multiple threats for the public buyers and create adverse impacts at reputational, legal and operational level not only for the suppliers but also for the public actors, which require adequate measures in place to identify, address, prevent and mitigate them.[203]

But what specific human rights can be impinged in the business context and throughout supply chains of public buyers? Despite acknowledging the human rights universality and indivisibility, key characteristics of civil and political rights and economic, social and cultural rights are scrutinized below, with particular attention to human rights at work and the existence of a fundamental right to a decent work. Multiple drivers of discrimination and exclusion in the business context are enquired, shedding lights on the evidence of multiple human rights impacts, which apply also to public procurement transactions.

Human Rights: Into Civil and Political Rights

Civil and political rights constitute *negative* rights focusing prominently on the protection of life, integrity, liberty and personal opinion against an overbearing state.[204] Protecting, respecting and fulfilling such rights is fundamental to address social exclusion, inequality and discrimination, which are prone to significantly increased vulnerability. Furthermore, social exclusion, inequality and discrimination are closely related to lack of access to justice and absence of effective remedies, which both reflects and compounds vulnerabilities and impunity.[205] The ICCPR is the core international legal instrument listing and recognizing such entitlements.[206] Regarding the legal status and regime of protection, as negative obligations civil and political rights require entrenchment in the legal order, and thus they are justiciable and enforceable before courts. States are, thus, obliged to implement them immediately, as provided by article 2.1.

Considering the business context, civil and political rights may be impinged not only by overbearing States, but also by non-state actors including business entities, having taken on a growing importance in the wake of States withdrawal from public functions. Examples of human rights risks that may be violated in the business context include patterns of discrimination and exclusion must be considered when reflecting on human rights risks at work, for instance towards marginalized and vulnerable groups. Indeed, cornerstone provisions in the International Bill of Human Rights, recognized by both International Covenants and numerous legal instruments are the freedom from discrimination and the right to equality between men and women. [207] A generic non-discrimination clause included in both Covenants forbid discrimination based on "any distinction, exclusion, restriction, preference which is based on any ground such as race, color, sex, language, religion, political or other opinion, national or social origin, property, birth, or other status and which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms".[208]

Throughout global supply chains risks of exploitation of vulnerable workers may arise in the form of forced labour and child labour. Such harms violate freedom from torture, freedom from slavery, the right to liberty and security of person. Furthermore, risks related to lack of access to justice for victims of corporate related human rights harms, violating the right to equality before the law, right to fair trial, right to recognition before

[202] OECD (2019) Government at Glance, Managing risks in public procurement, OECD Publications, pp. 142-144.
[203] DIHR (2020) Driving change through public procurement
[204] Bantekas, I., Oette L. (2020) International Human Rights Law and Practice, Cambridge, pp. 350-410
[205] Principle 1, Updated Set of principles for the protection and promotion of human rights through action to combatimpunity, UN doc A/72/502
[206] Freedom from discrimination, Right to equality between men and women, Right to life, Freedom from torture, Freedom from slavery, Right to liberty and security of person, Right to be treated with humanity in detention, Freedom of movement, Freedom of non-citizens from arbitrary expulsion, Right to fair trial, Right to recognition before the law, Right to privacy, Freedom of religion and belief, Freedom of expression, Right of peaceful assembly, Freedom of association, Right to marry and found a family, Right of children to birth registration and a nationality, Right to participate in public affairs, Right to equality before the law, Minority rights.
[207] The right to equality and non-discrimination is recognised in art. 2 UDHR and is a cross-cutting issue in different UN human rights instruments, such as Artt.2 and 26 ICCPR, Art. 2(2) ICESCR, Art. 2 CRC, Art. 7 CMW and Art. 5 CRPD. Two of the major UN human rights treaties explicitly prohibit discrimination: CERD on the ground of race and CEDAW on the ground of gender. Despite the fact that the principle of non-discrimination is contained in all human rights instruments, only a few instruments expressly provide a definition of non-discrimination: Art.1(1) CERD, Art. 1 CEDAW, Art. 2 CRPD, Art. 1(1) ILO 111, Art 1(1) Convention against Discrimination in Education
[208] Artt. 3 and 26, ICCPR. HRC General Comment 18: Non discrimination, UN Doc HRI/GEN/1

the law. Other examples relate to violations of the fundamental rights of freedom of expression, freedom of movement, freedom of association of communities, whose participation is often neglected.

Furthermore, according the UN Secretary-General, fulfilling gender equality is "*the unfinished business of our time, and the greatest human rights challenge in our world"* as women and girls face intersectional direct and indirect discrimination on the basis of multiple compounding grounds.[209] Among key-challenges, gender-based violence is perpetrated, discriminatory laws and social norms remain, women political and leadership underrepresentation continue, the gender pay gap persists globally,[210] requiring an adequate normative framework addressing gender-based discriminations.[211]Reflecting on possible implications of gender discrimination and exclusion in the business context, multiple human rights risks should be considered, also in the public procurement context, including gender-based discrimination and sexual harassment risks, among others.

Human Rights: Into Economic, Social and Cultural Rights and Human Rights at Work

Economic, social and cultural (ESC) rights are positive rights recognized by articles 22-27 of the Universal Declaration of Human Rights as well as by article 55.a and b of the UN Charter. They have been, further, extensively elaborated in the ICESCR, envisaging a comprehensive list of rights[212].

Regarding their legal nature and regime of protection, ESC rights are strictly interrelated with civil and political ones, nonetheless with some differences. As per article 2.1 ICESCR, unlike civil and political rights subject to immediate implementation, most ESC rights are framed as goals to be achieved progressively, contingent on the maximum use of a nation's available resources. Resource scarcity could be a significant impediment to the fulfilment of ESC rights. Thus, it has been questioned whether an obligation that is not immediately enforceable, not overtly justiciable and which is contingent on available resources can give rise to an entitlement. The answer is positive. ESC rights are binding on States, entailing obligations of conduct and obligations of result, namely the obligation to respect, protect and fulfil human rights. Furthermore, States have an immediate obligation to take appropriate steps to ensure the enjoyment of minimum essential levels of each right, guaranteeing continuous and sustained improvement in their enjoyment over time. For instance, although a State has inadequate resources at its disposal, it should introduce low-cost and targeted programmes to assist those most in need so that limited resources are used efficiently and effectively, as provided by the CESCR General Comment 3.

With reference to the business context, the protection of rights at work is an integral part of fulfilling human rights obligations. ICESCR recognizes as ESC multiple human rights at work or labour rights: the right to work, the freedom to choose and accept work, the right to just and favourable conditions at work, the right to form trade unions, the right to strike, the right to social security, the right of mothers to special protection before and after birth, the freedom of children from social and economic exploitation. All of them promote decent work, recognized and guaranteed by the ILO legal framework and by the CESCR General Comment n.18 on the Right to Work.

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[209] Charlesworth H., Chinkin C. (1993) The Boundaries of International Law: A Feminist Analysys, Manchester University Press; Cook R.Women International Human Rights Law: the Way Forward", 15 Human Rights Quarterly

[210] Chapman A, Carbonetti B. (2011) Human Rights Protections for Vulnerable and Disadvantaged Groups: the Contribution of the UN Committee on Economic, Social, Cultural Rights 33 Human Rights Quarterly 682, at 693

[211] The Convention on the Elimination of All Forms of Discriminations against Women (CEDAW) adopted in 1979 is the first major international treaty on the protection of women's rights. It marks out inequality and discrimination against women as a particular and serious form of human rights violation meriting a specific instrument. The importance of the rights of women and girls has been emphasized also by the 2030 Agenda for Sustainable Development. SDG 5 constitutes a specific stand-alone goal which seeks to "achieve gender equality and empower all women and girls". The SDGs recognize that realizing gender equality and women's empowerment are crucial to achieve all other goals by mainstreaming gender across 14 out of 17 goals: 230 of the SDG indicators are gender responsive; 32% are gender relevant and 21% of targets are disaggregated by sex.

[212] Freedom from discrimination, Right to equality between men and women, Right to work, Freedom to choose and accept work, Right to just and favourable conditions at work, Right to form trade unions, Right to strike, Right to social security, Right of mothers to special protection before and after birth, Freedom of children from social and economic exploitation, Right to an adequate standard of living, Freedom from hunger, Right to health, Right to education, Freedom of parents to choose schooling for their children, Right to take part in cultural life, Right to enjoy benefits of science, Right of authors to moral and material interests from works, Freedom to undertake scientific research and creative activity

The exposure to human rights violations at work is a fundamental challenge in global supply chains. As ILO statistics highlights, approximately 16 million people are exploited in the private sector.[213] Indeed, for millions of human beings throughout the world, full enjoyment of the right to freely chosen or accepted work remains a remote prospect.[214] Far before the ICESCR, since 1919 the ILO developed a system of ILS forming part of the international human rights norms and standards landscape. ILS are fundamental to promote decent and productive work, in conditions of freedom, equity, security, dignity and non-discrimination. ILS have been giving expression to human rights at work even before the UN Charter, then the UDHR formally articulated the human rights that would become the foundation of decent work. Following the UDHR, ILS continued to inspire the formulation of human rights in the two International Covenants. Further, the ILO Declaration of Fundamental Principles and Rights at Work (1998), amended in 2022[215], highlights five fundamental principles that are mandatory to be realized even when a country has not ratified the relevant "fundamental" ILO Conventions[216]:

- Freedom of association and the effective recognition of the right to collective bargaining
- The elimination of all forms of forced or compulsory labour
- The effective abolition of child labour
- The elimination of discrimination in respect of employment and occupation;
- A safe and healthy work environment (added in 2022).

The relevance of human rights risks at work and fundamental labour rights harms that may arise throughout global supply chains has been progressively recognized under the ILO framework through the ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy (MNE Declaration), providing direct guidance to enterprises on social policy and inclusive, responsible and sustainable workplace practices. The internationally recognized instruments invoking the respect by business enterprises of human rights will be unpacked in depth in the Chapter 3.

Considering human rights risks in the business context, potential harms can be linked to discriminatory treatments, inequality between men and women, abuses of international labour standards in terms of wages and workhours, employment, workplace discrimination, forced and bonded labour, youth and child labour, and health and safety. All such risks may impinge access to decent work and several human rights.

The table below illustrates some examples of human rights issues and related risks that may arise in the business context and throughout supply chains, impacting civil, political, economic, social and cultural rights.

Table n.2.1: Examples of risks in the business context and related impacted human rights.

[213] Know the Chain (2020) Food & Beverage-Benchmark Findings Report

[214] UNCESCR General Comment 3: The Nature of States Parties' Obligations

[215] International Labour Conference-110th Session (2022), *Resolution on the inclusion of a safe and healthy working environment in the ILO's framework of fundamental principles and rights at wor*k. The ILO Declaration has been amended, including the Occupational Safety and Health Convention (No. 155) and the Promotional Framework for Occupational Safety and Health Convention (No. 187) as fundamental Conventions

[216] Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87); Right to Organise and Collective Bargaining Convention, 1949 (No. 98); Forced Labour Convention, 1930 (No. 29) (and its 2014 Protocol); Abolition of Forced Labour Convention, 1957 (No. 105); Minimum Age Convention, 1973 (No. 138); Worst Forms of Child Labour Convention, 1999 (No. 182); Equal Remuneration Convention, 1951 (No. 100); Discrimination (Employment and Occupation) Convention, 1958 (No. 111); Occupational Safety and Health Convention, 1981 (No. 155); Promotional Framework for Occupational Safety and Health Convention, 2006 (No. 187)

Human rights issue	Terms of Employment and Labour Standards Violations	Workplace Discrimination	Exploitation: Forced Labour and Child Labour	Community Impacts	Health and Safety
Risk	**Informal Work** -Part-time or seasonal workers subject to unequal protections benefits and working conditions - Significant use of informal work - Workers not provided annual leave pursuant to local laws -Workers are dismissed without regard to procedural safeguards **Collective Bargaining** - Intimidation of union members and prohibition of participation in unions - No engagement or non-recognition of union members - Business does not comply with collective bargaining agreements - Business restricts employee religious worship and expression during rest periods **Wages** - Wages are paid under unsafe circumstances exposing workers to violence, theft or other harms -Wages provided are below the national minimum wage - Wages do not cover basic needs including food, shelter, and education	- Discriminatory treatment of applicants or employees with disability - Affirmative action policies to reduce discrimination in the workplace are absent - Medical health information is used to discriminate in hiring process or against employees - Business requires employees with a mental health illness to take unpaid leave or reduce their working hours - Migrant workers subjected to unfair recruitment and payment practices **Gender-based discrimination:** - Discrimination of female employees based on age, caste, marital status, pregnancy or parenthood status, disability, HIV/AIDS - Women not provided equal pay for equal work - Business exposes pregnant and nursing women to health risks, including reproductive health risks - Women restricted to specific jobs which may be low-paying and/or precarious - There are no separate toilet and/or facilities available for men and women	**Forced Labour:** -Salary deductions are made without authorization or employee's knowledge -Employer or hiring agency recruits using false advertising and/or contracts -Employee movement restricted at housing facility and unable to leave work -Employee's identification, travel papers and/or other documents are withheld **Child labour:** -No procedures in place to ensure workers meet minimum age requirements -Children of workers support parents at workplace or in supply chains -Children are sexually exploited at work -Children work in hazardous conditions -Young workers experience workloads, tasks or conditions unsuitable for their age -Child labour found in operations or supply chain or child labor risks are not monitored regularly	- Operations affect cultural, spiritual or religious traditions of a community - Community members not given due and just compensation for business operations that affect them - Lack of regular dialogue with local community on operational impacts - Business operations diminish livelihood opportunities for the surrounding community	-Workers lack adequate protective equipment and training -Absence of systems to detect, avoid and respond to occupational risks **Sexual harassment:** -Sexual harassment or threats of a sexual nature used to coerce work, to recruit or promote -Sexual harassment or threats of sexual nature used to intimidate workers -Sexual harassment policies do not exist -Sexual or personal favours are exchanged for hiring or promotion -Sexual harassment or violence by security guards -Reporting of sexual harassment discouraged or victim stigmatised for doing so

	-Wages, remuneration or documents are withheld to coerce workers **Working hours** - Excessive overtime is required from employees and overtime is routinely unpaid	- No benefits afforded to non-traditional families such as those with same-sex couples and adopted children			
Impacted Human Rights	**ICCPR:** freedom from discrimination (art 2.1), right to equality between men and women (art.3), freedom of expression (art.19), freedom of movement (art. 12), freedom of association (art. 22), minority rights (art.27). **ICESCR:** Freedom from discrimination (art. 12.1), right to equality between men and women (art.3), Right to work (art. 6.1), Freedom to choose and accept work (art. 15), Right to just and favourable conditions at work (art. 7), Right to form trade unions (art.8), Right to strike (art.8.1), Right of mothers to special protection before and after birth (art.10.3), Freedom of children from social and economic exploitation (art. 10), Right to an adequate standard of living (art.11); freedom of expression (art. 19), freedom of movement (art.12), freedom of association (art.22).	**ICCPR:** freedom from discrimination (art 2.1), right to equality between men and women (art.3), freedom of expression (art.19), freedom of movement (art. 12), freedom of association (art. 22), minority rights (art.27), freedom from slavery (art.8), the right to liberty and security of person (art. 9). **ICESCR:** Freedom from discrimination (art. 12.1), right to equality between men and women (art. 3), Right to work (art. 6.1), Freedom to choose and accept work (art. 15), Right to just and favourable conditions at work (art. 7), Freedom of children from social and economic exploitation (art.10)	**ICCPR:** Freedom from torture (art.7), freedom from slavery (art.8), the right to liberty and security of person (art. 9). **ICESCR:** Freedom from discrimination (art. 12.1), right to equality between men and women (art. 3), Right to work (art. 6.1), Freedom to choose and accept work (art. 15), Right to just and favourable conditions at work (art. 7), Right to form trade unions (art.8), Right to strike (art.8.1), Right of mothers to special protection before and after birth (art.10.3), Freedom of children from social and economic exploitation (art. 10).	**ICCPR:** Freedom of expression (art.19), freedom of movement (art. 12), freedom of association (art. 22), minority rights (art. 27), right to equality before the law (art.7), right to fair trial (art. 14). **ICESCR:** Freedom from discrimination (art. 12.1), right to equality between men and women (art. 3), Right to work (art. 6.1), Freedom to choose and accept work (art. 15), Right to just and favourable conditions at work (art. 7), Freedom of children from social and economic exploitation (art.10)	**ICCPR:** Right to liberty and security of person (art.9), Freedom of expression (art.19), freedom of movement (art. 12), minority rights (art.27). right to equality before the law and right to fair trial (art. 14) **ICESCR:** Freedom from discrimination (art. 12.1), right to equality between men and women (art. 3), Right to just and favourable conditions at work (art. 7), Freedom of children from social and economic exploitation (art. 10), right to health (art.12), Right to an adequate standard of living (art.11)

Implications for the State as Buyer: Reasons to Act and Systemic Drivers of Violations

Through public procurement, governments play an important role in promoting and advancing human rights of its citizens, by providing public services, essential for citizens to fulfil their own human rights. For instance, referring to the right to health, only through a functioning public health system depending on infrastructure development, procurement of essential goods (medical equipment, drugs) and medical services, the State fulfils its fundamental duty to protect, respect and fulfil the right to the highest attainable standard of health for its citizens. The same applies to other essential public services, such as education, public transport, social security etc. Nonetheless, as already outlined, along the global supply chain multiple risks and related adverse impacts may occur. Public authorities when entering into commercial relationships with the private sector may be inevitably involved and be indirectly complicit in fostering such impacts.[217]

International expectations of responsible business conduct call on suppliers to respect labour rights, human rights, gender equality, environmental and integrity standards in their operations, supply chains and business relationships. However, data on compliance to human rights standards in supply chains by business is particularly low, given the soft law and voluntary nature of most of them.[218] Similarly, governments have to act and purchase responsibly, establishing contractual relationships with those business actors who respect human rights and the aforementioned standards. However, evidence shows exposure of public purchasing to potential human rights adverse impacts throughout supply chains and inadequate response and paradoxical lack of action.[219] Scandals regard central governments, subnational, local authorities, international organizations[220] purchasing from suppliers using, for example, forced labour, child labour, excessive working hours, unsafe working conditions, suppressing freedom of association and expression, all hindering decent work.[221] Such abuses may occur in most, if not, all economic sectors, *inter alia* extractive, textile, electronics, construction, food and beverage, etc. - investigated in depth in the next paragraph.

Should public actors' reactions be expected to address such risks? There are multiple grounds of justifications - including legal, economic, policy and reputational - for States to act. Action may entail the use of requirements that promote human rights respect within the public procurement procedures and public contracts, influencing suppliers to respect human rights in their business activities.[222]

First of all, there is a legal reason to act from an international human rights law perspective, namely positive obligations of States to protect human rights of "right-holders" (the individuals) deriving from customary and treaty law obligations. Possible violations may trigger international responsibility and legal consequences. The international human rights law grounds and related responsibility will be unpacked in details in Chapter 3. Furthermore, at national level, legal risks regard compliance concerns.[223] Suppliers may incur liability for human rights abuses and this could create damages in the public purchasing. Non-compliance by suppliers with legal frameworks mandating human rights protection and due diligence in business might impact the procurement processes leading

[217] O'Brien C.M., Ortega O.M. (2018), Discretion, Divergence, Paradox: Public and private Supply Chain Standards on Human Rights,
[218] O'Brien, C., Botta, G. (2022) The Corporate Responsibility to Respect Human Rights:Updated Status Review, in da Silva Almeida (ed), Corporate Social Responsibility and Social and Environmental Governance: Greenwashing and Human Rights, Rio de Janeiro, Lumen Iuris.
[219] OECD (2022) Integrating Responsible Business Conduct in Public Procurement Supply Chains: Economic Benefits to Governments, OECD Public Governance Policy Papers No. 14.
[220] Morlino, E. (2019). *Procurement by International Organizations: A Global Administrative Law Perspective*. Cambridge: Cambridge University Press. Russo D. (2019), The human rights responsibilities of international organizations as procuring authorities, in O'Brien, Ortega (eds.) *Public Procurement and Human Rights*, Edward Elgar Publishing, pp. 62-77
[221] O' Brien, C.M. (2016) The home state duty to regulate Transnational Corporations abroad
[222] Morris, D. (2020)
[223] Oliphant K., (2016), The Liability of Public Authorities in Comparative Perspective

to the disruption of key public services and their delivery.[224] More on the legal risks, role and liability of suppliers towards human rights will be addressed under Chapter 4.

From an economic and efficiency perspective, human rights adverse impacts increase costs for both public buyers and suppliers. Costs may be associated with delays in contract delivery, re-running procurement exercises or remediating harms to victims. Also, reputational risks have a cost, reputation has value for public buyer. Thus, association with human rights abuses may deter potential employees or undermine the credibility of policy commitments to uphold human rights in other areas. From an efficiency point of view, supply chain disruption and public services disruption may have high economic impacts. Indeed, increasingly public services rely on the smooth operation of complex, global, fragmented and potentially fragile and vulnerable supply chains. As anticipated, suppliers are spreading their production over several countries along international supply chains to reduce production costs and mitigate risks. Nonetheless, this makes supply chains more vulnerable to localised supply shocks, including to human rights and labour rights risks, and increases the possibility of disruption. Such factors and risks can impact supply chains and consequently disrupt essential public service delivery - such as telecommunications, energy or water supply, transportation, financial systems, etc. - producing significant economic damages.

Thus, governments, as major buyers, are in a position to influence practices across international supply chains, by requiring suppliers integrate more responsible business conduct expectations into their operations, supply chains and business decisions, contributing to more resilient public services.[225] Additionally, at macro-economic level, integrating considerations related to human rights risks in business, especially in public procurement operations, addressing patterns of inequality, discrimination, vulnerability and exclusion could impact on socio-economic development of a country, decreasing overall public spending on social benefits. For instance, preventing the costs of unemployment with more inclusion of vulnerable groups in the market is essential. Unemployment is, indeed, highly costly to governments, individuals and to society as a whole. Further, high barriers to entry on the labour market for vulnerable groups impact tax revenues and also causes governments to increase their spending on social benefits. Labour market discrimination may affect several vulnerable groups, including women, the long-term unemployed, minorities and people with disabilities, and generates considerable benefits spending for governments. Thus, public procurement could be used as a strategic lever to integrate vulnerable groups in the economy, positively impacting the national economy and government revenues and spending when including vulnerable groups.

From a policy perspective, governments, as major buyers, have a powerful opportunity to influence production and consumption patterns through procurement.[226] As *mega-consumers* and often the dominant purchaser for specific categories of goods, works and services, public institutions have a potential in defining buying standards that may stimulate progressive transformation in sourcing and production processes, in favour of socially responsible products and services on a large scale.[227] The role of governments while purchasing is crucial: studies demonstrate that primary incentives for suppliers to include human rights-based strategies in their business model, for instance undertaking due diligence, are: reputational risks; investors requiring a high standard; and consumers requiring a high standard.[228] Therefore, in sectors where the public sector is the largest consumer, high sustainable standards set by the public sector in the production process will also benefit other categories of consumers. Since economic operators and their supply chains have to comply with sustainability requirements set by the public sector, high sustainability standards in public procurement activities

[224] Tulp, S. (2020), "Officials: School laptops help up ahead of new academic year", The Washington Post.
[225] OECD (2021), Fostering economic resilience in a world of open and integrated markets: risks, vulnerabilities and areas for policy action
[226] OECD (2022)
[227] Amann, M. et al. (2014), Driving Sustainable Supply Chain Management in the Public Sector: Importance of Public Procurement in EU
[228] European Commission (2020), Study on due diligence requirements through the supply chain, BIICL, LSE, CIVIC Consulting

could influence production patterns and thus consumption patterns.[229] Indeed, governments by setting, promoting and implementing high responsible standards on suppliers while procuring inevitably impact on production patterns throughout supply chains and consequently also on consumption patterns of individuals and end-users of public services.[230] Additionally, in their role as purchasers, public institutions are uniquely positioned to address human rights and workers' rights risks in global supply chains. Unlike individual consumers, they buy large volumes and maintain multi-year contracts affording them potential leverage to address human rights concerns by virtue of their long-term and high value relation with suppliers. In comparison to individual consumers, which have usually limited access to the origins of the products they buy, public institutions can create access to such information and they can receive and act on complaints, having also investigatory capacity and the power to impose sanctions on suppliers that violate standards or provide false information.[231]

Another reason to act is ethical and reputational, embracing the argument of States *leading by example*, which can be translated in the idea of *buying by example*. Since governments operate both as regulators and participants in the market, "when principles they espouse in the former are not applied in the latter, the government appears to lack coordination or to be simply hypocritical. An important driver then for the incorporation of corporate social responsibility standards in public procurement is the need to be seen to be leading by example: if government expected firms to ensure that their supply chains are clean, then the least government can do is to ensure that its own house is in order too".[232] Following the idea of States *leading by example*, "if the government expects business to take human rights issues in their supply chains seriously, it must demonstrate at least the same level of commitment in its own procurement supply chains".[233] Then, in practical terms, making *buying by example* strategies working and creating positive influence to promote inclusive labour market, means developing mechanisms and support to enforce existing laws, for example, in labour standards, human trafficking and child protection. Particularly, guaranteeing a level playing field for suppliers that respect human rights in the market is crucial in a competitive and market-based context as public procurement. It must be secured that businesses abusing human rights do not gain an unfair competitive advantage over businesses which respect human rights. If efforts by businesses to implement measures to respect human rights (such as the *human rights due diligence*) are not recognised or valued in public procurement exercises, it may discourage them. In conclusion, state purchases should ensure that all suppliers play by the same rules and that public procurement promotes a 'race to the top' business environment.[234]

In conclusion, "given its ubiquity across all states, its vast scale and market value, public procurement embodies an enormous opportunity for governments" to leverage their purchasing power to promote respect for human rights in the private sector, promoting transition to sustainable production and consumption.[235] Therefore, there is an opportunity for governments to shift markets towards sustainable public production, consumption and more inclusive economies, contributing to the achievement of *sustainable development* and decent work prescribed by the United Nations *2030 Agenda for Sustainable Development*[236], acting on public procurement norms, policies and practices, as will be addressed in the next paragraph (2.3).

[229] Sandra Black, J. (2021), Washington Center for Equitable Gowth - Evidence for a stronger economy.
[230] OECD (2022), p. 25
[231] Claeson, B., (2019) Making rights effective in public procurement supply chains: lessons from the electronics sector in O'Brien, Ortega (eds) Public Procurement and Human Rights, Edward Elgar Publishing, pp. 192-205
[232] McCrudden, C. (2007) Corporate Social Responsibility and Public Procurement in McBarnet,D., Voiculescu,A, Campbell,T. (eds) The New Corporate Accountability: Corporate Social Responsibility and the Law,Cambridge University Press, Oxford Legal Studies
[233] La Chimia A. (2019) Development Aid procurement and the UNGPs on BHR: Challenges and opportunities to move towards the new frontier of "Buying Justice"
[234] Morris, D.(2020)
[235] Ortega O.M, O'Brien C. (2017), p.7
[236] UNGA (2015) Transforming our World: the 2030 Agenda for Sustainable Development, G.A. Res. 70/1

Systemic Drivers of Violations in Selected High-Risk Sectors

Examples of violations that may occur along global supply chains of procuring entities are several. States purchase a large portfolio of goods, works, services, all characterized by peculiar features and related impacts. An insight into human rights high-risk sectors and potential violations based on real cases and scandals involving procurement authorities is functional to show practical implications of irresponsible public procurement. A sectoral approach is adopted in this paragraph shedding lights on non-exhaustive examples of selected industries characterized by labour-intensive features, high-volume of production and complex supply chains: textiles, medical supplies, electronics, and intensive agriculture production.

The Textiles Industry

Human rights risks are particularly high in the case of labour-intensive sectors with geographically dispersed production entailing fragmented and complex value chains, such as textiles. The sector employs millions of people worldwide, 75% of which are women.[237] Since the 1990s, the industry has massively expanded outsourcing labour-intensive production to developing and under-developed countries with lower wages and weaker human rights regulations.[238] The textile and footwear sector are among the largest consumer goods sectors with multiple supply chains across the globe. Awareness has raised on the *opaque*, unsecured and untraceable nature of textile supply chains[239], hiding risks for human rights abuses potentially occurring throughout all value chain phases[240] and below first-tier suppliers. O*paqueness* is mainly related to the lack of transparency of subcontracting cascades with variegated ownership structures and employment relations[241]. Indeed, although supply chains traceability has increased, the *Fashion Transparency Index* (2021) has revealed that progress on transparency in the global garment industry is pretty slow[242].

Human rights abuses reported in the textiles sector include, *inter alia*, the use of child labour, dangerous working conditions, low wages, excessive hours, and violations of freedom of association[243]. One of the first scandals known worldwide regarded the multinational corporation Nike, one of the first manufacturing companies to completely outsource its production. International labour standards and human rights violations were reported in South-East Asia manufacturing workshops, especially in Indonesia and Vietnam, related to low wages, abusive working conditions, child labor and *health & safety* risks related to the use of chemicals causing respiratory illness. A perfect storm of bad publicity enveloped Nike throughout the 1990s, triggering the development in the next decades of human rights risks assessment and mitigation measures aimed at fostering more supply chain transparency.[244] Further, emblematic cases with disrupting consequences, as the Rana Plaza collapse in Bangladesh or the Ali Enterprises factory fire in Pakistan, have shed lights on the existence of a shared responsibility of States and companies towards human rights in business, increasingly legitimized at international legal level[245]. The Raza Plaza accident in 2013, killed over 1000 mainly female garment workers[246] and injured more

[237] Tager, S. (2016), Women in the Global Clothing and Textile Industry, Duke University
[238] Richero and Ferrigno (2016) A Background Analysis on Transparency and Traceability in the Garment Value Chain, DAI, EPRD.
[239] Agrawal T., Koehl L., Campagne C., (2018) "A secured tag for implementation of traceability in textile and clothing supply chain", The International Journal of Advanced Manufacturing Technology
[240] Textile supply chain phases range from the raw material collection (entailing growing, ginning and trading phases), the production of fibres including spinning, knitting, weaving, dyeing phases, garment production through cutting, sweing, trimming phases, shipping, retail of final products
[241] Sack D, Sarter E.(2022) To comply or to be committed? Public procurement and labour rights in global supply chains. Global Social Policy.
[242] The Index showed that between 250 world's largest fashion brands and retailers, lack of transparency in supply chain traceability is high: only 27% of major brands disclose some of their processing facilities and just 11% of major brands publish some of the raw material suppliers.
[243] O'Brien et al (2016); Stumberg R. et al. (2014), Turning A Blind Eye? Respecting Human Rights In Government Purchasing, ICAR.
[244] Ruggie, J. G. (2013). Just business: multinational corporations and human rights. First edition. New York: W. W. Norton & Company, pp. 3-19
[245] Rahim, M. (2020), Humanizing the Global Supply Chain: Building a 'Decent Work' Environment in the Ready-made Garments Supply Industry in Bangladesh in Deva, Surya & Birchall, David. Research Handbook on Human Rights and Business. Edward Elgar Publishing
[246] Absar, S. (2002) Women Garment Workers in Bangladesh. Economic and Political Weekly. 37. 3012-3013

than 2500 in the Savar building collapse.[247] Due to its horrendous scale, the Rana Plaza catastrophe attracted public outrage, and triggered a significant multi-actor mobilization. Various factors contributed to the Rana Plaza disaster, such as breaches of construction, health and safety regulations and labour standards by local suppliers based in the factory, under contract to well- known European and American brands, as well as defective inspection arrangements and social audits on the part of purchasers.

Countries' annual public spend on textiles products is significant enough to be a considerable opportunity to initiate changes in supply chains (from fibre to finished goods) through public procurement. Public authorities purchase large amounts of textiles and garment products, ranging from workwear, public security uniforms, personal protective equipment, etc. For instance, the EU Member States are major consumers of textiles**:** the industry involves more than EU 160.000 companies[248] most often relying on geographically dispersed supply chains. Furthermore, the EU is one of the largest global importer of textiles accounting for EUR 80 billion. Thus, most of EU public procurement of textiles - approximately 8.6 billion per year[249] - result from global supply chains. For instance, the healthcare sector, the second largest area of governments spending (over 9% of GDP in OECD countries) consumes high volumes of textiles.

Abuses linked to public purchasing of textiles products have been increasingly documented in different part of the world[250]. Various investigations and reports have highlighted potential human rights violations in the cotton sectors, for instance in China[251] and in Turkmenistan[252] , and in the glove sector in Malaysia[253]. Further cases have been detected in military uniforms and healthcare textiles procurement by different NGOs, such as the Worker Rights Consortium, the Clean Clothes Campaign[254], Denwatch[255], Swedwatch[256], the British Medical Association. In the US, evidence has been collected by the Worker Rights Consortium[257] and studies on "Transparency for human rights: US government procurement of apparel"[258] showing the close relationship between human rights, global supply chains and procurement[259], especially in the US employee and military uniforms and camouflage clothing procurement. Multiple initiatives have been launched to address human rights risks in public procurement in the textiles sector. One example is the Sweat-free Purchasing Consortium (SPC) in the US, comprising 14 cities and 3 US States seeking to ensure that the procured textiles are made without

[247]Foxvog, L. et al. (2013), "Still Waiting: Six months after history's deadliest apparel industry disaster, workers continue to fight for reparations", Clean Clothes Campaign and International Labor Rights Forum; Accord on Fire and Building Safety in Bangladesh (n.d.), "The Bangladesh Accord on Fire and Building Safety"; Kenner, J., & Peake, K. (2017). "The Bangladesh Sustainability Compact: An Effective Exercise of Global Experimentalist EU Governance?", Cambridge Yearbook of European Legal Studies, No.19, pp. 86-115.

[248] EURATEX (2022) Facts & Key Figures 2022 of the European Textile and Clothing Industry, EURATEX- Economic and Statistics

[249] ECAP (2017), Report European Textiles & Workwear Market: The role of Public Procurement in making textiles circular

[250] For goods see: Martin-Ortega O. and O'Brien, C. (2017) n. 15. For services see: O'Brien, C. (2015) Essential Services, Public Procurement and Human Rights in Europe. University of Groningen Faculty of Law Research Paper No. 22/2015

[251] Lehr, A. (2020), Addressing Forced Labor in the Xinjiang Uyghur Autonomous Region: Toward a Shared Agenda; Xiao, M. et al. (2020), "China is using Uighur labor to produce face masks", The New York Times; Goodman, P., V. Wang and E. Paton (2021), Global Brands Find It Hard to Untangle Themselves from Xinjiang Cotton, The New York Times.

[252] About violations in the cotton sector in Turkmenistan, see: ETI (2021), Turkmenistan cotton harvest continued to use forced labour in 2020.

[253] On the glove sector in Malaysia, see: BMA (2015), In good hands -Tackling labour rights concerns in the manufacture of medical gloves.

[254] Alliance of NGOs and trade unions across 16 European States to improve workers' rights in apparel and shoe supply chains through multiple mechanisms. In 2002 the CCC launched the Clean Clothes Communities project, dedicated to include ethical considerations in public procurement initially focused in Dutch and Belgian municipalities, then it has generated procurement reforms in municipalities in Germany, France, and elsewhere.

[255] Danwatch, (2015), The Lost Thread: Violations and Abuse of Power in the Garment Industry in Bangladesh

[256] Jaekel T, Santhakumar A. (2015) Healthier procurement: Improvements to working conditions for surgical instrument manufacture in Pakistan.

[257] WRC is a multi-stakeholders initiative in US helping to encourage the uptake of human rights in the procurement practices of public actors

[258] Stumberg, R. (2019) "Transparency for human rights: US government procurement of apparel" by the Georgetown University and ICAR

[259] Stumberg, R, Vander Meulen N. (2019), Supply chain transparency in public procurement: lessons from the apparel sector in Ortega, O'Brien (2019)

sweatshop labour[260]. The States and cities part of the Consortium, such as Los Angeles[261], have adopted "Sweat-Free Procurement" Ordinances, to avoid sweatshop labour in government's textiles' purchasing[262]. Such ordinances are based on sweat-free codes of conduct requiring suppliers to comply with laws in the country of production as well as ILO ILS, entailing different monitoring systems. Also other international and regional organizations have focused the attention on textiles procurement and human rights risks. The OECD has adopted the *Due Diligence Guidance for Responsible Supply Chains in the Garment & Footwear Sector*. In this framework, a pilot project on *Integrating OECD Due Diligence into Public Procurement in the Garment Sector* has been launched, to support public buyers in integrating responsible business conduct considerations into the public procurement policies and practices of this purchasing category.[263]

Healthcare Supplies Procurement

Healthcare procurement of medical supplies and services represents one of the main public purchasing expenditures worldwide. For instance, in the EU approximately 9% out of 14% GDP is allocated to health services and medical equipment. Healthcare costs, sharpened under COVID-19 pressure, have increased in recent years, following the primary objective to provide universal access to quality healthcare at an affordable cost, allowing effective enjoyment of the human right to health[264] to everyone. Thus, public procurement has increasingly been promoted as a tool for contributing to better health outcomes[265]. As stressed by UNDP[266] in the *Sustainable Health Procurement Report*, focused on the social and environmental impacts of global health procurement, the health sector alongside electronics, textiles, agriculture and infrastructure is characterized by human rights 'high risk' particularly to decent work and women's rights, given its nature, geographical location of production and lack of transparency in supply chains.

Linking public procurement and human rights, the focus of different NGOs (British Medical Association[267], Swedwatch, Denwatch) has been on medical supplies purchasing, including surgical instruments, plastic gloves and other personal protective equipment. Such items are, indeed, characterized by dispersed value chains and low-skilled labour pressed by low costs of production and high production volumes. Cases on human rights and environmental risks have been detected in the procurement of disposable plastic gloves, whose manufacturing is a large global industry with a market value of over USD $5 billion[268]. Of all disposable gloves, an estimated 85-95% are used in the medical sector, and most of the remaining in the food sector. In recent years, there have been a number of audits or investigations of labour conditions in the medical gloves industry, undertaken by labour rights groups or by those procuring gloves for the medical sector. These have revealed endemic and serious labour rights abuse of workers in factories particularly in Thailand, Malaysia, and Sri Lanka, including both factories manufacturing for small-scale medical glove suppliers, and those manufacturing for major international brands. For instance, cases of forced labour and migrant exploitation in rubber plantations

[260] Sweatshop labour is defined with respect to compliance in the country of production with applicable rules regarding minimum wages, maximum working hours, child and convict labour, and health and safety.
[261] Ordinance No. 176291, Art. 17 to Division 10 of the Los Angeles Administrative Code: sweat-free procurement policy for procurement of equipment, materials, goods, and supplies. It establishes compliance procedures for the City's Contractor Code of Conduct, to ensure compliance with all labor and human rights standards imposed by law or treaty on the country in which the goods sold to the City are assembled, and that employees working on garments, uniforms, footwear, and related accessories be paid a "procurement living wage".
[262] Government agencies purchase an annual average of $284 million of soft apparel. Top suppliers for these agencies (60 %) customarily import finished apparel from 12 countries, mainly from South East Asia and Latin America, entailing evidence of human rights and labour rights risk of abuses
[263] OECD (2022), Pilot on Integrating OECD Due Diligence into Public Procurement in the Garment Sector, OECD Paris.
[264] The right to health is recognised in numerous international and regional instruments, starting with the UDHR (Art 25) and including the ICESCR (Art 12), the CRC (Artt 6, 24), the CEDAW (Art 10, 11, 12, 14), and the European Social Charter.
[265] European Commission *Opinion of the Expert Panel on effective ways of investing in Health*
[266] UNDP (2020) Sustainable Health Procurement Guidance Note.
[267] BMA (2016), In good hands Tackling labour rights concerns in the manufacture of medical gloves, Medical Fair and Ethical Trade Group
[268] Shields D. (2014) World Disposable Gloves Market - Opportunities and Forecasts, 2013-2020. Portland, USA: Allied Market Research.

and exposure to hazardous chemicals impinging the right to health have been reported in the procurement of plastic gloves by UK and Denmark. In 2015, the BMA *Medical Fair and Ethical Trade Group* convened a group to tackle labour rights concerns in the medical gloves industry.[269]Those involved in national or regional procurement of gloves in the UK, Sweden and Norway put in place requirements such that suppliers of gloves to these regions are now contractually required to evaluate and improve labour standards in their supply chains.

Other examples regard unsafe working conditions and lack of adequate personal protective equipment in medical supplies production. This is the case of surgical instruments manufacturing for healthcare providers procured by many public authorities for national or regional healthcare systems. Surgical instruments are mainly procured through companies based in EU and US, with the actual manufacturing taking place in developing countries, as Bangladesh, Malaysia, Pakistan supplying many EU and US-based healthcare multinational corporations. [270] Surgical instruments are generally made of carbon steel, stainless steel, titanium or aluminium, requiring highly-labour intensive production processes. Most of the instruments, such as retractors, scissors and forceps, procured are branded in EU, where the automatic forging is performed. However, the products grinding, milling, piling and sharpening takes place mainly in Pakistani manufactories.[271] Over the past decade a number of in-depth studies have highlighted instances of severe labour conditions within the industry in Pakistan, particularly in Punjab region. Pakistan, indeed, is a major exporter[272] of surgical instruments, produced in the industrial district of Sialkot and procured by public and private health authorities in Europe and US. Despite socio-economic benefits of this sector in the country, it is estimated that over 95% of production is outsourced to the informal sector, where worksites are unregistered and work is carried out in small units and family homes. The informal sector is largely unregulated, and evidence of unsafe working conditions, child labour, excessive working hours, low wages, discrimination and vulnerability to abuse and exploitation have been reported.[273]

Since 2007, the British Medical Association (BMA) has campaigned for fair and ethical trade of medical supplies in healthcare procurement, encouraging public authorities and the National Health Service (NHS) to engage on human rights concerns.[274] Investigations were led by the *Medical Fair and Ethical Trade Group* of BMA, which visited factories in the Sialkot area, part of the UK National Healthcare System supply chain, revealing unethical working conditions in the manufacture of surgical instruments routinely used in UK health sector and released reports on the surgical manufacturing industry situation[275]. Further cases have been reported by the Swedish NGO *Swedwatch* on healthcare procurement and violations of human rights, in surgical instruments manufacturing in Pakistan, Bangladesh, Malaysia, Thailand. *Swedwatch* in "The Dark Side of Healthcare" report[276] brought to the public-eye the labour conditions of industries and local workshops linked to the Swedish healthcare procurement, reporting international labour standards violations, hazardous working environments lacking, widespread use of child labour, unfair contractual obligations and wage, excessive overtime[277].

[269] European Working Group on Ethical Public Procurement (EWGEPP) was co-founded by the BMA Medical Fair and Ethical Trade Group.
[270] O'Brien et al (2016) Public Procurement and Human Rights: A Survey of Twenty Jurisdictions; SwedWatch et. Al (2015), Healthier Procurement: Improvements to Working Conditions for Surgical Instrument Manufacture in Pakistan. See also: International Learning Lab on Public Procurement and Human Rights, Medical Supplies
[271] Jaekel T, Santhakumar A. (2015) see n. 194
[272] The global market for surgical equipment is estimated at €4.4 billion. In Sialkot, more than 150 million surgical instruments are produced every year, of which almost 95% are exported, with a global market value of €277 million, considered the key SME export sector in Pakistan.
[273] ETI, Surgical Instrument Supply Chain Work in Pakistan
[274] BMA, Fair Medical Trade
[275] The manufacturing conditions within the industry were first reported on by Dr Mahmood Bhutta in 2006, who subsequently founded the *Medical Fair and Ethical Trade Group* at the BMA.
[276]Swedwatch (2007) Vita rockar och vassa saxar
[277] Gothberg, P. (2019) "Public Procurement and human rights in the healthcare sector: the county councils' collaborative model".

Both BMA and Swedwatch documented appalling work conditions in several workshops. For instance, 12 years-old children were producing surgical instruments in hazardous working conditions while being paid less than US$ 1 per day.[278] Although in 2016 the Government of Punjab raised the minimum employment age to 15 years in most sectors, and to 18 years in hazardous occupations, including the manufacturing of surgical instruments, child labour is prominent in the informal sector. Concerning health and safety at work, after in-site visits by the NGOs, working conditions in the informal sector were found generally unhygienic and hazardous for workers and their employers. Small vendor units, particularly forging shops, were dirty, cramped and poorly lit, without ventilation or health and safety equipment. Further, forging, cutting, grinding and polishing by hand expose workers to harmful dust and debris, without proper equipment.

Regarding the wage's situation, Pakistan's national minimum wage increased from PKR 13,000 to PKR 15,000 in 2017, increasing production costs. Due to increased competition, businesses have increasingly out-sourced parts of the production process to workers in the informal sector. The result has been wage stagnation as most workers in the informal sector are not subject to minimum wage laws. In formal factories across the entire manufacturing industry in Sialkot, it was found that only 44% workers were registered at the *Punjab Social Security Institution*. In the surgical instrument sector specifically, only 29% of formal workers were registered with the *Employees Old-Age Benefit Institution*, entailing no access to social and employee benefits for informal workers. According to the *Global Living Wage Coalition Report* in 2017, living wages in Pakistan is set at PKR 20,000 for urban Sialkot and PKR 18,000 for rural Sialkot. However, the informal sector, incomes vary between PKR 15,000 and 30,000 per month, keeping informal workers in the poverty trap. Finally, regarding freedom of association, Pakistan has ratified ILO core labour standards, including the right of workers to freedom of association and collective bargaining, however, many workers were found prevented from joining an independent, democratically elected trade union or may be threatened if they do so.[279]

After such scandals were brought to light, different initiatives have been fostered by public authorities towards more ethical and responsible healthcare procurement and business. Improvements were reported following dialogue and mitigation measures as a result of increased social requirements included by public buyers in tender. Different strategies and practical approaches employed by public actors to include human rights considerations throughout the procurement cycle as reaction to the scandals will be explored in depth in Chapter 6, with focus on Sweden.

The Electronics Sector

In recent decades, the electronics industry has become one of the largest in the global economy. An estimated 18 million workers produce 20% of global imports and create a $1.7 trillion trade in electronics products[280], growing at an annual rate of 15%[281]. The current global economy propels constant new product developments, short product life cycles, market uncertainty, lack of production forecasting, and minimal brand inventory resulting in production peaks and troughs, late orders, and changes to orders midstream. Electronics factories must produce increasingly complex products with expectations of shorter time-to-market, often with thin profit margins. However, workers often have to absorb such production stresses. Factories may demand excessive overtime hours to complete orders on time, and use temporary or contract workers to deal with flexible production demands.

[278] Gothberg, P., 2019, ibid

[279] Botta G. (2021), Public Procurement & Human Rights: The Intergenerational Duties for States and Corporations to Advance Responsible Business Conduct in the EU debate on Mandatory Human Rights Due Diligence, in Pantalone P. Doveri intergenerazionali e tutela dell'ambiente

[280] Electronics Watch (2018) Strategic Plan: 2018-2020

[281] Consumer Electronics Market, (2022), Consumer Electronics Market Outlook 2023-2033

Across all the different upstream and downstream stages of the electronics supply chains – from mining, trading, smelting and refining, component production, battery manufacturing to the final assembling of electronic and automotive devices – important factors are to be taken into account: occupational health and safety violations and exposure to toxic chemicals, with direct effects on worker's lives; precarious employment conditions; forced labour risks in factories, smelting facilities and mine, often entailing violation of the freedom of association and collective bargain, no access to effective grievance mechanisms, exploitation of migrant workers, no living wage, excessive recruitment fees and debt bondage, which are all risks that workers face in many regions in the electronics supply chains, from mining to manufacturing[282].

Regarding occupational health and safety, reports and investigations[283] show that electronics are often produced by workers in unsafe environments, working long hours with inadequate protection. Workers may be vulnerable to serious health and safety hazards, such as prolonged exposure to toxic chemicals[284], that may be explosive, toxic or corrosive, and affect the skin, respiratory system, reproductive system, and central nervous system requiring adequate personal protective equipment which is often insufficient. Electronic devices, indeed, contain minerals, such as lithium, gold, tungsten and cobalt, mined in conditions that may violate workers' fundamental labour rights and human rights, destroy ecosystems, and undermine the livelihood of surrounding communities. Studies report that people in surrounding communities have high levels of lead and arsenic in the blood samples. The sales of minerals from conflict or high-risk areas can fund armed groups and fuel human rights abuses. Unfortunately, supply chain transparency from the end product to the mines is sorely lacking, obscuring corporate responsibility for the impacts of mining on workers, communities and ecosystems.[285] Furthermore, studies have demonstrated the adverse psychosocial factors in electronics work related to fast and unvarying pace of work in assembly lines, the monotonous nature of work, and rotating shifts. In China, research by Electronics Watch and Economic Rights Institute suggests worker suicides are linked to harsh working conditions. Finally, workers often lack access to unions or occupational health and safety committees that could demand a safer work environment.

Precarious employment is most often endemic to the sector. Rush orders, transfer of risks to subcontractors, and cost-cutting mechanisms are part of an industry business model that profoundly impact working conditions in factories. This model has resulted in flexible and precarious work arrangements, along with irregular working hours, social insecurity, and increased health and safety risks. According to the ILO, about 80-90% of the workforce are temporary contract workers in some areas of China, Malaysia, Hungary, and Mexico during peak production periods.[286]

Forced labour is another obstacle. ILO estimates that 24.9 million people are forced to work under the threat of coercion worldwide. Almost one of every four victims of forced labour are migrant workers, and 15% work in manufacturing.[287] In the electronics industry, migrant workers are particularly at risk of forced labour[288]: nearly one-third of migrant workers are in situations of forced labour in Malaysia. US Department of Labor notes reason for concern of forced labour in electronics production in both China and Malaysia, and deeper in the supply chains, in the extraction of tin, tungsten, and gold in the Democratic Republic of Congo.[289] Electronics Watch highlight risk of forced labour in the electronics industry in China, Thailand, the Philippines, and Indonesia. Risks are often

[282] Electronics Watch (2020) Strategic Plan: 2018-2020
[283] Electronics Watch (2014), Winds of change: Public procurement's potential for improving labour conditions in the global electronics industry.
[284] O'Brien et al (2016)
[285] ICLEI et al (2020), How to procure fair ICT hardware - Criteria set for socially responsible public procurement, ICLEI – Local Governments for Sustainability, European Secretariat.
[286] ILO (2017), The impact of procurement practices in the electronics sector on labour rights and temporary and other forms of employment,
[287] ILO (2017) Global Estimates of Modern Slavery: Forced Labour and Forced Marriage
[288] Verité (2014) Forced Labor In The Production of Electronic Goods In Malaysia: A Comprehensive Study of Scope and Characteristics
[289] Bureau of International Labor Affairs (2022) List of Goods Produced by Child Labor or Forced Labor

associated with migrant workers who may incur large debts in their pursuit of employment and may face debt bondage.[290]

Considering public procurement, public authorities purchase significant volumes of electronic devices annually. For instance, EU cities, local governments, universities, hospitals and other public bodies procure over €50 billion worth of electronic devices annually, including desktop or laptop computers, servers, screens, workstations, printers or smartphones.[291] Examples of cases of violations[292] have been reported in the electronics sector, since governments often purchase commercial items from manufacturers that source from countries where child labour is prevalent in factories.[293] Indeed, severe violations are accounted in the extractive industry supplying raw materials required by the electronics and other sectors, engaging children as workforce in hazardous working environments. For instance, around 1.5 million children work in gold mines.[294] Other examples in the IT supply chains regard systematic exploitation of Chinese students forced to work in electronics factories that produce servers for brands that universities and public offices procure.[295] Another example is the purchase of electronics devices produced with components from Xinjiang where serious human rights violations in China targeting Uyghurs and other ethnic minority citizens happen. Particularly in Sweden, Adda Central Purchasing Body, the Swedish Regions and the Church of Sweden initiated a collaborative effort to conduct due diligence and monitor the risk of state-imposed forced labor in the supply chains of the goods and services procured in the electronics sector. The risk of state-imposed forced labor is still prevalent and should be part of regular monitoring activities of electronics supply chains for brands, suppliers and buyers.[296] The Swedish initiative will be explored in depth in Chapter 6.

As a result, various supply chain initiatives focusing on IT manufacturing have emerged.[297] Some of them at improving working conditions in the electronics industry through contract clauses, monitoring, reporting, capacity building of local organizations, and workshops on socially responsible public procurement. Different associations and organizations have flourished[298] as Electronics Watch, whose rationale is to support public bodies seeking to address human rights abuses in their ICT supply chains and provides model contract conditions for inclusion in procurement agreements.[299] Others highlight abuses in the supply chains of individual government bodies: Danwatch, for instance, recently exposed forced labour and hazardous working conditions in the IT supply chains of the Danish State and municipalities, prompting public authorities to consider cancellation of relevant contracts.[300]

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[290] ILO (2016) Sectoral Studies on Decent Work in Global Supply Chains: Comparative Analysis of Opportunities and Challenges for Social and Economic Upgrading;

[291] Electronics Watch, Worker-Driven Transparency, Electronics Watch Policy Brief

[292] On mineral sector in Africa and Latin America, see Amnesty International (2020), South Africa: Mining gathering must confront human rights violations; ACHPR (2016), Working Group on Extractive Industries, Environment and Human Rights Violations; Caritas Canada (2013), Mining and Human Rights in Latin America: Canada's responsibility; ILO (2019), Child Labour in Mining and Global Supply Chains; Kippenberg, J. (2017), Tackling Child Labor in the Minerals Supply Chain.

[293] U.S. Department of State (2013), Country Reports on Human Rights Practices for 2013: China; U.S. Department of Labor, Bureau of International Labor Affairs (2013), List of Goods produced by Child Labor

[294] Johannisson, F.(2013) Child Mined Gold in Your Gadgets? Child Labor in Ghana and Mali and Sourcing Policies of IT Brands 6

[295] DanWatch & GoodElectronics (2015) Servants of Servers: Rights Violations and Forced Labour in the Supply Chain of ICT Equipment in European Universities

[296] Martin Ortega, O.; Outhwaite, O.; Rook, W. (2020) Promoting responsible electronics supply chains through public procurement, Working Paper. BHRE, Greenwich, London

[297] O'Brien, et al (2016), n. 208

[298] Coalition Good Electronics; Electronics Industry Citizenship Council (EICC), Electronics Watch Monitoring and Reform Programmes; Business, Human Rights and the Environment Research Group, University of Greenwich; Dutch social enterprise FairPhone etc.

[299] Electronics Watch, (2014) The ICT sector in the spotlight: Leverage of Public Procurement Decisions on Working Conditions in the Supply Chain,

Green Electronics (2016) Council Purchasers Guide for Addressing Labour and Human Rights Impacts in IT Procurements.

Electronics Watch, (2016), Public Procurement and Human Rights Due Diligence to Achieve Respect for Labour Rights Standards in Electronics Factories: A Case Study of the Swedish County Councils and the Dell Computer Corporation.

[300] Martin-Ortega, O., Outhwaite, O., Rook, W.(2015), Buying power and human rights in the supply chain: legal options for socially responsible public procurement of electronic goods. The International Journal of Human Rights, 19 (3). pp. 341-368.

Martin-Ortega, O. (2018), Public procurement as a tool for the protection and promotion of human rights: a study of collaboration, due diligence and leverage in the electronics industry. Business and Human Rights Journal, 3 (1)

Food Procurement and Intensive Agriculture

Food procurement occupies a prominent position accounting for a significant portion of overall public procurement. It ranges from public school meal programmes to provision of food and food-related services in public offices, hospitals, prisons, universities, as well as social programmes such as in-kind transfers (the distribution of food aid to families in need) or social restaurants.[301]

Food procurement has been increasingly employed to foster development policy objectives, as promoting local agricultural production, supporting vulnerable producer groups (smallholder farmers, women, indigenous peoples, small and medium food enterprises), and promoting environmental sustainability and biodiversity. [302] In connection with human rights, the food sector and catering service industry is strongly related to stressors on the right to adequate food and nutrition of final beneficiaries. Furthermore, given complex global supply chains of food production, it has been evidenced the urgency to reduce human rights impacts and prevent and mitigate related risks raising throughout all supply chain phases – food sourcing, sowing, cultivation, harvesting, etc. – especially in case of intensive agriculture[303]. Social and human rights aspects concern[304]: the conditions of farm workers, especially seasonal workers, and related risks of exploitation; the support, indirectly, to local economies and small producers introducing zero-km and reduced supply chains; the fair compensation of catering companies and farmers; poverty conditions and food insecurity of populations, to avoid deprivation of valuable food resources; the use of fair trade products; the employment of disadvantaged or differently-abled people and the use of social agriculture processes. Some developments have been made to shorten supply chains to make more inclusive ones involving local suppliers.[305]

In details, forced labor risks are prevalent on a global scale, across commodities and tiers of food and beverage supply chains. Agriculture employs more than a quarter of the world's population[306] with workers very often subjected to exploitative and abusive working conditions. Indeed, 11% of global forced labor cases take place in agriculture and fishing.[307] Studies have classified more than twenty commodities as at risk of forced labor,[308] including staples such as wheat, rice, and corn.[309] There are several inherent traits within agricultural work that render workers more vulnerable to forced labor risks. First of all, precarious employment conditions, frequently informal or temporary, thus workers are often excluded from legal protection. The sector relies on workers in vulnerable conditions, such as migrant, undocumented, economically vulnerable, and women workers. Several cases of exploitation especially of women migrant workers has been evidenced, exacerbated by the temporary nature of their employment, a lack of income due to the pandemic, and their "inhumane living conditions" as well as

[301] De Schutter D., Quinot G., Swensson L. (2021) Public Food Procurement as a Development Tool: The Role Of The Regulatory Framework in Swensson et al (2021) Public food procurement for sustainable food systems and healthy diets - Volume 1

[302] Morgan, K. & Sonnino, R. (2008) The school food revolution: public food and the challenge of sustainable development. London and Washington, DC, Earthscan. De Schutter, O. (2014) The power of procurement: public purchasing in the service of realizing the right to food. Geneva, UNHRC. Swensson, L.F.J. & Tartanac, F. (2020) Public food procurement for sustainable diets and food systems: the role of the regulatory framework. Global Food Security, 25. Fitch, C. & Santo, R. (2016) Instituting change: an overview of institutional food procurement and recommendations for improvement. Baltimore, USA, Johns Hopkins Center for a Livable Future.

[303] Botta, G. (forthcoming). Italy: Leading the Way towards Mandatory Sustainable Public Procurement through Minimum Environmental Criteria. In Caranta, R. & Janssen W. (Eds.), (forthcoming). Mandatory green and social requirements in EU public procurement law: Reflections on a paradigm change in the European Union, Bloomsbury.

[304] De Schutter, O. (2014) The power of procurement: public purchasing in the service of realizing the right to food. Geneva, United Nations Human Rights Council (UNHRC). Swensson, L (2018). Aligning policy and legal frameworks for supporting smallholder farming through public food procurement: the case of home-grown school feeding programmes. Working Paper No. 177. Rome, FAO

[305] International Learning Lab on Public Procurement and Human Rights: Catering services

[306] The World Bank (2020), "Employment in Agriculture (% of total employment) (modeled ILO estimate)."

[307] ILO (2017), "Global Estimates of Modern Slavery," p. 11.

[308] Know the Chain (2020) Food & Beverage: Benchmark Findings Report: Commodities at high risk of forced labour: bamboo, beans, brazil nuts, cattle, chili peppers, coca (stimulant), cocoa, coffee, corn, fish, palm oil, peanuts, rice, sesame, shrimp, sugarcane, sunflowers, tomatoes, wheat.

[309] US Department of Labor (2018), "U.S. Department of Labor's 2018 List of Goods Produced by Child Labor or Forced Labor," pp. 11-14: US Department of State cited forced labor risks across numerous commodities: seasonal berry pickers and workers on fruit farms in Belgium and Finland; strawberry and orange harvesters in Burma; shrimp farms and tea estates in Bangladesh; agricultural workers in the UK, Sweden, and South Africa. Food and beverage companies are also reported to source goods from Xinjiang in China, entailing systemic forced labor of ethnic minorities.

the isolation of being based in rural areas.[310] Poor working and living conditions exacerbated by low wages are very frequent, hindering human rights in the agricultural sector. In addition, as agricultural work is often remote (such as on fishing vessels, coffee farms, or tea estates), workers rely on their employer for essentials like food and transport. These costs, combined with low wages, put workers at greater risk of becoming indebted and increase their vulnerability to exploitation. A core challenge is debt bondage. Workers may be indebted before they even begin their work, due to paying recruitment-related fees to exploitative recruitment agents. Such practices are well-documented across commodities in the sector in various countries[311] - for instance the case of Moroccan women harvesting strawberries in Spain, migrant workers exploitation in tomato picking in Italy, further migrant workers from Burkina Faso and Mali who migrate to work in Côte d'Ivoire's cocoa sector are likely to be in debt for their recruitment and migration. In addition, the lack of freedom of association is crucial to be taken into consideration in food supply chains. In a survey of 1,500 global food suppliers, less than one-quarter noted that trade unions were present. Agriculture is cited as one of two sectors having the "greatest frequency, intensity and severity of attacks on human rights defenders".[312]

Different NGOs have increasingly shed lights on violations happening in the food sector. However, from the procuring entities perspective, awareness of human rights risks and a systemic approach to prevent, mitigate, address them is most often missing. For instance, various media reports during 2014 and 2015 showed modern slavery and severe abuse of migrant workers, mainly from Cambodia and Myanmar, in the Thai fishing industry.[313] The Swedish NGO Swedwatch has reported evident high risks in the public procurement of specific products derived from South-East Asia and Latin America. For instance, in the poultry industry in Thailand[314] and the coffee production in Brazil[315] severe labour rights violations, including debt bondage, modern slavery and reports of child labour, were identified. Also, health and safety risks are prominent in these cases, with exposure of workers to toxic pesticides without adequate protective equipment required by law, as in the case of coffee plantations in Brazil. Brazil is one of the world's largest buyers of pesticides,[316] and the health effects experienced by the country's agricultural workers are increasingly becoming a source of concern. A number of pesticides that are banned in the EU are allowed in Brazil, some of which are toxic and highly risky as they can damage reproductive systems or producing Parkinson's-like symptoms. Brazilian agricultural workers who have been continuously exposed to pesticides have been found to be more likely to develop cancer and experience miscarriages, birth defects, respiratory problems and a loss of sensibility in limbs. These effects are especially noticed in workers on the country's cotton, corn and coffee fields, and they represent a risk also for workers' families.

Swedwatch reported that human rights risks are particularly high in farms that are not audited by certification bodies or part of credible sustainability programmes. An estimated 0.25% of the coffee produced at the over 300,000 coffee farms in Brazil is organically produced.[317] Similarly, Fairtrade organisation only buys coffee from 20 cooperatives in Brazil – a small number, considering that Brazil

[310] Verité (2020), Case study: African Migrants in the Strawberry Fields and Greenhouses of Spain during the Pandemic.
[311] Human Rights Watch (2018), "Hidden Chains: Rights Abuses and Forced Labor in Thailand's Fishing Industry," pp. 15-16.
Verité (2019), "Recommendations for addressing forced labor risk in the cocoa sector of Cote d'Ivoire," p. 1.
[312] Business & Human Rights Resource Centre and International Service for Human Rights (2018), "Shared Space Under Pressure: Business Support for Civic Freedoms and Human Rights Defenders" p. 67.
[313] The Guardian (2014) Trafficked into slavery on Thai trawlers to catch food for prawns
[314] Thailand is a prominent world supplier of poultry meat products, one of the country's most important agricultural exports, after rice and rubber. Swedwatch reported migrant workers exploitation situations and debt bondage. Swedwatch (2016), Agents for change - How public procurers can influence labour conditions in global supply chains. Case studies from Brazil, Pakistan and Thailand.
[315] Swedwatch 2016, ibid
Brazil is one of the world's dominant coffee producing country. Swedwatch reported instances of sub-minimum wages, excessive work hours, lack of protective equipment, informal contracts. Most coffee harvesters work without social security and contracts registered in the "carteira de trabalho"
[316] Reuters (2015) Why Brazil has a big appetite for risky pesticides
[317] Naturskyddsföreningen (2015) Störst på kaffe – världsmästare på besprutning

is by far the world's largest producer. Claims from NGOs and other parties aims to provide additional incentive to public procurers to use their leverage as important buyers on the global market to contribute to the improvement of labour conditions in producing counties by implementing social criteria. Cases and research by Swedwatch showed that the Swedish county councils and municipalities had limited knowledge about, and resources for, setting social criteria in the procurement of food products.[318] Nonetheless, initiatives and policies have started to grow in this direction. Food procurement policies and programmes are increasingly including concerns on human rights in the procurement cycle. Strategies and national approaches to human rights risks while procuring have been developed, addressing among other "high risk" categories also food, in some countries. For example, in Italy, human rights concerns and traceability requirements have been recommended under specific Minimum Sustainability Requirements (Criteri Ambientali Minimi-CAMs).[319] Such approaches will be explored in depth in Chapter 6.

In conclusion, in depth analysis on specific sectors reveals the urgency to act for both States and suppliers to address potential human rights risks and adverse impacts, that are very likely to happen in each good, work, service procurement. Some isolated initiatives developed by public entities, NGOs and public organizations show a road ahead in this direction, as evidenced also in the crystallization in the international agenda of the notion of Sustainable Public Procurement, addressed in the next paragraph.

2.3 Sustainable Public Procurement and Human Rights: Evolution, Opportunities and Challenges

Public procurement when used strategically, goes beyond purchasing items and is a possible way through which governments could materialize their objectives and policies.[320] As such, the public buyers' purchasing power could be leveraged to select goods, services, works with a reduced environmental impact and fostering social outcomes, thus contributing towards the realization of sustainable development.[321] Indeed, due to the sheer volume it represents, public procurement has a potential to influence markets both in terms of production trends – *suppliers* side - and in terms of consumption patterns – *public buyers* side - favouring socially responsible goods, works, services on a large scale.[322]

This paragraph provides insights into the *Sustainable Public Procurement* (SPP) legal field clarifying concepts, sources and key sub-categories - *Green Public Procurement* (GPP) and *Socially Responsible Public Procurement* (SRPP). The aim is to understand whether and where human rights considerations find space within this landscape. Although SPP practices have been increasingly adopted, public and private organizations face challenges and barriers in the implementation of SPP as a method, which will be addressed to highlight potential frictions but also opportunities for interconnecting human rights and public procurement.

[318] Swedwacth (2015), *Trapped in the Kitchen of the World: The situation for migrant workers in Thailand's poultry industry*

[319] Botta, G. (forthcoming) see n. 241. Specific criteria on food include requirements on human rights for exotic products (fruits, coffee, chocolate) related to fair-trade, recognised certification scheme, multi-stakeholder initiatives. Human rights and labour exploitation risks relates also to national challenges, considering the phenomena of informal work and "caporalato", illegal phenomenon of recruitment and exploitation of workers through intermediaries, the so-called 'caporali'. See Fasciglione M. (2022). Rapporto sulla Due Diligence d'Impresa nella Filiera Agroalimentare, IRISS-CNR

[320] OECD MAPS (2020), Methodology for Assessing Procurement Systems - Why Assess Your Public Procurement System?

[321] OECD (2020), Integrating Responsible Business Conduct in Public Procurement, OECD Publishing, Paris

[322] Amann, M. et al. (2014), Driving Sustainable Supply Chain Management in the Public Sector: The Importance of Public Procurement in the EU.

Sustainable Public Procurement: Definition, Origin and Trends

Given the significance of public procurement spending, contracting authorities are major consumers in the global market. The decision-making processes governing how public entities purchase have relevant implications for the environment, the economy and society. For instance, public procurement produces approximately 7.5 billion tons of direct and indirect greenhouse gas emissions, about 15% of the world's total.[323] Shifting government spending towards more sustainable products and services can produce a significant impact, fostering a paradigm change and a transformative effect on markets.[324] Thus, procuring entities can make an important contribution to sustainable consumption and production, using their purchasing power to choose socially responsible goods and services with lower impacts on the environment.[325] This could be done in practice insisting in the bidding procedure that goods are produced and services are performed in compliance with human rights and labour standards, for instance avoiding child labour. Through selection, objectives can be promoted by excluding bidders on the extent to which their products, services, works respect social and environmental criteria. Through evaluation and award criteria, products manufactured sustainably or services delivered respecting ILS or reducing carbon emissions can be preferred. These examples form what has been increasingly consolidated as *Sustainable Public Procurement* (SPP).

SPP refers to the process of integration of social and environmental considerations into the purchasing process of public and private organizations alike, adopting a sustainable development perspective into public procurement, whereby economic, environmental and social aspects of development are considered in a holistic manner.[326] SPP is, indeed, intrinsically inspired by the concept of sustainable development which is a "development that allows us to meet our needs today without compromising the ability of future generations to meet theirs".[327]

SPP has gained wider recognition and traction over the past two decades from a legal and policy perspective, as evident in the growing literature, legal sources and practice at international, regional and national levels.[328] In the next Chapters, particularly Chapters 5 and 6, it will be evidenced how SPP has become a substantive trend in different jurisdictions, for example in the EU context, where it has been crystalized by not only policies but also by the EU regulatory framework, including specific provisions within the EU Public Sector Directive, consequently affecting EU Member States national laws on public procurement towards SPP. Indeed, it can be stated that SPP is an ongoing trend under current crystallization and expansion, supported by multiple policies at international, regional and national level and at the same time become legal source in some jurisdictions, with inevitable legal implications for its uptake.

Reconstructing the origins of the SPP notion, the United Nations Marrakesh Task Force[329]- established by the UN Environment Programme (UNEP)- endorsed a widely accepted SPP definition:

> "A process whereby organizations meet their needs for goods, services, works and utilities in a way that achieves value for money on a whole life basis in terms of generating benefits not only

[323] Boston Consulting Group (2022) Green Public Procurement: Catalysing the Net-Zero Economy, WEF
[324] UNEP (2022) 2022 Sustainable Public Procurement Global Review. Paris
[325] Caranta, R. (2021), Public Procurement for the SDGs – Rethinking the Basics
[326] European Commission (2020) Making socially responsible public procurement work: 71 good practice cases
[327] World Commission on Environment and Development (1987) Our Common Future. Brundtland Report
[328] See: Watermeyer, R.B. (2004). Facilitating sustainable development through public and donor regimes: tools and techniques. Public Procurement Law Review, 1: 30–55. Arrowsmith, S. & Kunzlik, P.(2009). Social and environmental policies in EC procurement law: new directives and new directions. Cambridge, UK, Cambridge University Press. Quinot, G. (2018). Public procurement law in Africa within a developmental framework. Stoffel, T., Cravero, C., La Chimia, A., Quinot, G. (2019) Multidimensionality of sustainable public procurement (SPP). Exploring concepts and effects in sub-Saharan Africa and Europe. Sustainability, 22(11): 1–23. In S. Williams-Elegbe & G. Quinot, eds. Public procurement regulation for 21st century. Africa, pp. 15–30. Cape Town, South Africa, Juta. McCrudden, C.(2004). Using public procurement to achieve social outcomes. Natural Resources Forum, 28: 257−267.
[329] The overall objective of the Marrakech Task Force on SPP is to promote and support the implementation of SPP by developing tools and supporting capacity building in both developed and developing countries.

to the organization, but also to society and the economy, whilst minimising damage to the environment".[330]

According to UNEP, SPP seeks to "achieve the appropriate balance between the three pillars of sustainable development - economic, social and environmental", meaning that procurement decisions should be guided by a combination of economic (the costs of products and services, etc.), environmental (emissions, climate change and biodiversity, etc.) and social factors (social justice, human rights, employment conditions, etc.).[331] Therefore, SPP can be conceived as a means for ensuring that public contracts contribute to broader environmental and social policy goals, either directly in the performance of the contractor and indirectly by encouraging companies to change general corporate practices.[332] SPP is, indeed, also about influencing the market, increasing demand for sustainable products and services, increasing their market share and providing business with tangible incentives.

Regarding the origins and evolution of SPP at policy and regulatory level, the idea of using public procurement as a strategic instrument to achieve development goals is not a recent phenomenon.[333] Evidence of government spending leveraged to achieve national policy objectives dates back to the nineteenth century.[334] For instance the US, UK, Northern Ireland and France, were used to conduct public procurement to pursue broader policy goals contributing to the overall public good, boosting SPP at regulatory and policy level.[335] Mentioning a few examples, the "Buy America" policies and the National Industrial Recovery Act (1933) adopted by President Roosevelt during the New Deal, promoted the idea that procurement is not an end in itself, rather a means to achieve social goals[336], for instance mandating fair wages in procurement.[337] Examples in other countries include the use of public procurement as a tool to enforce anti-discrimination employment laws, to promote distributive justice or stimulate entrepreneurial activity by disadvantaged groups, such as small and medium-sized enterprises (SMEs) and to combat apartheid.[338] This is the case of anti-discrimination and social justice policies pursued in South Africa to empower previously disadvantaged groups within societies, as required by the South African Constitution. The importance of socio-economic considerations in procurement in the 1970s has been remarked by Turpin:

> "The volume of government procurement is such that the government's decisions on how, when and what to buy must be inevitably have effects on the structure and health of industry, upon employment, and upon the economy as a whole. It would be remarkable if any government were to carry out its procurements wholly without regard to these incidental effects; in this as in other fields the decisions of government can be expected to be political decisions, which take account of the ulterior social and economic consequences of alternative courses of action".[339]

However, this type of practice declined as a consequence of the economic constraints imposed by globalization and the influence of neoliberalism, especially during the 1980s.[340] Best value for money became the new public procurement mantra and most attention was on "lowest cost" and "full and open

[330] UNEP (2011), Marrakech Task Force on Sustainable Public Procurement led by Switzerland – Activity Report, p. 6
[331] UNEP (2021) Sustainable Public Procurement Implementation Guidelines - Second Edition
[332] Sjåfjell,B Wiesbrock, A. (2016), *Sustainable Public Procurement under EU Law*, Cambridge University Press.
[333] Swensson et al (2021), n. 239
[334] In 1891, UK required government contractors to comply with fair labour standards. Following World War I, government procurement was also leveraged to provide work for disabled servicemen. This practice was later generalized to the disabled working population, adopted also in US.
[335] McCrudden, C. (2007), n.78; Quinot, Arrowsmith (2013), n. 11
[336] National Industrial Recovery Act of 1933, see S. 203(a)
[337] Ibid S. 204(2) c)
[338] McCrudden (2004): in the 1970s, UK local councils used procurement against apartheid, blacklisting suppliers doing business with South Africa.
[339] Turpin, C. (1972) Government Contracts. Penguin, London, p. 244.
[340] McCrudden, C. (2007), Corporate Social Responsibility and Public Procurement, in McBarnet, Voiculescu, Campbell (2007) The New Corporate Accountability: Corporate Social Responsibility and The Law, Cambridge University Press, Oxfor, 9/2006.

competition" principles at the heart of procurement systems.[341] After decades of minimum interaction between the state and the market in the neoliberalism age, the idea that governments can and should use public procurement to pursue social, environmental or economic goals has started to revamp.[342] Indeed, SPP practice is gaining traction again and has been mainstreamed particularly in the last two decades[343], shaped by new political and economic ideologies, as well as by the increased importance that sustainable development has acquired in regional and international policy debates.[344]

The international agenda has consolidated the notion of *sustainable development* since the 1990s, through different milestone events facilitating its mainstreaming.

Sustainability considerations started to be considered a cornerstone in the international agenda in the mid-1990s, catalysed by Agenda 21 adopted during the UN Conference on the Environment and Development (or "Earth Summit") in Rio de Janeiro in 1992. During the Earth Summit public procurement's potential contribution to sustainable development was for the first time highlighted. Governments, as major consumers, were called upon to change their consumption patterns to protect the environment and exercise leadership through government purchasing.[345] This marked a shift in the perception of public procurement, elevating it to a strategic function of government that could affect environmental outcomes.

Although a few OECD countries started to develop policies and to adapt procurement regulations in support of SPP,[346] concrete global action to promote and implement SPP has not properly materialized until a decade later, during the UN World Summit on Sustainable Development in Johannesburg (2002). This conference placed *sustainable consumption and production* (SCP) patterns at the heart of the discourse on sustainable development. Chapter III of the Johannesburg Plan of Implementation adopted after the Summit featured procurement as one fundamental means to achieve sustainability.[347]

In 2003, a Global Framework for Action on SCP, better-known as the 10 Year Framework of Programmes (10FYP) on SCP started to take shape. The so-called 'Marrakech Process' to implement concrete SCP projects, was launched between 2003 and 2011 and seven international task forces were organized around specific SCP themes or programmes, including the *Marrakech Task Force on SPP*. It led the first international initiative promoting and supporting the implementation of SPP in developing countries. In this context, the United Nations Secretary-General recalled that procurement can "harness the power of the supply chain to improve people's lives."[348] He emphasized that the enormous purchasing power of both States and international organizations exert a positive influence on economic systems to the benefit of people.

In 2012, during the UN Conference on Sustainable Development (Rio +20) set up to "strive for a world that is just, equitable and inclusive"[349], the 10-Year Framework of Programmes (10 YFP) on Sustainable Consumption and Production was finally adopted and in 2014 the UN 10FYP SPP Programme was

[341] Caranta, R (2022) Towards Socially Responsible Public Procurement, ERA Forum (2022) 23:149–164

[342] Kunzlik, P (2013) Neoliberalism and the European Union public procurement regime. In: Cambridge Yearbook of European Legal Studies. Cambridge University Press, Cambridge

[343] UNEP (2022), p. 63

[344] Watermeyer, (2004); Cervantes-Zapana *et al.*, (2020) Benefits of public procurement from family farming in Latin-AMERICAN countries: Identification and prioritization. Journal of Cleaner Production. 277.

[345] UN (1992) Agenda 21, Ch. 4 "Governments themselves also play a role in consumption, particularly in countries where the public sector plays a large role in the economy and can have a considerable influence on both corporate decisions and public perceptions. They should therefore review the purchasing policies of their agencies and departments so that they may improve, where possible, the environmental content of government procurement policies, without prejudice to international trade principles"

[346] The first SPP policy to emerge was the US's Executive Order 12873 (1993) Federal Acquisition, Recycling and Waste Prevention.

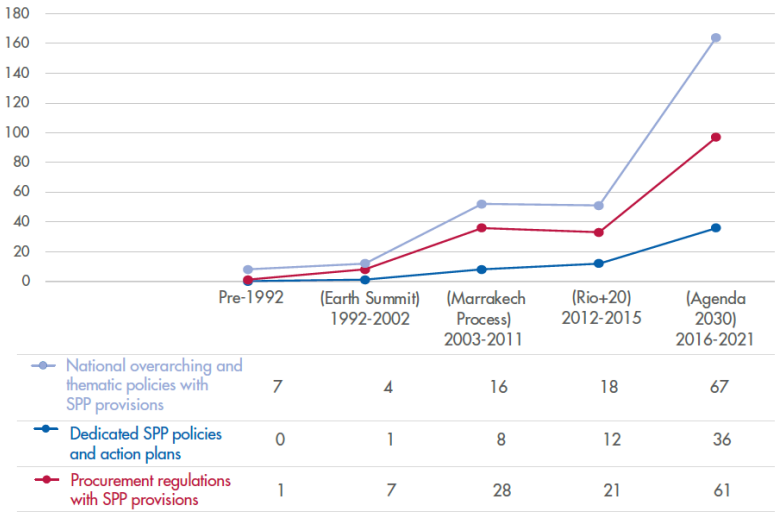
[347] Johannesburg Plan of Implementation (2003), Ch. 3 called for the development of a 10YFP to "accelerate the shift towards sustainable consumption and production, promoting social and economic development within the carrying capacity of ecosystems, by delinking economic growth from environment degradation' and encouraged 'relevant authorities at all levels to take sustainable development considerations into account in decision-making, including on national and local development planning, investment in infrastructure, business and development and public procurement…"

[348] UNOPS (2011) Procurement and the Millennium Development Goals. Supplement to the 2010 Annual Statistical Report on United Nations Procurement. New York, USA

[349] Open Working Group of the General Assembly on SDGs document A/68/970, p.3 para 4

officially launched. Such programme influenced the rise of multiple national-level policy frameworks supporting SPP worldwide in the subsequent years[350], as showed in the figure below.

Figure n. 2.12: Growth in policy frameworks supporting SPP worldwide (1990-2021) (Source: UNEP 2022)[351]



A pivotal moment in this process of consolidation is the adoption of the 2030 Agenda for Sustainable Development in 2015. The 2030 Agenda explicitly recognized the link between public procurement and sustainable development within its 17 Sustainable Development Goals (SDGs) and 169 associated Targets. SPP is specifically addressed under Goal 12 and Target 12.7. This milestone achievement helped promulgate and mainstream even more the development and implementation of policy frameworks supporting SPP worldwide.

The explicit inclusion of SPP in the SDGs in 2015, as well as the ratification of the Paris Agreement in 2016, were important milestones that helped to promulgate and accelerate the shift to sustainable procurement among national governments.[352] Indeed, a steep increase in the adoption of policy frameworks supporting SPP was registered worldwide. As reported by UNEP (2022), since 2015, there has been a considerable increase in the development of policies and legal instruments supporting SPP worldwide. In most countries a natural evolution in the development of legal frameworks on SPP has been observed. Most often, the process starts with the inclusion of SPP provisions in overarching and thematic national policies, such as sustainable development strategies and various environmental and socio-economic policies. Then, it follows with dedicated SPP policies, culminating with the inclusion of SPP provisions in procurement laws and regulations. [353]

More on national policies, initiatives and regulations on SPP with a focus on human rights aspects will be unpacked in Chapter 6, with attention to selected EU Member States practices.

Linking Sustainable Public Procurement and the Sustainable Development Goals (SDGs)

The 2030 Agenda for Sustainable Development is composed of 17 SDGs designed to address key challenges that societies currently face, including poverty, inequality, climate change, environmental

[350] UNEP supported a number of countries in developing SPP action plans based on the Marrakech Task Force SPP Approach. See information on outputs produced by the countries supported by UNEP since 2009.

[351] UNEP (2022) n. 262, p. 43. Data are from UNEP (2021) SPP Global Review Government Questionnaire and SDG 12.7.1 Monitoring Exercise

[352] Baron, R. (2016) The Role of Public Procurement in Low-carbon Innovation, Background paper, OECD.

[353] UNEP (2022): All 45 national governments participating in this study reported having SP provisions in their overarching or thematic policies and strategies, while the vast majority include them in their procurement regulations (82%) and/or have policies specifically dedicated to the promotion of SPP (76%). 31 national governments reported having a legal framework encompassing all three types of policies and instruments supporting SPP

degradation. The SDGs are assorted with 169 targets, each one accompanied by one or more indicators.[354]

Sustainable public procurement is expressly referred to in SDG 12 "Ensure sustainable production and consumption patterns", specifically under Target 12.7 "Promote public procurement practices that are sustainable, in accordance with national policies and priorities". The relevant indicator on SPP is "Number of countries implementing sustainable public procurement policies and action plans". Also target 12.6 is somehow relevant, encouraging suppliers and thus also procurement contractors, especially large and transnational companies, to adopt sustainable practices and to integrate sustainability information into the reporting cycle.[355]UNEP is the custodian agency for SDG 12.7, collecting contributions and data from national and sub-national governments[356], and responsible for developing a specific methodology illustrated in the *Sustainable Public Procurement Implementation Guidelines*. [357]

Various studies have outlined the importance of SPP as a vital component in achieving all SDGs**, as** public spending is, indeed, integral to meeting most of the goals. A systematic analysis, showed that SPP has the potential to impact all SDGs and 82% of the targets, being "the missing multiplier for development". [358] Indeed, if public institutions procured more sustainably, this could prompt rapid and significant improvements across global supply chains that would benefit the environment (through a stronger emphasis on sustainable materials use, re-use, the elimination of harmful chemicals and recycling), society (through enhanced labour standards and practices, improved capacity building for suppliers and the integration of key gender mainstreaming considerations), and the economy (by driving increased efficiency, helping to develop local markets and suppliers, fostering innovation and much more). Some selected examples of SPP impacting SDGs are showed in the table below.

Table n.2.2: SDGs and related role of SPP

SDG	**SPP Role**
SDG 1: End poverty in all its forms everywhere	SPP can have an important impact on ending poverty by ensuring that supply chains protect and reward their employees. SPP can increase the participation of under-represented, marginalized or vulnerable supplier groups in public contracts and help to create local employment opportunities. Further, promoting the human rights and the health and safety of workers throughout supply chains can foster resilience amongst supply chain employees and improve their living conditions. SPP can help in achieving target 1.4, "all men and women, in particular the poor and the vulnerable, have equal rights to economic resources, as well as *access to basic services*, ownership and control over land and other forms of property, inheritance, natural resources, appropriate new technology and financial services, including microfinance", by providing inclusive and socially responsible public services (e.g. collective transports purchased in a sustainable way).
SDG 5: Gender Equality- Achieve gender equality and empower all women and girls.	SPP can help to level the playing field for women by encouraging increased sourcing from women-owned businesses, as female entrepreneurs supply just 1% of the global public procurement market. Thereby, SPP can help key suppliers to understand how to incorporate gender equality in their businesses, and eliminate discrimination and harassment throughout the supply chain. SPP could also advocate for the equal representation of women and men in supplier management teams and the payment of fair and equal wages.

[354] Moyer J.D, Hedden, S. 'Are we on the right path to achieve the sustainable development goals?' 127 World Development 2020, 104749.
[355] Martin-Ortega, O.: Modern slavery and human rights risks in global supply chains: the role of public buyers. Glob. Policy 8(4), 512 (2017)
[356] See the full list of indicators for which UNEP is the custodian agency
[357] UNEP (2012), Sustainable Public Procurement Implementation Guidelines, Introducing UNEP's Approach
[358] Nordic Council of Ministers (NCM), Ramboll, UNOPS (2021) Sustainable Public Procurement and the Sustainable Development Goals

SDG 8: Decent Work and Economic Growth- Promote sustained, inclusive and sustainable economic growth, full and productive employment and decent work for all	As a large-scale purchaser from a range of industries, governments generate substantial employment opportunities. Governments can work to ensure that employment opportunities are available in the labour market and guarantee that decent work conditions are respected. SPP can ensure that suppliers throughout the supply chain respect labour rights and are held accountable through regular communication and spot checks. SPP can also encourage the upskilling of employees and create new opportunities for local communities and underrepresented groups, as well as advocating for the payment of fair and equal wages.
SDG 9: Industry, Innovation and Infrastructure- Build resilient infrastructure, promote inclusive and sustainable industrialisation and foster innovation	Beyond their central role in developing and maintaining quality and sustainable infrastructure, governments play a critical role in promoting sustainable industrialisation and supporting innovation. SPP can push markets towards innovative solutions that deliver sustainable outcomes, such as clean technologies. It also drives the supplier community to develop better ways of achieving sustainability objectives in the long term, instead of just focusing on immediate needs. Targeted approaches to public spending can help small-scale enterprises with market access, particularly in developing countries, while investment in innovative high-tech products can advance the embracement of the digital economy.
SDG 13: Climate Action- Take urgent action to combat climate change and its impacts	SPP can ensure that environmental considerations such as energy and water efficiency are included in tenders for products or services, to promote a clean energy economy. Examples include specifications to improve the energy efficiency of public buildings to the commissioning of energy efficient infrastructure. Purchasing energy locally and assessing the carbon footprint of what they purchase can enable governments to reduce their carbon emissions. SPP can also ensure that natural resources such as trees and waterways are properly stewarded and that supply chain activities do not contribute to deforestation or pollution.
SDG 16: Peace, Justice and Strong Institutions- Promote peaceful and inclusive societies for sustainable development, provide access to justice for all, and build effective, accountable and inclusive institutions at all levels	This goal includes indicators related to the accountability, transparency and good governance of institutions at all levels, including targets to substantially reduce corruption and minimize waste in government spending. Fair, effective and transparent competition is widely recognized as a key principle of SPP. It also contributes to SDG 16 by ensuring that public institutions demonstrate the proper stewardship of public funds, and by helping to eliminate fraud and corruption throughout global supply chains. SPP can also ensure that appropriate measures are taken to hold suppliers accountable and support them to remediate.

In conclusion, the UNEP Global Review on SPP 2022 data on the interconnection between SDGs and SPP, reveals that public entities when conducting SPP may impact multiple SDGs. In the study a survey disseminated among different procurement stakeholders, revealed that multiple SDGs can be addressed by SPP activities. The most voted are: SDG 12 - E*nsure sustainable consumption and production patterns* (57%), SDG 13 *Take urgent action to combat climate change and its impacts* (32%), SDG 8 *Promote sustained, inclusive and sustainable economic growth, full and productive employment and decent work for all* (25%), SDG 9 *Build resilient infrastructure, promote inclusive and sustainable industrialization and foster innovation* (18%) have been identified as the ones most addressed by SPP activities.[359]

Entry Points for Human Rights in the Sustainable Public Procurement Landscape

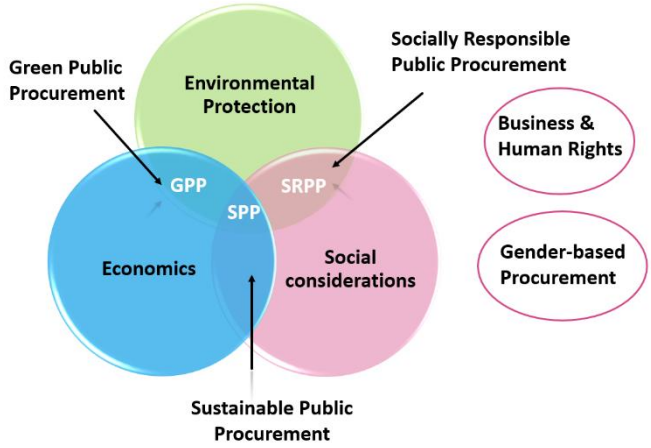
The concept of sustainable development is inspired by a systemic and multidimensional perspective on development, grasping economic, social and environmental aspects in a holistic manner and overcoming a conceptualization of development in silos. Human rights in such context constitute a universal lens and glue constituting both the premise, fuel and outcome of a development that is sustainable. Reflecting on sustainable public procurement, the same multi-dimensional approach should apply, considering equally important social, environmental and economic considerations in the purchasing process.

[359] UNEP (2022), p. 51

According to the specific subject matter impacted, SPP can be declined into different sub-categories, which all form part of a broader umbrella-term. Environmental and climate change aspects are very much at the forefront of SPP nowadays. Green public procurement (GPP) has gained particular *momentum* in the last decades, pushed to the fore by the climate crises and more generally by a recent upsurge in interest in environmental problems. SPP covers GPP but goes beyond the environmental perspective, taking social and economic perspectives into account, thus embracing the following sub-categories:

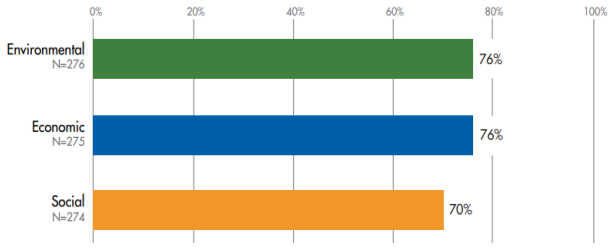
- Green public procurement (GPP)
- Socially responsible public procurement (SRPP)

Figure n.2.13: Sub-categories of Sustainable Public Procurement.



To better understand what subject matters are encompassed by SPP, the UNEP survey reveals what degree of importance is provided to different environmental, economic and social aspects of sustainability by public buyers. More than three-quarters of survey participants (76%) indicated that environmental aspects (such as natural resources preservation, pollution reduction and biodiversity) were either very or extremely important in their organization's work. About the same number indicated economic aspects (such as local suppliers, small and medium-sized enterprises (SMEs), innovation, fair dealings, corruption and dumping), while slightly fewer (70%) indicated social ones (such as diversity, equality, human and labour rights and health and safety). The findings of the study were supported by prior research indicating that the environmental dimension of SPP dominates purchasing decisions.[360] Nonetheless, as showed by the results of the survey, the scope of sustainable public procurement has gradually expanded to incorporate social or economic factors, including also more attention to human rights considerations.[361]

Figure n.2.14 Proportion of organizations who consider environmental, social and economic aspects as "very important" or "extremely important"[362]



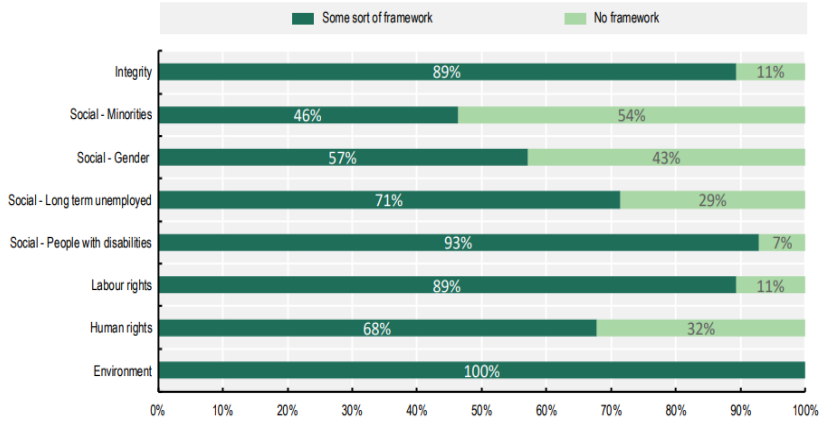
[360] Ferri,L.,Pedrini, M.(2018) Socially and environmentally responsible purchasing: Comparing the impacts on buying firm's financial performance, competitiveness and risk, Journal of Cleaner Production, Volume 174

[361] Cravero, C. (2017). Socially Responsible Public Procurement and Set-Asides: A Comparative Analysis of the US, Canada and the EU. Arctic Review on Law and Politics. 8.; Ivanova, T. (2020) Management of Green Procurement in Small and Medium-Sized Manufacturing Enterprises in Developing Economies, The AMFITEATRU ECONOMIC journal, Academy of Economic Studies - vol. 22(53), pages 121-121

[362] UNEP (2022) n. 262, p. 11 Data are from UNEP (2021) SPP Global Review Stakeholders Survey

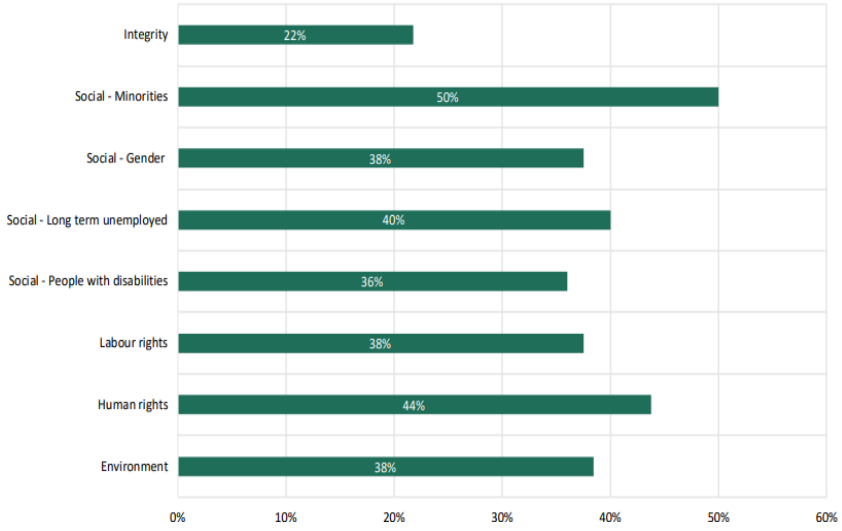
The OECD too has collected data on types of framework supporting various strategic objectives in public procurement in different countries, showing that most of them are focused on environmental aspects. While almost all OECD countries have already developed strategic and/or regulatory frameworks for including integrity and environment-related considerations in public procurement, strategic objectives related to social issues (including human rights) tend to be less represented in these types of frameworks.

Figure n.2.15: Share of countries with any type of framework supporting various strategic objectives in public procurement (Source: OECD (2020) Survey Leveraging Responsible Business Conduct through Public Procurement)[363]



The lack of provisions and legal frameworks on including social and human rights considerations fosters inevitable legal unclarity, with the consequence to restraining contracting authorities to experiment in this field and to really understand the urgency to act. OECD has also identified challenges faced by governments, especially related to the lack of clear understanding of how to implement social considerations into public procurement policies and practices, as showed by the figure below. The lack of understanding of how to implement human rights-related issues represents 44% of the responses.[364]

Figure n.2.16: Lack of clear understanding of how to implement strategic objectives through public procurement (Source: OECD (2020) Survey Leveraging Responsible Business Conduct through Public Procurement).[365]



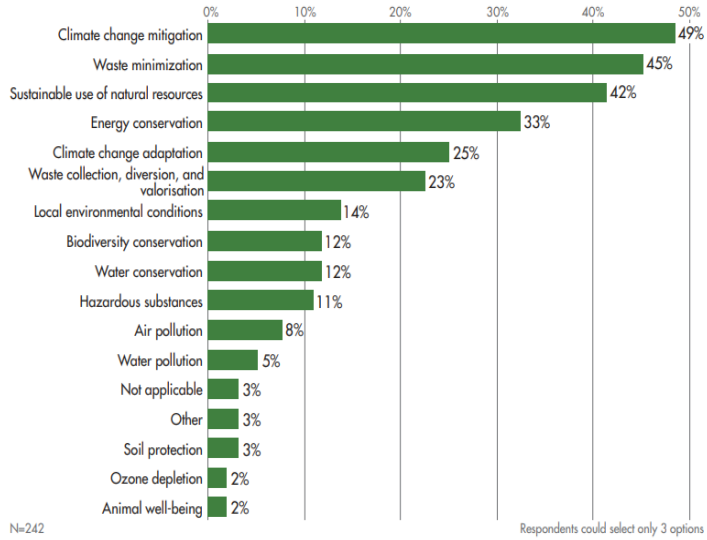
[363] Based on data from 28 countries, either regulatory or strategic frameworks. Data for Austria, Chile, Greece, Iceland, Ireland, Luxembourg,Portugal, Turkey, UK, US are not available
[364] OECD (2020) Survey Leveraging Responsible Business Conduct through Public Procurement.
[365] Based on data from 28 countries, either regulatory or strategic frameworks. Data for Austria, Chile, Greece, Iceland, Ireland, Luxembourg, Portugal, Turkey, UK, US are not available

Green Public Procurement and Human Rights

Sustainability consists of a wide range of environmental and socio-economic issues, such as climate change mitigation, technology development and innovation, and diversity and inclusion. Focusing on environmental aspects, GPP refers to a "process whereby public authorities seek to purchase goods, services and works with a reduced environmental impact throughout their life-cycle compared to goods, services and works with the same primary function which would otherwise be procured"[366]. Thus, by using their purchasing power, contracting authorities can choose goods and services with lower impacts on the environment, making an important contribution to sustainable consumption and production. Furthermore, green purchasing is also about influencing the market. By promoting and using GPP, public authorities can provide industry with real incentives for developing green technologies and products.

According to the UNEP survey results[367], "climate change mitigation" (49%), "waste minimization" (45%) and "sustainable use of natural resources" (42%) are *environmental issues* most frequently identified as priorities by public buyers.[368]

Figure n.2.17: Priority environmental issues identified by survey participants for their organizations to address through sustainable procurement (Source: UNEP 2022, p.15)



Although human rights considerations can be traditionally perceived as far from the environmental dimension, they constitute a cross-cutting element which can be easily impacted by GPP. Indeed, environmental and climate change considerations can be connected to the right to health, the right to health and safety at work and the right to a clean environment which has been recently recognized as fundamental human right. In 2022, the United Nations General Assembly (UNGA), with a unanimous vote, has affirmed that a clean, healthy, and sustainable environment is a human right – and a right for all, not just a privilege for some[369]. Considering the indivisible and interrelated and mutually reinforcing nature of human rights, this right inevitably links to all other existing human rights. Thus, realizing a clean, healthy and sustainable environment requires sustained efforts to keep working environments free from accidents, injuries and diseases; applying a "just transition" logic which avoids

[366] European Commission, Communication (COM (2008) 400) Public Procurement for a Better Environment
[367] UNEP 2013, Sustainable Public Procurement: A Global Review Final Report December, p. 13
[368] Comparing the current results with the 2017 ones, all three categories have remained among the top priorities since 2017, with 'climate change mitigation' moving up in the rankings from second to first place, while 'waste minimization' is now second (from third) and 'sustainable use of natural resources' holding steady in third. 'Energy conservation' dropped from first place to fourth. These shifts undoubtedly reflect the global consensus on climate change following the ratification of the United Nations Framework Convention on Climate Change 2015 and the subsequent COPs, as well as an increased emphasis on circular procurement.
[369] UNGA Resolution A/76/L.75; see also IISD (2022) UNGA Recognizes Human Right to Clean, Healthy, and Sustainable Environment

trade-offs between the human right to work and the human right to a healthy environment; and protect biodiversity by supporting indigenous peoples' livelihoods.[370]

Socially Responsible Public Procurement and Human Rights

Socially responsible public procurement (SRPP) aims at addressing the impact on society of goods, services and works purchased by the public sector, assuming that public buyers may be interested not just in purchasing at the lowest price or best value for money, but also in ensuring that procurement achieves social benefits and prevents or mitigates adverse social impacts during the performance of the contract.[371] Indeed, moving away from a lowest price logic and introducing considerations related to social integration, equality, fair and inclusive employment and ethical supplies, public resources value, even when scarce, can be maximized. Furthermore, endorsing the European Commission definition of SRPP, this type of procurement process purports to set an example and influence the market-place by giving companies incentives to implement socially responsible supply chain and management systems, achieving positive social outcomes in public contracts.[372] Indeed, institutional purchasers, both public and private, are uniquely positioned to demand transparency about the upstream and downstream impacts of goods and services and send consistent purchasing signals to the market at a scale that can be transformative.[373]

For example, public procurement can promote local industries, small and medium-sized enterprises and disadvantaged groups, such as women and minorities. Public authorities can engage in SRPP by buying ethical products and services, using public tenders to create job opportunities, decent work, social and professional inclusion and better conditions for disabled and disadvantaged people. SRPP can be shaped by different social goals, such as the protection of human rights fostered by human rights- related considerations within the procurement process. Examples of social goals pursued through SRPP and possible related outcomes are:

Table n.2.3: Social goals and related Socially Responsible Public Procurement Outcomes

Social Goal	**SRPP Outcomes**
Promoting fair employment opportunities and social inclusion	SRPP could foster: ● Employment opportunities for youth and older workers; ● Gender equality (facilitating work/life balance, reducing sectoral and occupational segregation, ensuring equal treatment in the workplace). ● Employment opportunities for people experiencing social exclusion due to long-term unemployment, homelessness, discrimination or other vulnerabilities; ● Societal participation and employment opportunities for persons with disabilities; ● Diversity policies, social inclusion and employment opportunities for disadvantaged groups (e.g. migrant workers, people with a minority racial or ethnic background, religious minorities, people with low educational attainment and those at risk of poverty and social exclusion).
Ensuring compliance with social and labour rights and promoting decent work	Public procurement can contribute to social progress by ensuring that suppliers: ● Comply with applicable obligations in the fields of social and labour law established by national, regional, international law ● Comply with fundamental ILO conventions and decent work[374] ● Comply with the principle of equal treatment between women and men, including the principle of equal pay for work of equal value, and promotion of gender equality; ● Comply with occupational health and safety laws; and

[370] ILO (2022) UN General Assembly recognizes human right to a clean, healthy, and sustainable environment.
[371] European Commission (2021), Buying Social: a guide to tacking account of social considerations in public procurement, 2nd edition. p. 3
[372] Ibid p. 5.
[373] UNEP (2022), p. 24
[374] ILO definition: 'Work that is productive and delivers a fair income, security in the workplace and social protection for families, better prospects for personal development and social integration, freedom for people to express their concerns, organize and participate in the decisions that affect their lives, and equality of opportunity and treatment for all women and men.'

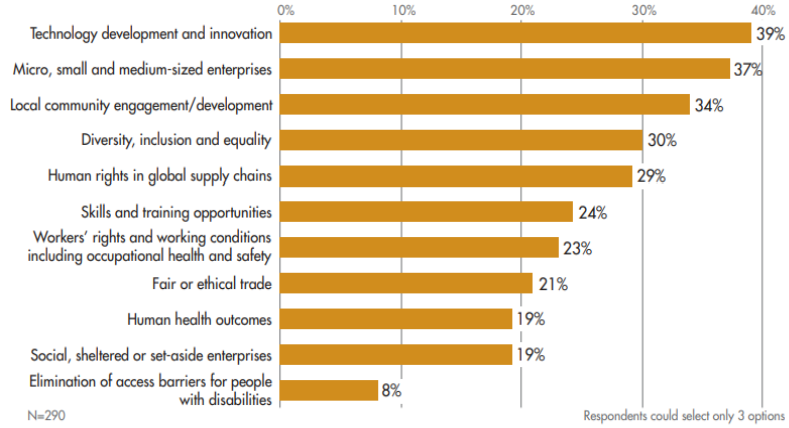
	● Fight discrimination on the basis of e.g. gender, age, disability, racial or ethnic origin, religion or belief, sexual orientation and create equal opportunities. SRPP could aim to promote decent work throughout global supply chains through: ● Secure employment; ● Fair wages; ● Safe working conditions; ● Social protection; ● Equality of opportunity and treatment for all women and men; ● Gender equality and non-discrimination in access to employment; ● Social dialogue; ● Safeguarding of rights at work.
Accessibility and design for all	SRPP could promote the purchasing of goods, services and works that are accessible to all, including persons with disabilities, thereby respecting the UNCRPD obligations on accessibility. The UNCRPD Committee has, indeed, identified buying accessible as a key issue for governments. Thus, public buyers have the opportunity to: ● Procure recognizing the needs of persons with disabilities and involving them in the purchasing process. Needs assessment and supplier engagement can ensure effective public services that take into account the objectives of social and professional inclusion ● Take into account accessibility in technical specifications to secure access for persons with disabilities to, for example, public services, public buildings, public transport, public information and ICT goods and services; ● Use award criteria to reward offers proposing higher standards of accessibility than those established in the technical specifications. ● Include performance clauses to ensure that the services procured are executed in a way that ensures that the result is accessible, on the basis of a design for all approach.
Respecting human rights and addressing ethical trade issues	Public procurement can be used to address human rights in supply chains and ethical trade issues. Respecting and protecting basic human rights is an essential part of any business relationship entered into by a State, as set out in the UNGPs. In details, human rights can be protected in procurement by: ● Increasing transparency in supply chains including through monitoring of subcontractors and sub-subcontractors; ● Analysing specific risks within supply chains; ● Requiring contractors and subcontractors to take measures to improve workers' conditions in the supply chain and tackle potential or identified human rights violations in the production process; ● Encouraging strict supplier codes of conduct for social responsibility
Promoting Gender Equality	The inclusion of gender equality considerations into the procurement cycle has been increasingly consolidated in what has been variously named "gender-based public procurement", "gender-smart public procurement", "gender-inclusive public procurement" by the literature and practice. Gender-based procurement can be identified as a sub-component of SRPP based on the introduction of gender-based requirements and considerations into procurement policies and programs, using public contracts as an instrument to advance gender equality, mutually reinforcing gender-based policy actions. Different international organizations have focused the attention on gender-based procurement: UN Women defines it as the selection of services, goods and civil works that considers their impact on gender equality and women's empowerment. The ILO defines it as a process that can create equal opportunities and treatment for women and men and decent jobs for all, and better development outcomes for women and men, [375] by: ● Ensuring that the gender dimension is explicit and verifiable through all phases of the procurement cycle: planning, tender, award, contract management phase. ● Providing business opportunities for women-owned or women-managed enterprises in procurement processes. ● Generating equal opportunities for women and men in the design, implementation and supervision of procured work and services: as workers, contractors and consultants.

[375] UN Women and ILO (2021) Rethinking GenderResponsive Procurement: Enabling an Ecosystem for Women's Economic Empowerment

	• Ensuring that contracting firms, regardless of ownership, respect human rights and observe ILO labour standards that contribute to gender equality and non-discrimination and women's empowerment.

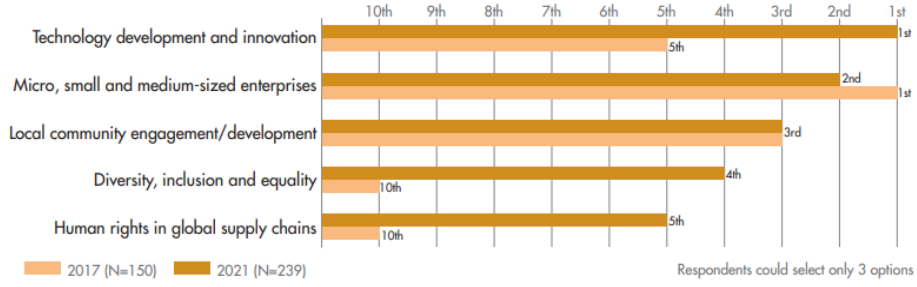
Among the key socio-economic issues identified as priorities by public stakeholders[376] in the UNEP survey, figure: technology development and innovation (39%), micro, small and medium-sized enterprises (37%), local community engagement/development (34%), but also diversity, inclusion and equality (30%) and human rights in global supply chains (29%).

Figure n. 2.18: Priority socio-economic issues identified by survey participants for their organizations to address through sustainable procurement (Source: UNEP 2022, p.16)



An increased interest to address human rights in supply chains through procurement has emerged in the last few years. Comparing the same survey results from the 2017 SPP Global Review, the findings point to significant changes. While 'micro, small and medium-sized enterprises' and 'Local community engagement/development' remain among the top three priorities, 'diversity, inclusion and equality' and 'human rights in global supply chains', have become more prominent: 'diversity' and 'human rights' have gone from tenth to fourth and fifth, respectively. These shifts are attributable to a growing acceptance of the government's role in driving markets toward an increased focus on the social dimension.

Figure n.2.20: socio-economic issues ranking, 2017 and 2021 (Source: UNEP 2022, p.16)



Particularly, the attention to human rights considerations while procuring is growing in practice. A gradual process towards raising awareness on the moral and legal obligations behind human rights protection and respect throughout supply chains is, indeed, ongoing. More on the legal grounds of justifications will be disentangled in Chapter 3 from the public buyers' perspective, and in Chapter 4 from the suppliers' perspective.

[376] Stakeholders were asked what they expect to be a priority for their organization over the next five years

Barriers and Core Challenges for Sustainable Public Procurement

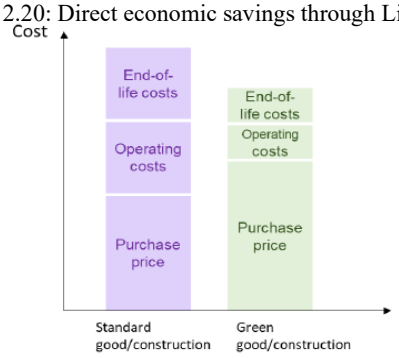
Although awareness on SPP benefits and the use of public procurement for sustainability is expanding worldwide, challenges and key barriers hinder their implementation in both public and private organizations. Obstacles that have emerged in different quantitative and qualitative studies concern: monitoring difficulties (particularly in terms of measuring social aspects and operationalizing human rights), lack of expertise and skills, lack of financial and human resources devoted to SPP, lack of government legislation and political support, lack of mandatory sustainable procurement rules/legislations; insufficient leadership, regulations, expertise and sustainable procurement tools to integrate sustainability considerations across the entire procurement cycle. Particularly, the perception that SPP products are more expensive than conventional ones results as the most voted barrier to SPP implementation in most organizations, according UNEP 2022 Global Review data. This perception has an inevitable impact the uptake of SPP and could hinder the incorporation of human rights and responsible business conduct objectives into public procurement. An example of possible approach to address such challenge is the adoption of life-cycle costing (LCC) as a powerful driver for a paradigm shift.[377] Indeed, while introducing environmental and social criteria in the procurement processes may lead to higher upfront costs, they may result in savings over the whole life-cycle of a purchase. For many products, services and works, costs incurred during use and disposal may also be highly significant – for example in terms of energy consumption, maintenance, disposal of hazardous materials. It must be recalled that SPP is grounded in the concept of VfM as the optimum combination of whole-life cost (or total cost of ownership) and quality (or fitness for purpose) to meet the user's requirements, considering also the social, economic and environmental implications of a purchase for society as a whole.[378] Thus, taking whole life-cycle costs (LCC) into account would mean including different costs borne by governments and societies, as[379]: (1) costs, borne by the contracting authority or other users (such as: costs relating to acquisition, costs of use, such as consumption of energy and other resources, maintenance costs, end of life costs, such as collection and recycling costs); (2) costs imputed to environmental and social externalities linked to the product, service or works during its life cycle, provided their monetary value can be determined and verified[380]. Thus, as recommended by OECD MAPS, value for money is based on the "most advantageous combination of cost, quality and sustainability to meet defined requirements"[381], considering social, economic and environmental implications of a purchase for society as a whole. This entails taking into account not only the market price but also other costs and risks that can have significant impact on government's budgets. For instance, costs related to integrity risks or non-compliance with human rights obligations and responsible business objectives.

So far, most academic studies and policy papers have focused on LCC related to environmental externalities, exploring approaches to introduce pricing instruments in the area of climate change.[382] Carbon pricing, for example, gives an explicit price on every tonne of CO2 emitted and therefore provides governments with an effective tool that can easily be integrated in an LCC approach. From a social perspective, both the social benefits and the avoided social costs enabled is particularly challenging, however studies are progressing in the field of social life-cycle costing approaches (S-

[377] Andhov, M., Caranta, R., Wiesbrock, A. (2020) *Cost and EU Public Procurement Law. Life-Cycle Costing for Sustainability*. Routledge, London
[378] UNEP (2022)
[379] European Union (2016), Buying green! A handbook on green public procurement.
[380] EU Parliament and Council (2014), "Directive 2014/24/EU of the European Parliament and of The Council", Official Journal of the European Union
[381] OECD (2022) OECD MAPS (2018)
[382] Carattini, S., M. Carvalho and S. Fankhauser (2017), How to make carbon taxes more acceptable; OECD (2016), Effective Carbon Rates Pricing CO2 through Taxes and Emissions Trading Systems

LCA)[383] and would be extremely useful also to operationalize human rights considerations in public purchasing.

Figure n. 2.20: Direct economic savings through Life Cycle Cost (OECD, 2022 p.11)



So, a paradigm shift is required now more than ever. Moving towards a mainstream LCC approach in purchasing practices would allow to foster sustainability in each purchasing and consumption practice and at the same time having a real picture on long-term costs, facilitating SPP implementation. The potential benefits of SPP could be multiple, ranging from financial efficiency, driving innovation and market transformation to achieving social goals- such as at global level child labour, forced labour, fair trade, etc; at local level employment generation, working conditions, marginalisation of groups etc.

2.3 Conclusion

Summing up, in the current global economy shaped by complex, dynamic and transnational supply chains multiple risks of human rights harms and related adverse impacts hinder responsible production and consumption patterns. In such scenario, the State acts as *mega-consumer* in the complex *public procurement system* purchasing goods, works, services for public management purposes, being a potential powerful mean to influence more human rights respect along global supply chains, inspiring more responsible business conduct of suppliers and alignment with international standards on Business & Human Rights. Human rights risks impinge all sectors of the global economy and consequently public procurement of any State, given their ubiquitous nature, as evidenced by multiple cases and studies presented in the chapter. However, State inaction in this respect results paradoxical, for different reasons, including legal, economic, reputational. Human rights risks may become opportunities for both buyers and suppliers when addressed effectively, indeed a supplier taking effective steps to respect the human rights of workers may be evaluated more favourably by procurers and investors.

Although the Sustainable Public Procurement paradigm has been increasingly embraced in the last decades, the path towards more awareness on the powerful role of public procurement to reinforce respect of human rights and towards the consolidation of effective practices and methodologies seems still long, but evolving. Thus, digging into the legal foundations bridging human rights and public procurement is essential to reinforce arguments on the necessity to act. After this introductory chapter, reflections will continue in Chapter 3 disentangling substantive human rights law justifications, reflecting on international law and human rights law obligations and responsibilities hold by the State as buyer. The focus of Part II will be specifically on the State duty to protect and the corporate responsibility to respect human rights in the public procurement context, to explore whether human rights obligations are applicable also in case of public procurement transactions.

[383] International Institute for Sustainable Development (2009), Life Cycle Costing in Sustainable Public Procurement: A Question of Value, International Institute for Sustainable Development.

Part II - International Law Perspective on Roles and Responsibility

3. Role and Responsibility towards Human Rights: International Legal Perspective on Public Buyers

Introduction

After having unpacked existing risks of human rights adverse impacts throughout global supply chains in the public procurement context, the focus of the following chapter is on the legal role, obligations and responsibilities arising upon public buyers under international law. As a matter of fact, a set of direct obligations binding States and their procuring entities to respect and protect human rights while purchasing is missing and the attention on the international responsibility of the State towards human rights while procuring has been marginal so far,[384] requiring a deep scrutiny. Thus, a human rights law lens is applied to public procurement to clarify potential obligations and to derive legal obligations for the public buyers to purchase more responsibly. Indeed, public authorities, despite behaving as private actors when purchasing, should not relinquish their human rights law responsibilities when entering into commercial relationships with the private sector. In a context of internationally legal uncertainty on the matter fuelling continual transnational abuses, it becomes essential to clarify the specific obligations and related attribution of responsibility that States as buyers hold to prevent further harms.

As it will be shown, the attention on public procurement sector from an international human rights law perspective has been marginal if not inexistent, at least before the UN Human Rights Council initiatives in the field of Business & Human Rights (B&HR). With the adoption of the 2011 United Nations Guiding Principles on Business and Human Rights (UNGPs), the Human Rights Council included an innovative vision of the role of public procurement as policy instrument to impose further respect for and promotion of human rights. On the other hand, looking at public procurement legal frameworks and practice, procurement regulations have not been given particular consideration to international human rights law and compelling obligations. So far, States have rarely perceived concerns about the protection of human rights as particularly compelling in the public procurement cycle. Rather, they have consistently acted on the basis of interests of a predominantly economic nature, such as liberalization, fight against corruption, transparency, market efficiency.

Such existing gaps foster a paradoxical situation. States hold obligations under human rights law that should extend also to their purchasing activities. Indeed, positive obligations to *protect, respect, fulfil* human rights should not stop at the borders,[385] rather States, as primary duty-bearers under human rights laws, "may be under a legal obligation not to assist in maintaining that breach through investing in those in breach".[386] Further levels of complexity are linked to domestic and foreign inputs added at different levels of production and in different jurisdictions. Those raise also questions on the extraterritorial dimension of human rights obligations which so far has had limiting traction over abuses in government supply chains occurring abroad.[387] Indeed, the extraterritorial nature of violation of human rights arises when suppliers who are not located within a state's boundaries commit violations, being a debated question regarding whether the State may be held responsible for violations perpetrated abroad. International law is, indeed, evolving towards a possible extension of the territorial scope of the human rights obligations by States. As clarified by UNCESCR in the 2017 *General Comment on State*

[384] Williams-Elegbe S. (2022) Public procurement as an instrument to pursue human rights protection in Marx A. et al (eds.) 2022, Research Handbook on Global Governance, Business and Human Rights, Edward Edgar Publishing; O'Brien, C., Ortega O. (2020) Missing a Golden Opportunity: Human Rights and Public Procurement in Deva, Surya & Birchall, David. (2020). Research Handbook on Human Rights and Business. Edward Elgar Publishing

[385] McCrudden, C. (2007) Corporate Social Responsibility and Public Procurement. The New Corporate Accountability: Corporate Social Responsibility and The Law, McBarnet, D. Voiculescu, A, Campbell, A. (eds). Cambridge University Press, 2007, Oxford Legal Studies

[386] ILC Articles of Responsibility of States for Internationally Wrongful Acts, art. 41(2). See McCrudden (2007), p. 91

[387] O'Brien, C. M. & Martin-Ortega O. (2020). Missing a Golden Opportunity: Human Rights and Public Procurement. In Deva, S. & Birchall, D. (Eds.), (2020). Research Handbook on Human Rights and Business

obligations, State parties have to pay close attention to the adverse impact outside their territories of the activities of enterprises that are domiciled under their jurisdiction; such obligation extends to any business entities over which parties may exercise influence by regulatory means.[12] Particularly, UNCESCR affirmed that in their duty to protect, State parties should also require corporations domiciled in the territory and/or jurisdiction of States' Parties to act with *due diligence* to identify, prevent and address abuses to Covenant rights by such subsidiaries and business partners, wherever they are located.[14] Thuds, in the context of public procurement, States could deny awarding public contracts to companies that have not provided information on the social and environmental impacts of their activities or on due diligence activities to avoid or mitigate any negative impacts on the rights under the Covenant.[388]

Given such premises, the focus will be on understanding the rationale and structure of B&HR legal framework and to position public procurement in this specific landscape. First of all, what are substantial multi-level obligations arising in case of human rights risks while procuring? The first section (3.1) will clarify main dilemmas and core obligations related to human rights instruments and conventions exploring the *duty to protect, respect, fulfil while purchasing*. In the process of B&HR crystallization, considering increasing fragmentation and proliferation of new sources in the international regulatory architecture, the attention is devoted to relevant international legal sources for public buyers, as:

- UN-led initiatives in the B&HR consolidation process: starting from UN initial steps, the UN Global Compact, the Ruggie's *Protect, Respect, Remedy Framework* and the UNGPs. Hardening soft law processes, potential obstacles and benefits in the route towards a B&HR Treaty are also explored considering alternative international law mechanisms to achieve the objectives of UNGPs+10 Roadmap.
- The ILO approach to human rights in business: the ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy, ILO Core Conventions and particularly the ILO Convention n. 94 on "Labour Clauses in Public Contracts"
- OECD key instruments in the consolidation of B&HR foundational concepts, as the OECD Guidelines for Multinational Enterprises and other instruments relevant in public procurement.[389]

Having depicted the general B&HR legal framework, the interconnection between UNGPs and public purchasing is addressed focusing on State-business transactions. The so-called *State-Business nexus* mentioned under the State Duty to Protect (Pillar I) will be at stake. Although the UNGPs do not provide a specific definition for State-business nexus, its three different forms described under UNGPs 4,5,6, will be screened to derive further clarity. Peculiar attention will be to UNGP 6 as most relevant for public procurement cases. The real question will be to understand whether the State-business nexus in its forms create obligations upon the public buyers in public procurement situations.

The second section of this Chapter (3.2) enquires whether there are multi-level responsibilities connected to the aforementioned obligations in which the State as buyer may incur under international law. The aim is to explore whether the State as buyer could be held internationally responsible for human rights abuses committed by its suppliers. To reply, lights will be shed on multiple dilemmas on the theory of international responsibility, exploring the possible attribution of conducts of non-State actors, as private suppliers, to the State. Complexity is linked to the specific role of the State as public buyer, dealing with *acta iure gestionis*, requiring to enquire the possible attribution of responsibility for *acta jure gestionis* in case of commercial transactions and public procurement. To clarify this point, the International State Responsibility theory is explored to understand whether it could apply to public

[388] Russo, D., (2018) The Duty to Protect in Public Procurement: Toward a Mandatory Human Rights Clause?
[389] OECD (2020) Due Diligence Guidance for Responsible Business Conduct and the OECD Report: Integrating Responsible Business Conduct in Public Procurement.

procurement situations, despite the very limited application in the case-law and practice. Relevant provisions of the Draft Articles on Responsibility of the State for International Wrongful Acts (DARS) are analysed to define an international wrongful act and the possible existence of a responsibility for omission in case of State due diligence obligations. Peculiar attention will be on attribution of conduct to a State, differentiating between conduct of organs (article 4), of persons or entities exercising elements of governmental authority (article 5) and, particularly, the conduct directed or controlled by a State in case of State-owned enterprises and private contractors (article 8), trying to understand whether international responsibility could be applied to the State also in case of public procurement transactions, considering the State-business nexus. As it will be shown, the classical international State responsibility theory, ILC Articles and existing case-law do not reply explicitly to such dilemmas, requiring to think outside the box and read international responsibility attribution matters under the UNGPs lens, disentangling mutual intersections and deriving possible answers.

3.1 Addressing Human Rights Risks while Procuring: Multi-Level Obligations

3.1.1 Fragmentation and New Actors in the International Regulatory Architecture: Business & Human Rights International Legal Framework

Back to the origins of international law, its main purpose has been to facilitate and preserve inter-nations relationships with a state-centric approach. Nonetheless, law is not fixed and static, legal *corpora* evolve with the time and external dynamics into new shapes responding to contextual challenges. The effects of globalization have led to the proliferation of a number of sub-fields of international law and raising dilemmas on non-State actors' role in the international regulatory architecture.

Human rights entered the state-centric international law domain as consolidated *corpus* of law only relatively late and slowly, considering the traditional view on individuals as subjects within their States and consequently "only" objects in respect of international law.[390] In other words, although individuals are subjects in their domestic legal systems, they do not enjoy the same status in international law, mainly because they still fall under the domestic jurisdiction of their respective States.[391] Thus, being addressees of international rules, individuals can be considered as partial or limited subjects of international law.[392] Nevertheless, the consolidation of human rights law as minimum level[393] obligations for all countries, has pierced the veil of domestic jurisdiction, reducing the shield of national sovereignty against international scrutiny and fostering further debates on the status of non-state actors – including both natural persons (individuals) and juristic entities (international organizations, NGOs, business enterprises).[394]

In the last decades, economic globalization trends have increased the influence of business actors and transnational corporations[395] on the economy of most countries and in international economic

[390] Back in 1947, Philip C. Jessup, in his article on the Subjects of a Modern Law of Nations, drew a distinction between subjects and objects regarding the position of individuals

[391] Crawford, J. (2012) Brownlie's Principles of Public International Law (8th edn) 115 ff.

[392] Spagnolo A (2020), To What Extent Does International Law Matter in the Field of Business and Human Rights? In Buscemi et al (2020) Legal Sources in Business and Human Rights: Evolving Dynamics in International and European Law, Developments in International Law, Ch.3, Vol: 73, Brill

[393] Rodley, N. and Sheeran, S. (2016) Routledge Handbook of International Human Rights Law, Routledge

[394] Tanzi, A. (2017) International Law, A concise Introduction

[395] "Transnational corporation" refers to a cluster of economic entities operating in two or more countries, characterized by economic unity and legal plurality at the same time. They constitute one economic enterprise with several legal entities established on the territory of different countries, entailing parent/mother companies (the decision-making centre) and subsidiaries. According to the corporate veil doctrine, the different entities are legally independent, namely each legal subsidiary company is independent from the others and from the parent company. Further, several other stakeholders are legally linked to the mother companies through contractual relations, such as contractors or subcontractors. Bonfanti A. (2018) Business and Human Rights in Europe: International Law Challenges, Transnational Law and Governance

relations,[396] dismantling the centrality of the State as unique focus of international law. Indeed, power is less centralized in the international legal system, with economic suppliers representing new fragmented centres of power,[397] and States conducting their functions more and more in synergy with private actors. Thus, States are no longer considered the sole catalysts of the law-making process, given that they are increasingly sharing their role with other powerful non-State actors, such as corporations, recognized as increasingly influential in the international system.[398]

What about the legal status of non-State actors? The aforementioned shift of power to private sector entities has not been reflected so far in a substantial reformulation of the theory on international legal subjectivity.[399] Although the existence of non-state actors is recognised by international law, this is mainly in their capacity as addressees or objects of regulation. Indeed, corporate entities still remain "an institution created by States", albeit one that "has become a powerful factor in the economic life of nations",[400]and are therefore not presumed to be direct addressees of international human rights obligations. Doctrinally, classic international law does not consider non-state actors to be true subjects of international law with factually no role in the process of ascertaining international legal norms, and, thus, no power to formally contribute to the formation of international law. Nonetheless, the distinction between State and non-State actors and their close interconnection has fuelled multiple debates in the academic context. The dominant opinion since the late nineteenth century and confirmed by the ICJ case-law[401] was that there is a clear separation between States and private corporations; however lively debates have raised particularly within the Business & Human Rights scholarship on the existence of a responsibility to respect human rights also for business, which will be addressed in depth in Chapter 4.

The emergence of new international law actors in the last two decades has fuelled a process of legal fragmentation leading to the proliferation of newly specialized subfields and types of international norms outside traditional legal sources. As outlined by Martti Koskenniemi in the ILC "Report on the Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law"[402], the rise of multiple and fragmentary sources of law makes systemic integration an indispensable element. Particularly, in a context where the globalisation of international policy is complicating international relations, multiple actors are involved in law-making. In this context, over the past three decades a process of consolidation of a new sub-cluster of human rights law has emerged: *Business and Human Rights (B&HR).* Since the 1970s, debates on the role and shared responsibility of the State and corporations towards human rights in business have raised with B&HR slowly consolidating as coherent field of study.[403] Its main rationale is to address how business may negatively impact human rights along the global supply chain and the various ways in which such violations can be prevented and assessed, including how business can be held accountable.[404] Particularly in the 1990s, the unscrupulous policy of different multinational companies boosted the first attempts of international soft regulation in this field, under the auspices of the UN and other regional actors, as the OECD. However, B&HR started gaining *momentum* in the international arena only in the last decade after the

[396] Human Rights Principles and Responsibilities for Transnational Corporations and Other Business Enterprises, U.N. Doc. E/CN.4/Sub.2/2002/XX, E/CN.4/Sub.2/2002/WG.2/WP.1
[397] Fasciglione M (2020) A Binding Instrument on Business and Human Rights as a Source of International Obligations for Private Companies: Utopia or Reality? in Buscemi et al (2020), Ch. 4.
[398] Ryngaert,C. Noortman, M. Reinisch, A., Concluding Observations on Non-State Actors, chapter 17, p. 369
[399] Jägers, N. (2002) Corporate Human Rights Obligations: in Search of Accountability, Intersentia; Bilchitz, D. (2016) "Corporations and the Limits of the State-Based Models for Protecting Fundamental Rights in International Law" 23 Indiana Journal of Global Studies, 143.
[400] ICJ (1970) Barcelona Traction, Light and Power Company, Limited (Belgium v Spain) (Merits), Rep 1, paras 38–39.
[401] ICJ (1951) Anglo-Iranian Oil Company case
[402] Koskenniemi M. (2007) Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law, ILC Study Group Report
[403] Sagafi-Nejad, Dunning J. (2008) UN and Transnational Corporations: From Code of Conduct to Global Compact, Indiana University Press
[404] Bernaz, N. (2016). Business and human rights: History, law and policy - Bridging the accountability gap. Taylor and Francis.

unanimous endorsement of the *United Nations Guiding Principles of Business and Human Rights* (UNGPs)[405] by the UN Human Rights Council in 2011.

In the process of current consolidation of B&HR obligations, it must be clarified that most sources adopted so far are of soft-law and non-binding nature. Nonetheless, B&HR constitutes an interesting springboard to observe new trends in the normative process and to reflect on the role of soft-law and possible mechanisms to indirectly *hardening the soft,* as through public procurement contracts. Indeed, innovative processes relates to the formal or substantive hardening, through a multi-layered and multi-player law-making process, of originally soft normative standards that concur to circumvent States' reluctance to accept binding rules in this field, and to strengthen the effectiveness of soft international regulation. It may be argued that hard and soft law borders are blurred in B&HR as the system of legal sources and legal addressees of obligations is under constant change.

Regarding the role and impact of soft law,[406] States have shown an evolving and increasing appreciation for the adoption of soft law[407] instruments, as they can more easily reach agreements strengthening the areas of international cooperation, particularly where customary or treaty norms are not yet established or where the rules are still fragmentary.[408] States may be tempted by the adoption of non-binding instruments also because they are not required to comply with the forms laid down by the Vienna Convention on the Law of Treaties; it must be also recalled that States do not commit an international offense when they violate provisions of a soft law act they adopt.[409] This does not mean that soft law instruments are devoid of any normative value. Overall, when States adopt or conclude non-binding instruments, it seems possible to consider that they are committing themselves on a level that is "*purement politique"*.[410] Therefore, it cannot be ruled out that non-binding instruments may nevertheless generate expectations among the States that have adopted them in their bilateral relationships by virtue of the principle of good faith. Rather, soft law instruments might have an impact on the sources of international law. With reference to customary international law, they can constitute evidence of a consolidated *opinio juris* among States, leading to the identification of new customary rules.[411] For example, soft law instruments, such as General Assembly resolutions, can be conducive to the conclusion of legally binding agreements between States as affirmed in several examples by the International Law Commission and the ICJ.[412] Soft law might be also able to guide the subsequent practice of States in the application of a treaty pursuant to Article 31, par. b), of the Vienna Convention on the Law of the Treaty[413] and can be relevant sources for domestic judges in the interpretation and application of domestic law in accordance with international law.[414]

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[405] UNHRC (2011) Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework, UN Doc A/HRC/17/31.

[406] Kingsbury, B., Krisch, N., Stewart, K. (2005) 'The Emergence of Global Administrative Law' 68 Law and Contemporary Problems

[407] Soft-law is a category of acts including non-binding agreements between States, resolutions of international organizations, final acts of assembly of States parties to a treaty and other instruments that lack binding authority

[408] Francioni,F. (1996) International 'Soft Law': A Contemporary Assessment in Vaughan Lowe, Malgosia Fitzmaurice (eds), Fifty Years of the International Court of Justice. Essays in Honour of Sir Robert Jennings (cup 1996) 167, 174–175

409 Schachter,O. (1977) The Twilight Existence of Nonbinding International Agreements 71 American Journal International Law 296;

[410] Virally,M. La distinction entre textes internationaux de portée juridique et textes internationaux dépourvus de portée juridique (à l'exception des textes émanant des organisations internationales),Annuaire de l'Institute de Droit International, Tome 1 1983) paras 144 and 230

[411] ILC (2018), Report of the International Law Commission on the Work of its Seventieth session UN Doc (A/73/10), Conclusion n. 12; ICJ (1996) Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion) Rep 226, para 70; Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965 (Advisory Opinion)

[412]Examples are: the guidelines of the International Atomic Energy Agency (AEIA), which preceded the adoption of a Convention on the timely notification of a nuclear accident. Similarly, the 1992 Rio Declaration also contributed to the conclusion of successive international treaties, such as the Framework Convention on Climate Change.

[413] The ICJ, for instance, has interpreted the provisions of the UN Charter in light of the resolutions of the General Assembly in its ruling concerning the Military and Paramilitary Activities in Nicaragua. This function does not lie exclusively with the resolutions of the General Assembly; rather, it can also be associated with other soft law instruments, when they are indicative of a clear will of the States.

[414] Some cases seem to demonstrate the tendency of internal courts to resort to non-binding instruments. In the field of refugee protection, the House of Lords of the UK and the High Court of Australia made reference to the Handbook on Procedures and Criteria for Determining Refugee Status published by the UNHCR to interpret their respective States' obligations in the application of the 1951 Refugee Convention. The Supreme Court of Canada interpreted an internal law on child pornography in the light of a report of the UN Special Rapporteur on the sale of children. Scholars agree that such practice shows that soft law instruments can have an interpretive and even a persuasive function.

In conclusion, considering such arguments, it results that the non-binding nature of the instruments adopted to define the human rights obligations of business entities has significance in international law. As a matter of fact, non-binding instruments as the UNGPs may influence the conduct of actors in international law, generating legitimate expectations and may contribute to the evolution or recognition of customary rules or to the conclusion of legally binding international treaties in the B&HR field. The path towards the conclusion of a binding treaty seems to confirm the view that non-binding instruments such as the UNGPs can serve as a basis for the evolution of binding norms**.** Moreover, primary rules of international law might influence the secondary rules that define the liability of the same entities for human rights violations and inspire reflections on international state responsibility.
In the next sections the different relevant sources and instruments of the B&HR framework will be unpacked to systematize the B&HR landscape and to understand its relevance for public buyers.

Extraterritorial Jurisdiction and Non-State Actors

In an increasingly globalised world, with a significant increase of activities of transnational corporations, growing investment, trade flows between countries, and the emergence of global supply chains, the number and complexity of cross-border human rights abuses have raised.[415] Such developments give particular significance to the question of extraterritorial human rights obligations of States. [416]

In the traditional view, States are the typical subjects and main addressees of international human rights norms according to the principles of sovereign equality and independence of States, connected to the principle of non-interference in the internal affairs of other States. As social aggregates, States are capable of independently exercising their threefold internal sovereignty based on jurisdiction to prescribe, to adjudicate and to enforce. In details, domestic jurisdiction is strictly linked to the two fundamental and interconnected elements of territoriality and nationality.[417] Jurisdiction is, indeed, the right and authority of the State to regulate its own public order and to legislate for everyone within its territory. Nonetheless, States are also entitled to legislate for their nationals with some actions extending over national boundaries[418], as in case of extraterritorial violations of human rights. [419]

As recognized by a flourishing case-law, for example under the International Court of Justice (ICJ) and regional courts as the European Court of Human Rights (ECtHR), there are two specific circumstances where human rights jurisdiction is recognised in relation to extraterritorial acts[420]: where the State exercises *"effective overall control"*[421] of a geographical area beyond its own borders, referring to the "*spatial model" of jurisdiction;*[422] where a state "*exercises authority or control over an individual*"

[415] Palombo D. (2023) Extraterritorial, Universal, or Transnational Human Rights Law? Israel Law Review (2023), 56, 92–119, Cambridge University Press

[416] On extraterritoriality and human rights see: Cassel D., 2020, State Jurisdiction over Transnational Business Activity Affecting Human Rights in Deva, Surya & Birchall, David. (2020). Research Handbook on Human Rights and Business. Edward Elgar Publishing.
O'Brien, C., (2018) The Home State Duty to Regulate the Human Rights Impacts of TNCs Abroad: A Rebuttal. Business and Human Rights Journal. Vandenhole, W. (2015). Challenging Territoriality in Human Rights Law: Building Blocks for a Plural and Diverse Duty-Bearer Regime, Routledge. Gibney, Mark, Gibney Ed, and Skogly (2010) Universal Human Rights and Extraterritorial Obligations, Philadelphia: U of Pennsylvania,Print. Pennsylvania Studies in Human Rights. Gibney, M., Gibney E., Türkelli E., Krajewski E., and Vandenhole (2022), The Routledge Handbook on Extraterritorial Human Routledge, Print. Routledge International Handbooks.

[417] Tanzi, A. (2017) International Law, A concise Introduction

[418] Only legislative jurisdiction has the power to operate extraterritorially, whereas executive and judicial jurisdiction are considered territorial

[419] UNCESCR (2017) General comment No. 24 (2017) on State obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities, p.8

[420] O'Brien C.M. & Ortega O.M. (2018) Discretion, Divergence, Paradox: Public and private Supply Chain Standards on Human Rights

[421] ECtHR (1995) Loizidou v Turkey, App.No.15318/89, Judgment (Preliminary Objections), 23 March 1995, para. 62: the ECtHR emphasised that Turkey exercised effective control operating "overall"; in such circumstances, it was unnecessary to identify whether the exercise of control was detailed. So, if the State is in effective overall control of a territorial unit, everything within that unit falls within its "jurisdiction", even if at lesser levels powers are exercised by other actors.

[422] See ICJ cases: Bankovic and Others v Belgium and Others, App. No. 52207/99; Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory: Advisory Opinion (9 July 2004), 136, paras.107-112; Armed Activities on the Territory of the Congo (Congo v Uganda), Judgment 19 December 2005, paras.178-180.

outside its own territory, according to the "*personal*" or *"state agent authority and control*" model of jurisdiction.[423]

Regarding the global supply chain context, the UNCESCR General Comment n.24 clarifies that States parties must:

> "Take the steps necessary to prevent human rights violations abroad by corporations domiciled in their territory and/or jurisdiction (whether they were incorporated under their laws, or had their statutory seat, central administration or principal place of business on the national territory), without infringing the sovereignty or diminishing the obligations of the host States under the Covenant".

Furthermore, it clarifies that extraterritorial obligations arise when a State party may influence situations located outside its territory by controlling the activities of corporations domiciled in its territory and/or under its jurisdiction, and thus may contribute to the effective enjoyment of economic, social and cultural rights outside its national territory.[424]

Both the Covenant and human rights case law have evidenced the existence of an extraterritorial obligation for the State to protect, respect and fulfil human rights in case of infringements of Covenant rights occurring outside their territories due to the activities of business entities over which they can exercise control, especially in cases where the remedies available to victims before the domestic courts of the State where the harm occurs are unavailable or ineffective. Such obligations have been further developed within the recently consolidated Business & Human Rights subfield of international law which will be addressed in the next paragraph.

3.1.2 Business & Human Rights Specific Legal Sources, Impacts and Road Ahead

Core UN-led initiatives forming the B&HR legal framework started in the 1970s with early-stage developments as discussions on a possible UN Code of Conduct and UN Norms negotiation. Overall, States have faced a difficult path in seeking to establish corporate responsibilities for human rights, leading to multiple soft-law initiatives blossoming in the last decades. Such initiatives are mainly of non-binding and voluntary nature, close to self-regulation.[425] Most relevant ones were promoted in the 2000s with the adoption of the UN Global Compact adoption, the Ruggie's *Protect, Respect, Remedy Framework* and the UN Guiding Principles on Business & Human Rights (UNGPs) endorsement, now in its second decade of implementation (UNGPs +10 Roadmap). Furthermore, discussions on potential obstacles and benefits in the route towards a possible B&HR Treaty hardening soft law processes are ongoing and will be addressed. Transcending the hard-soft law binary also alternative international law mechanisms, as a possible framework convention must be considered.

Early-Stage Developments: The UN Code of Conduct

The 1970s marked the beginning of discussions on corporate social responsibility as relevant concept to modern global business. A starting point was the UN Economic and Social Council (ECOSOC) Resolution adopted in 1972, stating the following extract from the 1971 UN World Economic Survey:

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[423] See ICJ cases: Lopez Burgos v Uruguay (1981) 68 ILR 29, Communication No. R12/52, UN Doc. Supp. No. 40 (A/36/40) at 176); Celiberti de Casariego v Uruguay, Communication No. R 13/57, UN Doc. Supp No. 40 (A/37/40) at 157 (1981); Öcalan v Turkey, App. No. 46221/99, Judgment, 12 Mar 2003, para.93, Öcalan v Turkey [GC] App. No. 46221/99, Judgment, 12 May 2005; Al-Skeini and others v UK, App. No.55721/07 7, Judgment, 7 July 2011.

[424] UNCESCR (2017) para 28. In that regard, the Committee also takes note of General Comment No. 16 (2013) on State obligations regarding the impact of the business sector on children's rights, of the Committee on the Rights of the Child, as well as of the positions adopted by other human rights treaty bodies.

[425] Bernaz, N. (2016), p. 163

> "While corporations are frequently effective agents of transfer of technology as well as capital to developing countries, their role is sometimes viewed with awe, since their size and power surpass the host country's entire economy. The international community has yet to formulate a positive policy and establish machinery for dealing with the issues raised by the activities of these corporations".[426]

ECOSOC requested the Secretary General to appoint a study group of eminent persons to study the role of multinational corporations and their impact on the process of development. The Report on Multinational Corporations in World Development by the group outlined the need to elaborate a set of devices and institutions to guide the multinational corporations exercise of power and to "introduce some form of accountability to the international community into their activities".[427] The report suggested the elaboration of a "broad international Code of Conduct"[428] as an instrument to cover both corporate and governments activities. The works for a draft Code of Conduct for Transnational Corporations were initiated in the early 1980s[429] by an Inter-governmental Commission on Transnational Corporations (CTNC) and the Centre on Transnational Corporations. The negotiations of a UN Code of Conduct occupied the UN for decades, with the first draft presented by the Commission in 1982. However, discussions on the draft Code lasted for over a decade and eventually came to an end in 1992. Indeed, a unanimous agreement was not reached. The Commission envisaged to impose not only obligations on governments to make corporations abide by code's provisions, but also the possibility for the code to impose obligations directly on corporations to respect human rights[430], a controversial point given the traditional position which denies multinational corporations the status of subjects of international law.[431] This point, indeed, led to major criticism for the code and disagreement on the Code, whose work was abandoned in 1993. The UN work on these issues was transferred to UNCTAD and the Commission was dissolved. [432]

Nonetheless, the story of the failed draft Code of Conduct for multinational enterprises shows that States and corporations were to some extent not reluctant to the idea of introducing some regulation at international level. Indeed, some elements resurfaced after 1992. Following initiatives, including the Global Compact, the UN Draft Norms and the UNGPs flow from the work done around the draft Code and the efforts of the Commission to bridge the corporate accountability gap.[433] The failure of the Code prompted new initiatives also from other regional organizations, as the OECD adopting the OECD Guidelines for Multinational Enterprises in 1976. Further, voluntary standards started to blossom for corporate responsibilities for labour issues under the ILO mandate, with the ILO's Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy in 1978. Both initiatives will be addressed later on in this chapter.

The UN Global Compact

Regardless the failures to adopt regulatory instruments as the UN Code of Conduct and lately the UN Norms, a parallel path based on soft law was followed leading to more successful outcomes, as

[426] UN ECOSOC (1972) World Economic Survey 1971, Current Economic Developments, UN Doc E/5144, p.10
[427] UNDESA (1973) Report on Multinational Corporations in World Development, p. 2
[428] Ibid, p. 102
[429] See: Melish, Tara J. and Meidinger, E. (2011) Protect, Respect, Remedy and Participate: 'New Governance' Lessons for the Ruggie Framework; Mares R. (2012) The UN Guiding Principles on Business and Human Rights: Foundations and Implementation, Martinus Nijhoff Publishers, Buffalo Legal Studies Research Paper No. 2012-019; Deva, S. (2021). The UNGPs and its Predecessors: Progress at a Snail's Pace? in Bantekas I., Stein M.(eds), The Cambridge Companion to Business and Human Rights Law (Cambridge Companions to Law, pp. 145-172). Cambridge: Cambridge University Press.
[430] UN (1983) Draft United Nations Code of Conduct on Transnational Corporations, 22 ILM 192
[431] While the idea of corporations having human rights responsibilities did not appear to meet with much opposition, developed States were concerned with rights of corporations vis-à-vis host States and preferred a voluntary rather than a binding Code. In part this preference for a voluntary approach was largely driven by corporations who were focused on ensuring that "no legally binding norms emerged" in this process
[432] Muchlinski, P. (2021). The Impact of the UN Guiding Principles on Business Attitudes to Observing Human Rights. Business and Human Rights Journal, 6(2), 212-226.
[433] Bernaz, N. (2016), p. 176

the adoption of the UN Global Compact. Launched in 2000 by initiative of the UN Secretary General Kofi Annan[434], it refers to a *platform for dialogue* among corporations and other stakeholders rising awareness on human rights. It is a policy initiative that advocates good corporate practices in several areas[435], including human rights, the environment, labour and corruption.[436]

Differently from the drafted Code of Conduct, the UN Global Compact is not a regulatory instrument, rather a "norms-based learning forum and engagement mechanism" which would act as a "complement to other approaches, including business initiatives and law-making"[437], also described as a guide-dog, rather than a watch-dog.[438] Ten principles inspired by key international human rights, labour, environment, anticorruption norms and treaties are the guides for this learning forum. Regarding human rights principles, the business community is required to support and respect the protection of international human rights, making sure that enterprises are not complicit to human rights abuses. About labour rights, business is required to uphold freedom of association and recognize the right to collective bargaining, eliminating of all forms of forced and compulsory labour and child labour, eradicating discrimination of employment and occupation.

The soft law nature of the UN Global Compact is evidenced by the companies' voluntary participation, submitting an annual *Communication on Progress* (COP) to disclose their efforts. Main expectations are to implement the principles as an integral part of the business strategy, in day-to-day operations, organizational culture and incorporating them in the decision-making processes of the highest-level governance body (the Board). The Global Compact also includes an embryonic complaint mechanism in cases of systematic human rights abuses[439] and in case of failure to disclose the COP, it is publicly notified on the Global Compact website, with possible detrimental effects on the reputation of the company[440]. Regardless the increasing participation to the UN Global Compact by over 12.000 companies, nonetheless flaws and inherent limitations of its voluntary nature have been outlined by academics and practitioners in terms of impact, effectivity and enforcement.

The Draft Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises

After the introduction of non-voluntary standards for corporations, States made an effort at the UN once again to establish binding norms for corporations in relation to human rights.[441] The result was the *UN Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with regard to Human Rights* (UN Norms), the first non-voluntary initiatives to detail corporate obligations for human rights. Similar to the Code of Conduct, this instrument was meant to be non-voluntary and universal in scope and it was then abandoned due to lack of state support at the UN and in part due to business opposition.[442]

The Norms contained a list of obligations to which companies had to comply in the areas of non-discrimination, right to security, forced labour, children's rights, health and safety, adequate remuneration, collective bargaining, freedom of association, bribery, consumer protection and

[434] On 31 January 1999, UN SG Kofi Annan declared at the WEC of Davos: "I propose that you, the business leaders gathered in Davos, and we, the UN, initiate a global compact of shared values and principles which will give a human face to the global market"
[435] Rasche, A. (2009). "A Necessary Supplement": What the United Nations Global Compact is and is not. Business & Society, 48(4)
[436] Bernaz, N. (2016), p.178
[437] Ruggie, J. (2017) "The Social Construction of the UN Guiding Principles on Business & Human Rights." HKS Faculty Research Working Paper Series RWP17-030.
[438] Choudury B. (2023), The UN Guiding Principles on Business and Human Rights: A Commentary, Edward Elgar Publishing
[439] Upon receiving a complaint against a company, the GC Office may facilitate a resolution of the dispute either directly by contacting the company or by referring the dispute to the local GC network or by suggesting the use of other mechanism (for instance the OECD National Contact Point).
[440] Global Compact Website: Integrity Measures Section
[441] Weissbrodt D., Kruger, M. (2003) Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights, 97 AM. J. INT'L L. 901
[442] UN Sub-Commission on the Promotion and Protection of Human Rights (2003) Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights

environmental protection. Thus, the Norms were meant to be a restatement of international law, both customary and treaty-based but addressed specifically to companies but widening the obligations derived from international human rights law.

The Draft Norms were developed by the UN Sub-Commission on the Promotion and Protection of Human Rights in 1997 and transmitted for approval in 2003, however approval never came. They rested on the controversial idea that companies had obligations under international human rights law creating ambiguity. Further, the norms imposed the same obligations on companies and States with regard to human rights, meaning that the private sector was expected not only to respect but also to protect, promote and secure fulfilment of human rights". Moreover, the obligations applied not only on transnational corporations but to all business enterprises, attracting debate and oppositions from the private sector.

Following such failure, given the necessity to further find consensus and develop instruments on the matter, the UN Secretary General decided to appoint a Special Representative on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises to clarify standards and not to develop a regulatory instrument *per se*. Professor John Ruggie from Harvard University, one of the architect of the UN Global Compact, was appointed to operate in such "divisive debate" to explore spaces of consensus and cooperation among business, civil society, governments, international institutions with respect to human rights.[443]

The *Protect, Respect and Remedy* Framework and the UNGPs

Regarding the development of soft law tools with regulatory nature, after unsuccessful negotiations of the UN *Draft Norms*, the UN Commission on Human Rights issued a report on the "scope and legal status of existing initiatives and standards" relating to corporations and human rights. Among other findings, the report concluded that "there are gaps in understanding the human rights responsibilities of business with regard to human rights" and that there is increasing interest in a UN statement of universal human rights standards applicable to business. Given these findings, the UN Commission of Human Rights appointed John Ruggie as Special Representative, who led the development of the "Protect, Respect and Remedy Framework" and the UNGPs.

In 2008, the UN endorsed the *"Protect, Respect and Remedy Framework"* for business and human rights, resting on three distinct but interrelated and complementary pillars: the state duty, under international human rights law, to protect against corporate human rights harm; the corporate responsibility to respect human rights as a social expectation; the rights of victims to an effective remedy, whether judicial or non-judicial.[444] The Framework outlined the broad contours of the contents of each of the three pillars[445], bypassing the contentious issues related to human rights obligations of businesses under international law which had been previously problematic. The Framework was warmly welcomed by the UN Human Rights Council, enabling to extend the Special Representative mandate to "provide views and concrete and practical recommendations on ways to strengthen the fulfilment of the duty of the State to protect", to elaborate on the "scope and content of the corporate responsibility to respect" and "to explore options and make recommendations for enhancing access to effective remedies".[446]

B&HR increasing *momentum* has culminated with the unanimous endorsement by the UN Human Rights Council of the *United Nations Guiding Principles of Business and Human Rights*

[443] Ruggie J. (2013) Just Business, New York and London: WW Norton and Company
[444] Bernaz, N. (2016). Business and human rights: History, law and policy - Bridging the accountability gap. Taylor and Francis.
[445] Chouduri B., (2023) The UN Guiding Principles on Business and Human Rights- A Commentary, Elgar Commentaries, p. 4
[446] UN Human Rights Council, "Mandate of the Special Representative of the Secretary General on the issue of human rights and transnational corporations and other business enterprises – Resolution 8/7

(UNGPs)[447] in 2011, nowadays considered the most authoritative global framework for preventing and addressing adverse business-related human rights impacts. UNGPs are constituted of a set of guidelines for States and companies to prevent and address human rights abuses committed in business operations, operationalizing the "*Protect, Respect, Remedy Framework*"[448]. The 31 Guiding Principles apply to all States and to all businesses regardless of "size, sector, location, ownership and structure". They are to be "read individually and collectively, in terms of their objective of enhancing standards and practices with regard to business and human rights" However they do not create new international legal obligations, nor limit any legal obligations otherwise imposed upon a State.[449]

The UNGPS structure entails three sections addressing each Framework's pillar: *the State Duty to Protect* (GPs 1-10), the *Corporate Responsibility to Respect* (GPs 11-21) and the *Access to Remedy* for the victims of corporate harm (GP 22-31).

Under *Pillar 1*, States have the duty under international human rights law to protect everyone within their territory and/or jurisdiction from human rights abuses committed by business enterprises. States must adopt effective laws and regulations to prevent and address business-related human rights abuses and ensure access to effective remedy. Therefore, it is required to states to prevent, investigate, punish and redress human rights abuses in domestic business operations, setting also clear expectations that companies domiciled in their territory and jurisdiction respect human rights in every country and context in which they operate.

Pillar 2, outlines business enterprises' *responsibility to respect* human rights wherever they operate and whatever their size or industry. It is clarified that such responsibility exists independently of States' ability or willingness to fulfil their duty to protect human rights, States and businesses retain these distinct but complementary responsibilities. Companies are required to identify their actual or potential impacts, prevent, mitigate and remedy human rights abuses that they cause or contribute to. Therefore, companies must know and show that they respect human rights in all their operations, having necessary policies and processes in place. This responsibility includes three components: first, companies must institute a policy commitment to meet the responsibility to respect human rights. Second, they must undertake *human rights due diligence* to identify, prevent, mitigate and account for their human rights impacts. Finally, they must have processes in place to enable remediation for any adverse human rights impacts they cause or contribute to. The corporate responsibility to respect human rights will be addressed in depth in Chapter 4.

Pillar 3, recalls the fundamental right of individuals and communities to access effective remedy when their rights are violated by business activities. The state duty to provide access to effective remedy includes taking appropriate steps to ensure that State-based domestic judicial mechanisms are able to effectively address business-related human rights abuses. However, the access to remedy principles do not only apply to States: business enterprises, on their side, should provide for effective mechanisms addressing grievances from individuals and communities adversely impacted. The Pillar provides overview on state and company-based non-judicial grievance mechanisms, setting their effectiveness criteria.[450]

The UNGPs Impacts and the Road Ahead

As the UNGPs turned ten in 2021, the UN Working Group on Business and Human Rights, mandated by the Human Rights Council to promote dissemination and implementation of the UNGPs worldwide, took stock of the first decade of implementation. The stocktaking exercise highlighted that the UNGPs have led to significant progress providing a common framework for all stakeholders in managing business-related human rights risks and impacts. Yet, considerable challenges remain in

[447] UNCHR, (2008) Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework' (21 March 2011) UN Doc A/HRC/17/31

[448] UN Working Group on Business and Human Rights, consisting of five independent experts, was appointed to guide the dissemination and implementation of the UN Guiding Principles

[449] Ibid 1

[450]OHCHR (2011) Grievance mechanisms must be legitimate, accessible, predictable, equitable, transparent and rights-compatible.

terms of coherent implementation with respect to ensuring better protection and prevention of adverse human rights impacts, with particular attention to the most marginalized and vulnerable, and to ensuring access to remedy for harms that occur. Therefore, raising the ambition and increasing the pace of implementation to improve coherence and create greater impact have been stressed as crucial objectives of the second decade of implementation.

Challenges hindering an effective enforcement are primarily linked to the voluntary and soft law nature of the B&HR legal framework, lacking a centralized mechanism for implementation. As recognized by John Ruggie, structural governance gaps hamper effectiveness and create accountability challenges which need to be addressed with a *smart-mix* of voluntary and binding solutions which nonetheless require coherence.[451] The lack of coherence creates also coordination challenges in international law, requiring systemic integration, especially when confronting with an increased legal fragmentation and the proliferation of newly specialized subfields and new types of international norms outside acknowledged sources. For example, low uptake and low commitment of States in operationalizing UNGPs are demonstrated by the fact that only 42 countries worldwide have adopted or are currently developing a B&HR National Action Plan[452], recommended as policy tool by the UN Human Rights Council. This represents a missed opportunity as NAPs constitute a powerful means to foster coherent implementation at policy and strategic level, as outlined in the Guidance on business and human rights NAPs (2016).[453] More on adopted the B&HR NAPs and existing practices with specific reference to public procurement will be explored in Chapter 5, with focus on the European Union context, where the greatest number of NAPs have been drafted.

The UN Working Group on BHR reports also that many barriers to access justice remain for rights-holders[454]. Overall, it appears that while progress has been made, many of the root problems firstly identified by the Special Representative are still evident. To proactively address all such challenges, the Working Group has identified eight action areas for moving faster and with greater ambition to support the overall urgent need for more coherent action, drafting the UNGPs +10 Roadmap.[455] The Roadmap elaborates on the priority goals connected to each action area, setting out what needs to happen over the next decade to scale up UNGPs integration and implementation and corresponding supporting actions to be taken by States and businesses, as well as other stakeholders. For example, "improving policy coherence to reinforce more effective government action" (Goal 2.1) has been identified as one priority goal, underlining the need for policy coherence as means for realizing better protection of people in business contexts. This means, for example, that laws and policies that govern the creation and ongoing operation of business enterprises, such as corporate laws but also public procurement procedures, should be leveraged to shape more responsible business conduct. The Roadmap, indeed, clarifies that the human rights obligations of States apply also when they act as economic actors, or when they outsource public services that lead to adverse human rights impacts.

Hardening Soft-Law Processes: Potential Obstacles and Benefits towards a Treaty

A core priority identified by the UN Working Group for the second decade of implementation is to seize the mandatory wave and develop a full smart mix (Goal 2.2). As outlined by the Working Group, one of the most remarkable developments of the last decade of implementation has been the growing understanding of the need to a legal requirement. Indeed, making emerging mandatory requirements effective and developing regulatory options that work in all markets is essential, while

[451] Ruggie J.G. (2017) Multinationals as global institution: Power, authority and relative autonomy, Kennedy School of Government, Harvard University, Cambridge, MA, USA
[452] DIHR (2023) National Action Plans on Business & Human Rights Portal, last accessed 08/2023.
[453] UN Working Group on Business & Human Rights (2016) Guidance on National Action Plans on Business and Human Rights
[454] UN Human Rights Council (2021), Guiding Principles on Business & Human Rights at 10: Taking Stock of the First Decade – Report of the Working Group on the issue of human rights and transnational corporations and other business enterprises A/HRC/47/39.
[455] Human Rights Council (2021) UNGPs 10+ A Roadmap For The Next Decade of Business and Human Rights

complementing these efforts with a full "smart mix" of measures to foster responsible business that respect human rights. The UNGPs expect States to "consider a smart mix of measures – national and international, mandatory and voluntary" – all of which are needed to address accountability gaps.
The trend towards hardening soft B&HR instruments has been corroborated by a long process of negotiations (still not concluded) of a potential Treaty on Business and Human Rights under the auspices of the UNHRC, particularly the Open-ended Intergovernmental Working Group on transnational corporations and other business enterprises with respect to human rights appointed since 2014.[456] The negotiation process started in 2017[457] with the Elements for the draft legally binding instrument[458], followed by the 2018 Zero Draft[459], the 2019 Revised Draft[460], the 2020 Second Revised Draft[461] and the 2021 Third Revised Draft.[462] The Third Draft on the *Legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises* has been object of State-led direct intergovernmental negotiations during the 8th session in October 2022[463] proposing further amendments. In October 2023, the 9th negotiation session has taken place, but significant work has been proposed prior to this date in order to meet the goal of advancing the text.[464]

Regarding the treaty coverage and content, the Third draft would apply to all business activities[465], including the ones of a transnational character. The treaty purports to clarify and facilitate not only the effective implementation of the States obligation to *respect, protect, fulfil* and promote human rights in the context of business activities, but also to ensure respect and fulfilment of the human rights obligations of business enterprises and to prevent and mitigate the occurrence of human rights abuses by effective mechanisms of monitoring and enforceability. The focus of the proposal is from the victim's perspective to ensure access to justice and effective, adequate and timely remedy. Furthermore, specific articles aim at strengthening mutual legal assistance and international cooperation to prevent and mitigate human rights abuses in the context of business activities.[466]

Concerning the link with public procurement, direct reference to public contracts and public procurement procedures is missing in the current text. Explicit reference has only been included in the First Draft[467], outlining under the *Obligation of the States* that:

> "States shall take all necessary and appropriate measures to ensure that public procurement contracts are awarded to bidders that are committed to respecting human rights, without records

[456] Ecuador and South Africa sponsored a resolution at UNHRC to draft a binding instrument on Transnational Corporations and Other Business Enterprises with Respect to Human Rights, to ensure prevention of B&HR abuse and access to justice and reparation for victims. After that the open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights was established in 2014 in response to Human Rights Council resolution 26/9 with a mandate to elaborate an international legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises
457 De Shutter (2015), Towards a New Treaty on BHR, Business & Human Rights Law Journal, p. 41
[458] OHCHR (2017) Elements for the Draft Legally Binding Instrument on Transnational Corporations and other Business Enterprises with Respect to Human Rights, Chairmanship of the OEIGWG established by HRC Res. A/HRC/RES/26/9
[459] OHCHR (2018) Legally Binding Instrument to Regulate, in International Human Rights Law, the Activities of Transnational Corporations and Other Business Enterprises, Zero Draft 16.7.2018
[460] OHCHR (2019), Legally Binding Instrument to Regulate, In International Human Rights Law, The Activities of Transnational Corporations and Other Business Enterprises, OEIGWG Chairmanship Revised Draft 16.7.2019
[461] OHCHR (2020), Legally Binding Instrument to Regulate, In International Human Rights Law, The
Activities of Transnational Corporations and Other Business Enterprises, OEIGWG Chairmanship Second Revised Draft 06.08.2020
[462] OHCHR (2021), Legally Binding Instrument to Regulate, In International Human Rights Law, The Activities of Transnational Corporations and Other Business Enterprises, OEIGWG Chairmanship Third Revised Draft 17.08.2021
[463] Seventh session of the open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights
[464] OHCHR (2023) Open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights: Update and invitation for written inputs
[465] Art 3: requiring to States Parties to establish in their law, a non-discriminatory basis to differentiate how business enterprises discharge these obligations commensurate with their size, sector, operational context or the severity of impacts on human rights
[466] Deva, S., & Bilchitz, D. (2017). *Building a Treaty on Business and Human Rights: Context and Contours*. Cambridge: Cambridge University Press.
[467] OHCHR (2017)

of human rights violations or abuses and that fully comply with all requirements, as established in this instrument".

Thus, the first negotiated draft emphasized that public procurement contracts can be a key instrument linking the public and private sector. A possible ratification of a B&HR Treaty, clarifying that the State has a duty to set up mandatory measures on human rights due diligence for the business, which involve also public procurement operations would be the most desirable solution to drive B&HR through public procurement.

In terms of pros and cons of a potential treaty, several debates and opposing views have raised in the academia and practice. On one side, a treaty has been welcomed as a fundamental way for *hardening the soft* and consolidate the B&HR uptake complementing and enhancing the UNGPs and pre-existing voluntary measures. Among multiple arguments constituting good reasons to adopt a treaty there are: the effectiveness derived from the binding nature of treaties for its application and the importance of levelling the playing field with a mandatory instrument; the creation of an international mechanism clarifying duties and legal consequences, creating mutual assurance and addressing competing obligations; the role in increasing access to justice for the victims.[468] However, the negotiations process has triggered opposed views on the desirability and possible content of the proposed treaty, with difficulties in reaching international *consensus* due to disagreement and competing interests particularly between the Global North countries and the Global South.[469]. According to some criticisms, the proposed treaty is too ambitious and broad in scale, risking to create "an unworkable one-size-fits-all approach", hindering legality and predictability in practice. As argued by John Ruggie, there is a wide diversity of concerns that need to be addressed which cannot be captured by one comprehensive treaty. A treaty would also need to establish a effective mechanisms for norm development and adjudication of particular disputes, however it would not be meant to address every single issue that arises in this complex arena but to create the legal 'basic structure'[470] in terms of which such legal matters would be resolved. Thus, according to some arguments, included John Ruggie ones, the need to counterbalance a long-term treaty project and the urgency to act to create short-term impacts for protecting victims, requires to think about *smart* and flexible solutions to agree on an international framework. Moreover, a treaty could distract from the UNGPs implementation, already accepted by consensus in the Human Rights Council. As a recent report produced by the International Commission of Jurists[471]remarks, there is no need to consider the ongoing treaty process and the UNGPs as mutually exclusive: indeed, they can complement one another.

Consequently, the difficulties in reaching out international *consensus* slow down the negotiation process, delaying its potential implementation and fostering legal uncertainty, creating a situation of stalemate and impasse. Some scholars have outlined that other approaches and more flexible regulatory routes should be canvassed alongside pursuit of the treaty to solve this impasse. The aim is to combine a legal *basic structure* establishing effective mechanisms for norms development and adjudication, with the possibility to narrow-down the subject-matter in subsequent sub-agreements. For example, discussions have raised on a potential Business & Human Rights Framework-Convention as possible way to transcending the hard-soft law binary towards alternative international law mechanisms.[472] Evidence shows that traditional international law-making is in a process of stagnation, both

[468] Deva, S., Bilchitz D., (2017)

[469] The outcome reflects the longstanding disagreement among States as they attempt to find a consensus on the development of directly binding international norms in the area of business and human rights, with the still highly polarized ongoing debate between two conflicting schools of thought: those seeking a binding treaty, and those opposing it, as the majority of the Western Countries did, with the United States explicitly boycotting the negotiations and with the EU maintaining ambiguity.

470 Rawls, J. (2001) The Law of Peoples, Harvard University Press, pp. 3–10

471Ruggie,J. Closing Plenary Remarks, UN Forum Business and Human Rights

[472] Botta, G. (2022) Unpacking the Potentials of a Framework Agreement on Business and Human Rights: An Opportunity to Transcend the Hard and Soft-Law Dichotomy for More Policy Coherence, Völkerrechtsblog, 20.06.2022

quantitatively and qualitatively, opening the door to emerging alternative forms of cross-border cooperation. Thus, adopting a "*framework convention and protocol approach*"[473], instead of more traditional single *piecemeal treaties*, constitutes a valuable option, being a "hard law instrument with a soft law content".[474] Given its inherent flexibility it could serve as regulatory umbrella with treaty-force, setting binding general objectives and main principles building on progressive implementation of the UNGPs, and functioning as springboard for more specific standards-setting to be agreed through protocols at a second step. For instance, protocols on specific subject matters might address key-parameters for due diligence legislations, peculiar standards in high-risk sectors requiring tailored approaches, specific regimes as in the case of the *State-business nexus* and public procurement which have not been addressed by the last Draft.[475] So, according to some scholars, a framework-agreement inspired by the UNGPs could be a desirable and feasible option to consolidate a BHR international standard complementing the UNGPs implementation and transcending the binary of a *hard-vs-soft law* dichotomy.[476]

Complementary Initiatives: ILO and OECD Developments

In the international B&HR panorama, the UNGPs and the potential negotiation of a treaty are core milestones, however in the process of crystallization of a newly consolidated field of human rights law also other sources have played an influencing role. As anticipated above, the failure of the UN Code of Conduct prompted parallel initiatives also from other regional organizations as the OECD and fuelled UN agencies complementary works, for example under the ILO mandate.

The ILO Legal Instruments

Key developments in consolidating B&HR have been prompted by the International Labour Organization (ILO)[477], UN specialized agency with the mandate to protect labour rights and promote decent work for all[478] much before the UNGPs.[479]

Alongside international labour standards, including conventions and recommendations, ILO legal sources include declarations. In 1977, ILO adopted the *Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy (MNE Declaration)*[480]lastly amended in 2017[481] at its fifth edition, including adaptation to new labour standards and policy outcomes of the *International Labour Conference*, the *UNGPs* and the UN *2030 Agenda for Sustainable Development*. The Declaration introduced in 1978 included voluntary standards related to corporate responsibilities for labour issues. While ILS are aimed at governments, in the context of business-related human rights violations, the ILO MNE Declaration can be mentioned as a direct guidance for enterprises, addressing labour standards, protection and labour-related social responsibility, fostering social policy, inclusive, responsible and sustainable workplace practices. The aim is to encourage MNE's positive contribution to economic and social progress and the realization of decent work for all, addressing: employment, training, conditions of work and life, industrial relations, general policies, all founded on principles

[473] Matz-Lück N.(2009) Framework Conventions as a Regulatory Tool, Goettingen Journal of International Law 1 (2009) 3, 439-458
[474] De Feyter K., Type and Structure of a legally binding Instrument on the Right to Development, Research Group on Law and Development University of Antwerp
[475] Martin-Ortega O, O'Brien C. (2019), Public Procurement and Human Rights: Opportunities, Risks and Dilemmas for the State as Buyer, Cheltenham, UK: Edward Elgar Publishing.
[476] O'Brien C. (2020) Transcending the Binary: Linking Hard and Soft Law Through a UNGPS-Based Framework Convention
[477] The idea that workers have labour rights to be protected have developed progressively in the 19th century, receiving international recognition with the creation of a specialist body in 1919. The ILO, UN specialized agency, was established in 1919 as a permanent forum for the continuing improvement of labour standards. A distinctive feature of the organization is the principle of tripartism, according to which standards are systematically negotiated with employers and workers
[478] ILO Constitution: for each country, the government have two votes while labour and employers' representatives each hold one vote
[479] Bernaz, N. (2016)
[480] Adopted by the Governing Body of the ILO at its 204th session (Geneva, November 1977),
[481] ILO (2017) Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy (MNE Declaration)

contained in international labour standards.[482]The Declaration is relevant for BHR because rather than labour standards, it applies to governments and directly to employers which constitutes a rarity in the international legal landscape. Indeed, it is the only global instrument in this field elaborated and adopted together by governments, employers and workers, according to the *tripartism principle*. According to Principle 8, "all parties concerned" by the Declaration, including multinational enterprises themselves "should respect the Universal Declaration of Human Rights and the corresponding International Covenants adopted by the General Assembly of UN". Therefore, some responsibilities are placed on multinational companies, to contribute to the realization of the (1998) ILO *Declaration on Fundamental Principles and Rights at Work*. After the 2017 revision, the MNE Declaration has been aligned with the "*Protect, Respect and Remedy*" Framework and UNGPs perspective, addressing specific decent work issues related to social security, forced labour, transition from the informal to the formal economy, wages, safety and health, access to remedy and compensation of victims. Indeed, references to the UNGPs have been added in the Tripartite Declaration under para. 10.[483]

Core ILO legal sources are conventions, recommendations and declarations. At present, ILO counts 189[484] Conventions. Differently from recommendations which are not binding and provide general guidance to all member states, conventions are binding international treaties, requiring the ratifying states to align their national law and practice with their provisions, reporting periodically on their progress. A group of 8 "Core ILO Conventions" apply to all ILO Member States irrespectively whether they have ratified them or not. They have also been reproduced within the 1998 "*ILO Declaration on Fundamental Principles and Rights at Work*", establishing a minimum set of labour standards applicable in all circumstances. In the Declaration, 4 Core Labour Standards have been identified to represent the baseline standard categories applicable irrespectively of whether a state has ratified the corresponding labour conventions, elevating such rights to the level of universal human rights[485]: freedom of association and right to collective bargaining; the right not to be subjected to forced or compulsory labour; the right not to be subjected to child labour; the right not to face discrimination in employment.[486]

Regarding the interconnection between public procurement and human rights under ILO legal instruments perspective, the ILO approach to public procurement is one of the few inspired by the use of binding instruments. Indeed, the reference to ILO legally binding obligations can be considered as a powerful tool to ensure minimum level of labour conditions in public contracts. The mandatory nature of such obligations inevitably triggers State responsibility in case of direct violation or failure to act. In the field of public contracts, the need to ensure terms of contracts under human rights standards is required by specific ILO instruments. At the 1949 ILO Conference, the ILO Labour Clauses (Public Contracts) Convention (No.94), supplemented by Recommendation No.84, was adopted establishing minimum standards for those directly employed in public works and producing goods and services for the public sector. The main purpose is that employees performing work under public contracts should

[482] ILO conventions and recommendations listed in Annex I of the instrument.
[483] Choudury B., (2023), p. 6
[484] Conventions on: Freedom of association, collective bargaining and industrial relations; Forced labour; Elimination of child labour and protection of children and young persons; Equality of opportunity and treatment; Tripartite consultation; Labour administration and inspection Employment policy and promotion; Vocational guidance and training; Employment security; Social policy; Wages; Working time; Occupational safety and health; Social security; Maternity protection; Migrant workers; HIV/AIDS; Seafarers; Fishers; Dockworkers; Indigenous and tribal peoples; Specific categories of workers
[485] Kellerson, H. (1998), The ILO Declaration of 1998 on Fundamental Principles and Rights: A challenge for the future, International labour review
[486] ILO Conventions essentially concern the protection of many human and labour rights, such as the prohibition of forced labour (Forced Labour Convention No. 29 of 1930 and Abolition of Forced Labour Convention No. 105 of 1957), the provision of adequate safeguards for child labour (Minimum Age Convention No. 138 of 1973 and Worst Forms of Child Labour Convention No. 182 of 1999), freedom of association (Freedom of Association and Protection of the Right to Organise Convention No. 87 of 1948 and Right to Organise and Collective Bargaining Convention No. 98 of 1949) and the principle of non-discrimination(Equal Remuneration Convention No. 100 of 1951 and Discrimination Convention No. 111 of 1958).

not be subject to working conditions less favourable than those enjoyed by other workers in the same trade or industry.[487] This Convention is relevant for public procurement since it establishes prescriptive requirements for public buyers to ensure observance of socially acceptable labour conditions in relation to work performed on the public's account. The Convention requires the State parties to include in public contracts clauses guaranteeing workers' protection and appropriate conditions of labour.[488] The Convention applies, with some exceptions, to contracts for public works and the performance or supply of services where at least one party is a public authority. States are required to include clauses ensuring to workers conditions of labour which are not less favourable than those established by national laws and collective agreements for work of the same character in the district where the work is carried on (Article 2). In addition, even when appropriate conditions of labour are not applicable in virtue of national legislation or collective agreements, the competent public authorities must take adequate measures to ensure fair and reasonable conditions of labour for workers (Article 3).

The temptation to economize on the cost of public works by reducing labour protections should be resisted and governments "should not be seen as entering into contracts involving the employment of workers under conditions below a certain level of social protection, but on the contrary, as setting an example by acting as model employers".[489] The Convention obliges contracting states to include clauses in their public procurement procedures to ensure conditions of contract for the workers not less favourable than those established in the territory or area where the work is carried out. It also requires states to apply adequate sanctions for failure to insert those clauses in tender documentation.[490]

Regardless the potentials of such obligations in the field of public procurement and human rights, this Convention has some limitations that should be considered, partly due to the fact that it was adopted almost 70 years ago and that the ratification has been limited. The Convention, indeed, has not been successfully endorsed gaining only 60 ratifications, about one-third of ILO Member States. However, in 2008 at the *97th session of the ILO*, the *ILO Committee of Experts on the Application of Conventions and Recommendations* observing the lack of interest and little support for the idea that workers employed on public contracts need special protection in order to avoid social dumping in the sensitive area of public procurement. There is growing international pressure to apply labour standards in public contracts, as well as in private contracting in public-private partnerships, referring to sustainable public procurement or social considerations in public contracts, showing the importance to maintain the Convention No. 94. Indeed, risks posed to workers' labour conditions by competition for public contracts in 1949 are still present today: namely, that the successful tender may well be the one which pays the lowest wages, fails to provide safety equipment or coverage for accidents and has the largest proportion of informal workers, for whom no tax or social security are paid and who are not covered in practice by any legal or social protection. The ILO Committee considered that the Convention offers a concrete and effective solution to the problem of how to ensure that public procurement is not a terrain for socially unhealthy competition and is never associated with poor working and wage conditions. So, the Committee concluded that the purpose and object of the Convention remain intrinsically important.[491]

Further limits are that the Convention provides that 'adequate sanctions shall be applied, by the withholding of contracts or otherwise, for failure to observe and apply the provisions of labour clauses in public contracts' (Article 5.1). However, its content is strictly limited to labour standards and it

[487] Nielsen, H. N. (2017). Labour clauses in public contracts: ILO Convention no. 94 in the European Union after Regio-Post. Public Procurement Law Review, 26(5), 201-219.
[488] Barnard, C. (2013) 'Using procurement law to enforce labour standards' in Guy Davidov and Brian Langille (eds), The idea of labour law
[489] ILO, (2008), Report III (Part 1B) "General Survey concerning the Labour Clauses (Public Contracts) Convention 1949, No 94 and Recommendation No 84, Report of the Committee of Experts on the Application of Conventions and Recommendations
[490] Russo, D. (2018), The Duty to Protect in Public Procurement: Toward a Mandatory Human Rights Clause?
[491] The ILO has already prepared a 'Practical Guide to Convention No. 94' in order to promote awareness of the Convention.

neglects to make any reference to contract conditions applicable along supply chains. The EU legislator has also recognized the importance of the ILO Conventions in the context of public procurement procedures, recalling some Conventions in Annex X to Directive 2014/24/EU, particularly Conventions Nos 29, 87, 98, 100, 105, 138, 111 and 182. Thanks to the reference in Article 18, they have become binding even for EU Member States that have not ratified them. The impact and relevance of such article will be unpacked in Chapter 5.

The OECD Relevant Sources

Further relevant instruments in B&HR have been developed by regional organizations, as the OECD, fuelling the consolidation of multiple sources somehow relevant in the B&HR legal framework. In 1976, the first edition of the OECD Guidelines for Multinational Enterprises[492] was introduced, consisting of a broad, voluntary standards and practices for corporations to make positive contributions to economic and social progress.[493]

The OECD Guidelines for Multinational Enterprises are substantially recommendations addressed by governments to multinational enterprises operating in or from adhering countries. They provide non-binding principles and standards for responsible business conduct consistent with applicable laws and internationally recognised standards, being a multilaterally agreed and comprehensive code of responsible business conduct that governments have committed to promoting. A peculiar feature of the Guidelines is its implementation mechanism through National Contact Points (NCPs). The NCPs are agencies established by adhering governments to promote and implement the Guidelines, by assisting enterprises and their stakeholders to take appropriate measures and providing a mediation and conciliation platform.

The Guidelines have been updated in 2011,[494] alongside the consolidation process of the UNGPs, and revised for the third time in 2023. As a matter of fact, the UNGPs have had a transformative and highly influential effect on the OECD Guidelines. Indeed, Pillar II has been largely reproduced as a human rights chapter in the OECD Guidelines for Multinational Enterprises, which previously did not contain an individual chapter on human rights[495]. The Human Rights chapter recognise that States have the duty to protect human rights, and that enterprises, regardless of their size sector, operational context, ownership and structure, should respect human rights wherever they operate. Respect for human rights is the global standard of expected conduct for enterprises independently of States' abilities and/or willingness to fulfil their human rights obligations, and does not diminish those obligations. A State's failure either to enforce relevant domestic laws, or to implement international human rights obligations or the fact that it may act contrary to such laws or international obligations does not diminish the expectation that enterprises respect human rights. Furthermore, a new and comprehensive approach to due diligence and responsible supply chain management had been introduced representing significant progress relative to earlier approaches. Paragraph 5 of the Human Rights Chapter recommends that enterprises carry out human rights due diligence. The process entails assessing actual and potential human rights impacts, integrating and acting upon the findings, tracking responses as well as communicating how impacts are addressed. Human rights due diligence can be included within broader enterprise risk management systems provided that it goes beyond simply identifying and managing material risks to the enterprise itself to include the risks to rights-holders. It is an on-going exercise,

[492] OECD (2023) OECD Guidelines for Multinational Enterprises on Responsible Business Conduct
[493] Muchlinski, P. (2021). The Impact of the UN Guiding Principles on Business Attitudes to Observing Human Rights. Business and Human Rights Journal, 6(2), 212-226.
[494] The updated Guidelines and the related Decision were adopted by the 42 adhering governments on 25 May 2011 at the OECD's 50th Anniversary Ministerial Meeting
[495] Schekulin M. (2011), "Shaping Global Business Conduct: the 2011 update of the OECD Guidelines on Multinational Corporations" Columbia FDI Perspectives No. 47.

recognising that human rights risks may change over time as the enterprise's operations and operating context evolve.

Complementary guidance on due diligence, including in relation to supply chains, and appropriate responses to risks arising in supply chains are provided by further OECD instruments. The OECD Due Diligence Guidance for Responsible Business Conduct has been adopted in 2018, providing support to enterprises with practical, clear explanations of how to implement due diligence as recommended in the OECD Guidelines for Multinational Enterprises. It is the first government backed reference on due diligence which is relevant for all types of companies operating in all countries and sectors of the economy. This Guidance represents a common understanding among governments and stakeholders on due diligence for responsible business conduct and can also be used by businesses to respond to due diligence expectations of the UNGPs and the ILO Tripartite Declaration. It was developed through a multi-stakeholder process including representatives from OECD and non-OECD countries, international organisations, business, trade unions and civil society. This Guidance complements existing resources developed by the OECD to help enterprises carry out due diligence for responsible business conduct in specific sectors and supply chains including in the agriculture, minerals & extractive, garment & footwear and financial sectors.

Regarding public procurement, explicit reference to obligations of States when purchasing are missing in the Guidelines. Nonetheless, building a link between B&HR and public procurement, a OECD "Report on Integrating Responsible Business Conduct in public procurement"[496] has been issued in 2020, highlighting how to incorporate responsible business conduct[497] objectives and risk-based due diligence into public procurement systems. In details, the role that risk-based supply chain due diligence can play to support responsible business behaviour through public procurement is highlighted. Further, it encourages public procurement and responsible business conduct policymakers and practitioners to collaborate with all relevant stakeholders, drawing on good practices from across policy areas. It also identifies possible avenues to increase the impact of public procurement strategies to promote responsible business conduct objectives. Further initiatives have followed with the launch of a pilot project on due diligence in the public procurement of garment and textiles, as part of the OECD Forum on Due Diligence in the Garment and Footwear Sector in 2021.

3.1.3 Applying Business & Human Rights to Public Procurement: the State-Business Nexus

Unpacking the State Duty to Protect under the UNGPs

Pillar I of the UNGPs addresses the *State Duty to Protect* human rights. States as primary recipients of rights and obligations, hold a *duty to protect, respect and fulfil human rights* deriving from customary and treaty law rooted in conventional human rights law. Overall, the *State Duty to Protect* human rights concerns the protection of rights-holders within the state's jurisdiction from harmful actions and "abuses" committed by third parties, whether natural or legal persons (including non-state actors as corporations and suppliers to the government).[498]

UNGP 1 provides a general framework for the state duty to protect against business-related human rights abuses: States have to prevent, investigate, punish and redress human rights abuses by business

[496] OECD (2020) Report: Integrating RBC in public procurement

[497] Responsible Business Conduct (RBC) is about integrating within the core of businesses the management of risks to the environment, people and society. RBC principles and standards set out the expectation that businesses – regardless of their legal status, size, ownership or sector – contribute to sustainable development while avoiding and addressing adverse impacts of their operations including throughout their supply chains and business relationships.

[498] O'Brien, C. M. & Martin-Ortega, O. (2019). Public Procurement and Human Rights: Opportunities, Risks and Dilemmas for the State as Buyer. Corporations, Globalisation and the Law series, Edward Elgar.

enterprises through effective policies, legislation, regulations and adjudication.[499] The peculiar term "abuse" suggests that business enterprises as non-State (private) actors do not directly incur international human rights obligations.[500] Nonetheless, they are indirectly bound by international human rights law through States domestic implementation of their own obligations to prevent and redress corporate human rights abuse. So, although the UNGPs are a soft-law instrument without binding legal effect, the duties referred to in Pillar 1 constitute international legal obligations, thus authoritative guidance to their interpretation must be sought in international human rights law.[501]

Obligations to protect human rights have a dual nature: negative and positive. Negative obligations relate to the obligation to respect human rights entailing a direct responsibility of the State for the breach of such duty.

> "States are both the authors and the subjects of international human rights law and have therefore imposed on themselves an actual legal duty to protect human rights (negative state obligation) when business activities can be attributed to the State".[502]

In case of positive obligations, the duty to protect and fulfil human rights requires to take positive action within the jurisdiction to secure human rights, by preventing and redressing violations of third-parties such as business actors. In case of failure to act, an indirect responsibility arises for omission to prevent or undertaking due diligence, which will be analysed further in the next paragraph of this chapter. Thus, an example of positive obligation is that a State must protect against human rights abuses by business enterprises taking appropriate steps "to prevent, investigate, punish and redress private actors" human rights abuses in its jurisdiction, through effective policies, legislation, regulation and adjudication".[503] A State is, thus, obliged to enact legislation protecting human rights, to protect individuals when it is aware of threats to their human rights and to ensure access to legal remedies when human rights violations are alleged. Furthermore, States must provide individuals with access to remedy through investigation into allegations of abuse, legal responsibility, effective and independent mechanisms, fair trial, sanctions and reparation.

The State obligation to prevent corporate human rights abuses has both procedural and substantive dimensions.[504] From a procedural level, States are required to ensure an informed decision-making process that involve public participation and consultation of affected individuals and groups, public investigations, scientific studies and environmental impact assessments. At substantive level, the State duty to prevent corporate human rights abuses includes obligations to regulate and control the conduct of business enterprises through licensing, setting up and supervising activities that may pose risks to human rights. Where the domestic legal framework itself is deficient, States are obliged to introduce new legislations or to amend existing ones. Public authorities should also contribute to a proper administration of justice to uphold the rule of law, ensuring that domestic courts provide fair access to justice and effective civil remedies and reparation for victims of corporate human rights abuse.

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[499] UNGPs distinguish jurisdiction from territory they presume that international human rights obligations generally do not extend beyond state borders. Even though States have discretion in deciding which steps they want to undertake, the Commentary notes that "they should consider the full range of permissible preventative and remedial measures"

[500] UNCHR (2007) "State Responsibilities to Regulate and Adjudicate Corporate Activities under the UN Core Human Rights Treaties: an Overview of Treaty Body Commentaries, UN Doc A/HRC/4/35/Add.1

[501] Augenstein D., (2023) Guiding Principle 1: Scope of Obligations, in Choudury B. (2023), The UN Guiding Principles on Business and Human Rights: A Commentary, Edward Elgar Publishing p. 12

[502] Lagoutte, S. (2014), The State Duty to Protect Against Business-Related Human Rights Abuses. Unpacking Pillar 1 and 3 of UNGPs. Matters of concern Human rights' research papers Series No. 2014/1 p. 25. See also Ruggie's words: "State individually are the primary duty-bearers under international rights law" (commentary UNGP 4).

[503] UNGP 1: "States must protect against human rights abuse within their territory and/or jurisdiction by third parties, including business enterprises. This requires taking appropriate steps to prevent, investigate, punish and redress such abuse through effective policies, legislation, regulations and adjudication".

[504] Choudury B. (2023), The UN Guiding Principles on Business and Human Rights: A Commentary, Edward Elgar Publishing p. 8

[505] Thus, a legislative and administrative framework need to be set up to provide effective deterrence against human rights regardless the nature of the activity in question, whether public or private.[506]

All other UNGPs of Pillar 1 - from UNGP 2 to UNGP 10[507]- builds around UNGP 1 and elaborate further on it. As *general principle* together with UNGP 1, *UNGP 2* calls States to set out clearly the expectation that all business enterprises domiciled in their territory and/or jurisdiction respect human rights throughout their operations. Regarding the *operational principles*, under *UNGP 3* general State regulatory and policy functions to meet the State duty to protect are clarified, entailing to (a) enforce laws requiring business enterprises to respect human rights, (b) ensure that other laws and policies governing the creation and ongoing operation of business enterprises, such as corporate law, do not constrain but enable business respect for human rights; (c) provide effective guidance to business enterprises on how to respect human rights throughout their operations; (d) encourage, and where appropriate require, business enterprises to communicate how they address their human rights impacts. UNGPs 4,5,6 deal with specific state duties involving the *State-business nexus* – addressed in the next paragraph in depth- specifically applicable to public procurement circumstances. UNGP 7 refers to supporting business respect for human rights in conflict-affected areas. Finally, UNGP 8 is about ensuring policy coherence, UNGP 9 on domestic policy, and UNGP 10 on States as members of multilateral institutions.

The State-Business Nexus: Screening UNGPs 4, 5, 6

When intersecting B&HR and public procurement, the attention is inevitably on the "State-Business Nexus", expression coined under Pillar I of the UNGPs. Although a precise definition within the UNGPs is missing, nonetheless it denotes the close interrelation between public and private sphere outlining the role of the State as economic player and its leverage to protect business-related human rights abuses in State-business transactions.[508] This nexus can take the following three forms, expressed under UNGPs 4,5,6:

- UNGP 4: in case of companies owned or controlled by the state or receiving substantial support and services from state agencies

  > "States should take additional steps to protect against human rights abuses by business enterprises that are owned or controlled by the State, or that receive substantial support and services from State agencies such as export credit agencies and official investment insurance or guarantee agencies, including, where appropriate, by requiring human rights due diligence".[509]

- UNGP 5: in case of privatization of public services

  > "States should exercise adequate oversight in order to meet their international human rights obligations when they contract with, or legislate for, business enterprises to provide services that may impact upon the enjoyment of human rights".[510]

- UNGP 6: in case of public commercial transactions

[505] UN Committee on Economic, Social, Cultural Rights (2017) General Comment No. 24: State Obligations under the International Covenant on Economic, Social, Cultural Rights in the Context of Business Activities UN DocE/C.12/GC/24 para 16
[506] See Oneryldiz v. Turkey (2005) 41 EHRR 20 71, 89-90; Claude Reyes et al v. Chile (2006) Series C. No 151, 158-9
[507] UNGP 25: "As part of their duty to protect against business-related human rights abuse, States must take appropriate steps to ensure, through judicial, administrative, legislative or other appropriate means, that when such abuses occur within their territory and/or jurisdiction those affected have access to effective remedy"
[508] Treviño-Lozano, L., Uysal, E. (2023). Bridging the gap between corporate sustainability due diligence and EU public procurement. Maastricht Journal of European and Comparative Law
[509] OHCHR (2011), UNGP 4. For a comment to UNGP 4 see Backer L. (2023) Guiding Principle 4: the obligations of States in Markets with Respect to Enterprises Owned, Controlled or Supported by the State in Choudury B. (2023), The UN Guiding Principles on Business and Human Rights: A Commentary, Edward Elgar Publishing.
Russo D (2019) The Attribution of the Conduct of Public Enterprises in the field of Investment and Human Rights Law
[510] OHCHR (2011), UNGP 4. For a comment to UNGP 5 see Rivera H.C. (2023) Guiding Principle 5: The content of the State duty to protect in the context of privatization, in Choudury B. (2023), The UN Guiding Principles on Business and Human Rights: A Commentary, Edward Elgar Publishing.

"States should promote respect for human rights by business enterprises with which they conduct commercial transactions".[511]

In details, public procurement is addressed as one peculiar dimension of the State-business nexus[512], the UNGP 6 Commentary mentions it referring to situations when public bodies buy products, services or works from companies through public procurement procedures and contracts.[513]

Thus, UNGPs 4,5,6 deal with specific State duties, recognizing the dual role of States as both regulators and market players.[514] Within its territory and with respect to the entities that they create, the State represents the apex political authority and primary addressee of the State duty to protect human rights. States are, indeed, the "primary duty-bearers under international human rights law, and collectively as the trustees of the international human rights regime"[515] bear a heightened responsibility to protect human rights when they project their public authority privately through markets. Indeed, the State increasingly plays a role in private markets, also when engaging in economic activity projected beyond the borders of the State. In this regard, a dual set of obligations are relevant for the State. Its principal obligation remains tied to its essential political character both within its domestic legal order and as a member of the international community. Nonetheless, UNGPs 4, 5, 6 emphasizes that States acquire additional obligations, merging together the State duty to protect with the corporate responsibility to respect - the latter will be unpacked more in details in Chapter 4). Therefore, the State-business nexus recognizes the central role of the State as a commercial actor and draw a direct link between States commercial activities and States international law obligations to *Protect, Respect, Fulfil* human rights.[516]

Furthermore, in "General Comment n.24 on State Obligations under ICESCR in the context of business activities", UNCESCR further clarified that States could be held "directly responsible for the action or inaction of business entities".[517] Thus, it is clear that States have obligations to ensure that companies they do business with and procure goods and services from, respect human rights at home and abroad throughout their business chain. Therefore, by identifying the State as a commercial actor, the UNGPs recognize explicitly that States commercial activities can pose a risk to human rights, hence the imposition of human rights due diligence obligations on the State, its agencies and the companies they do business with is crucial.[518] Nonetheless, through UNGP 6, the UNGPs also acknowledge that such activities can equally provide an opportunity to promote respect for human rights.

The three different State-business nexus components described by UNGPs 4,5,6, will be scrutinized. They deal with distinct conditions, ranging from obligations of States in markets with respect to enterprises owned, controlled or supported by states, to the state duty to protect in the context of privatization, and human rights respect through commercial transactions, which all need to be outlined. The real question is to understand whether the State-business nexus in its forms create obligations upon the public buyers in public procurement situations.

[511] OHCHR (2011), UNGP 4. For a comment to UNGP 6 see La Chimia A.M. (2023) Guiding Principle 6: Respecting Human Rights Through Commercial Transactions in Choudury B. (2023), The UN Guiding Principles on Business and Human Rights: A Commentary, Edward Elgar Publishing;

[512] Ortega O.M, & O'Brien C., 2018, The Role of the State as Buyer Under UN Guiding Principle 6

[513] Martin-Ortega O., O'Brien, C.M. (2019) Public Procurement and Human Rights Interrogating the Role of the State as a Buyer, in Martin-Ortega and O'Brien (eds), Public Procurement and Human Rights: Opportunities, risks and dilemmas for the State as a Buyer, Edward Elgar.

[514] Becker L.C. (2023) Guiding Principle 4: the obligations of States in Markets with Respect to Enterprises Owned, Controlled or Supported by the State in Choudury B. (2023), The UN Guiding Principles on Business and Human Rights: A Commentary, Edward Elgar, p. 35

[515] UNGPs, Principle 4 Commentary

[516] La Chimia A.M. (2023) Guiding Principle 6: Respecting Human Rights Through Commercial Transactions in Choudury B. (2023), The UN Guiding Principles on Business and Human Rights: A Commentary, Edward Elgar Publishing p. 49

[517] UN Committee on Economic, Social, Cultural Rights (2017) General Comment No. 24: State Obligations under the International Covenant on Economic, Social, Cultural Rights in the Context of Business Activities UN DocE/C.12/GC/24 para 11

[518] Ibid para 16

UNGP 4: The Obligations of States in Markets with Respect to Enterprises Owned, Controlled or Supported by States

UNGP 4[519] concerns obligations of the State operating in markets through state-owned or controlled or supported business enterprises, requiring them to exercise human rights due diligence in their purchasing activities. Indeed, as claimed by Ruggie in the 2007 Report "State-owned enterprises were worse human rights offenders than their fully private competitors and were reluctant to commit to CSR initiatives."[520]

UNGP 4 specifies the additional duty of States when they serve not merely as regulators or political authorities, but as participants in the economic activity through chains of ownership, control or sponsorship. Two distinct set of enterprises are identified within UNGP 4. The first includes "business enterprises owned or controlled by the State", the second business enterprises, "receiving substantial support and services from State agencies", for example in the form of State aids that enhance their business operations, export credits, official investment insurance and outbound investment guarantees.[521] Particularly, starting from the last century, State-controlled or State-owned enterprises (SOEs) have become a common tool of protectionist trade policies and a means of developing national industry,[522] through States acting as direct entrepreneurs in the market. Over time, however, the role of States has gradually transformed into various indirect forms of influence over the activities of enterprises and particularly from the 1970s, a privatization wave has gradually changed the face of State intervention in the economy and transformed SOEs into more independent public-private partnerships, whereby States maintained the role of regulator or monitor of activities run by enterprises.[523]

UNGP 4 highlights that States should take "additional steps" to protect against human rights abuses by public enterprises. Peculiar attention is on the term "expectations"[524], clarifying what States are expected to do in their role as owners of enterprises and why.[525] Indeed, UNGP 4 deals with situations where States move beyond their traditional role projecting their authority through markets and the private sphere.[526] Expectations, including remedial ones, derive from the State duty to protect human rights set forth in the UNGPs. Particularly, an application of the broad requirements of UNGP 3 is suggested, outlining that States ensure their regulatory systems providing the appropriate coverage to prevent, mitigate and remedy human rights abuses in economic activity, including by economic enterprises directly or indirectly under their control as market actors.

The UNGPs do not focus on the question of attribution of human rights abuses. In his 2008 report, the Special Rapporteur Ruggie claimed that "The State itself may be held responsible under international law for the internationally wrongful acts of its SOEs if they can be considered State organs or as acting on their behalf […]."[527]

However, this possibility was not included either in the UN Guiding Principles, or in the recently released "Legally binding instrument to regulate, in international human rights law, the activities of

[519] UNGP 4: States should take additional steps to protect against human rights abuses by business enterprises that are owned or controlled by the State, or that receive substantial support and services from State agencies such as export credit agencies and official investment insurance or guarantee agencies, including, where appropriate, by requiring human rights due diligence

[520] Ruggie J. (2007) Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, "Addendum: State responsibility to Regulate and Adjudicate Corporate Activities under the United Nations Core Human Rights Treaties: An Overview of Treaty Body Commentaries", UN doc A/HRC/4/35/Add.1, para. 80.

[521] Becker L.C. (2023) p. 39

[522] Russo D. (2019) The Attribution to States of the Conduct of Public Enterprises in the Fields of Investment and Human Rights Law

[523] Rajavuori, (2016) "State Ownership and the United Nations Business and Human Rights Agenda: Three Instruments, Three Narratives", Indiana Journal of Global Legal Studies, p. 665 ff.

[524] Becker L.C. (2017) The Human Rights Obligations of State-Owned Enterprises: Emerging Conceptual Structures and Principles in National and International Law and Policy, 50(4) Vanderbilt J. of Transnat L. 827

[525] UN Human Rights Council (2016) UN Secretariat "Report of the Working Group on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises – Note by the Secretariat UN Doc A/HRC/32/45

[526] UN OHCHR (2016) State owned enterprises must lead by example on business and human rights – New UN Report

[527] Ruggie (2008), Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, UN Doc. A/ HRC/8/5 (2008), para. 32.

transnational corporations and other business enterprises – Zero Draft".[528] In sum, the UN Guiding Principles leave it up to the general rules on State responsibility to deal with the attribution of human rights abuses by public enterprises, including the question of where to trace the boundary between direct State responsibility and breach of due diligence.

Furthermore, considering the State-business nexus, States may seek to act as private actors, however they never shed their paramount character as public bodies. That dual character, then, ought to be reflected in the way in which they arrange their engagements as owner-controllers or subsidizers of private economic activity.[529] The peculiarity of such principle is that specific additional obligations regarding the State duty to protect human rights meet the corporate responsibility to respect human rights. Thus, the State-business nexus constitutes a *conundrum* requiring further clarification and in depth-analysis. The State duty to protect is based on a set of expectations grounded by and limited to the institutional organs of the State as the holder of political power. This power is rooted in and geared to the organizational premises of public authority as the bedrock of the State system, the highest expression of which is realized through the organization and functioning of the UN system. The corporate responsibility to respect human rights, instead, is based on a classical premise about the difference in scope and character between States as political bodies and corporate and economic bodies understood as "specialized organs of society performing specialized functions".[530]
The relevance of such UNGP to clarify public buyers' obligations is linked to the explicit reference to the HRDD, which could be extended to public procurement cases and also in case the State plays an economic role. As it will be outlined later, aspects on responsibility have been clarified better in reference to this principle.[531]

UNGP 5: the State Duty to Protect in the Context of Privatization

Regarding the exercise of public functions by corporations, UNGP 5[532] provides that where States privatise or outsource public services, they keep their human rights obligations[533] and adequate oversight is needed to ensure these are met.[534]
Privatization can be defined as a "process through which the private sector becomes increasingly or entirely responsible for activities traditionally performed by governments".[535] As a result of globalization, international financial policies and the inherent reduction of the State in the global economy, privatization of traditional public services (such as water supply, health, education, security) have massively increased.[536] The substitution of the State by business enterprises for the provision of these services, however, entails risks of negative human rights impacts that need to be fully understood to prevent, mitigate or redress them. Most of such services are outsourced to private suppliers, following public procurement procedures, making UNGP 5 relevant for this analysis.

The UNGP 5 addresses the issue of privatization taking a minimalistic approach, holding that States should exercise adequate oversight when contracting with or legislating for companies to provide

[528] Drafted by the open-ended Intergovernmental Working Group on Transnational Corporations and Other Business Enterprises with Respect to Human Rights, 2018
[529] UN Human Rights Council (2016), pp. 26-28
[530] UNGPs, Principle 4 Commentary
[531] Barnes MM (2021) State-Owned Entities and Human Rights: The Role of International Law. Cambridge University Press
[532] UNGP 5 States should exercise adequate oversight in order to meet their international human rights obligations when they contract with, or legislate for, business enterprises to provide services that may impact upon the enjoyment of human rights.
[533] Hallo de Wolf, A. G. (2013). Human Rights and the Regulation of Privatized Essential Services. Netherlands International Law Review, 60(2), 165-204.
[534] O'Brien, C., Dharnarajan S. (2016), "The Corporate Responsibility to Respect Human Rights: A status review", Accounting, Auditing and Accountability, Special Issue on Business and Human Rights
[535] Rivera H.C. (2023) Guiding Principle 5: The content of the State duty to protect in the context of privatization, in Choudury B. (2023), The UN Guiding Principles on Business and Human Rights: A Commentary, Edward Elgar Publishing p. 42
[536] Russo D. (2019) The Attribution to States of the Conduct of Public Enterprises in the Fields of Investment and Human Rights Law

services.[537] The Commentary to UNGP 5 broadens the scope of the State obligations, setting forth that regulatory instruments should require observance of human rights standards and that effective monitoring and accountability mechanisms should be in place for the State to fulfil its international obligations.

In the context of privatization, State duties can be generally categorized as obligations of result because the State is expected to ensure that the relevant business enterprise conducts itself in a manner that is respectful to human rights. In this regard, as a result of the inherently close link between the State and a private service provider, and the general State capacity to exercise decisive influence over the conduct of the company, three specific duties may reveal particular nuances for the context of privatization: (i) a duty to adopt human rights-based legislation or administrative instruments; (ii) a heightened duty to monitor the conduct of private service providers; and (iii) a duty to ensure the availability of different avenues of remedy.

UNGP 6: Respecting Human Rights through Commercial Transactions

UNGP 6 is the last UNGP devoted to the State-business nexus and the most relevant one when considering public procurement.[538] In details, it highlights that the State holds responsibility to promote respect for human rights by business enterprises with whom they conduct commercial transactions.[539] Under this principle, States are recognized as privileged market actors, being both regulators of the market and strategic consumers, who can influence, drive and condition market transactions. Thus, they can play a crucial role to promote awareness of and respect for human rights by combining public and private law instruments and developing effective monitoring mechanisms and enforcement system.[540]

By encouraging States to use their commercial activities as leverage to promote respect for human rights, UNGP 6 recognizes the normative power exercised by States through their commercial transactions. Indeed, the voluntary nature of commercial activities between the State and business and the significance of such transactions for certain business enterprises put States in a privileged position, having "unique opportunities" to act as agents to change companies' behaviour, by "playing" with procurement procedures and procurement contract clauses promoting responsible business conduct of suppliers.[541]

Regarding UNGP 6 scope, its coverage is quite broad in terms of envisaged entities and interpretation of the term "commercial transactions". The *entities* include the traditional State apparatus: the State, the government, the municipalities and any other entity acting on behalf of or for the State. The UNCESCR clarified in the General Comment 24, States are responsible

> "If the entity concerned is in fact acting on that State party's instructions or is under its control or direction in carrying out the particular conduct at issue, as may be the case in the context of public contracts".

In details, this derives from the international State responsibility theory, addressed in depth later.[542]

Hence, UNGP 6 captures any entity conducting commercial transactions with the St regardless of its size, sector, location, ownership and legal structure. Thus, any entity conducting business for the State could be the recipient of a State measure aimed at promoting respect for human rights. Further, concerning the interpretation of "commercial transactions, the Commentary refers to States conducting

[537] O'Brien, C. (2015) Essential Services, Public Procurement and Human Rights in Europe, University of Groningen Faculty of Law Research Paper No. 22/2015

[538] La Chimia, A. (2019). Development aid procurement and the UNGPs on Business and Human Rights: Challenges and opportunities to move towards the new frontier of "Buying Justice". In Willliams-Elegbe, S. & Quinot, G. (Eds.), (2018). Public Procurement Regulation for the 21st Century Africa, (JUTA).

[539] UNGP 6: "States should promote respect for human rights by business enterprises with which they conduct commercial transactions"

[540] La Chimia A.M. (2023) Guiding Principle 6: Respecting Human Rights Through Commercial Transactions in Choudury B. (2023), The UN Guiding Principles on Business and Human Rights: A Commentary, Edward Elgar Publishing p. 55

[541] UNGPs, Principle 6 Commentary – State commercial transactions with business enterprises

[542] See art. 8, ILC (2001) Draft Articles on Responsibility of States for Internationally Wrongful Acts.

a "variety" of commercial transactions and focuses on public procurement as example owing to its economic, social and strategic relevance:

> "States conduct a variety of commercial transactions with business enterprises, not least through their procurement activities. This provides States- individually and collectively- with unique opportunities to promote awareness of and respect for human rights by those enterprises, including through the terms of contracts, with due regard to States' relevant obligations under national and international law".[543]

This paragraph raises awareness on the importance to address public procurement also from a B&HR perspective as instrument for promoting respect for human rights, as it lies at the intersection between public and private law set of norms.

As outlined in the previous Chapter, the procurement process is usually regulated by public law instruments and once a tender is awarded, the relationship between the contracting authority and the successful supplier is regulated via contracts, which can be subject to either public or private/civil law rules and procedures according to the specific jurisdiction.[544] As such, States can shape the procurement process by setting up the rules with which companies willing to participate in the tender process must comply to. Thus, reflecting on the extraterritorial impacts of such obligations, the procurement process enables States to influence business conduct beyond the traditional boundaries of State territory and jurisdiction, and to strategically overcome the over-reliance on voluntary standards.[545]

In terms of obligations, UNGP 6 does not prescribe the use of peculiar actions or specific legal instruments to foster respect for human rights by States through their commercial transactions. The Commentary refers explicitly to "terms of contract" as example of a regulatory instrument that can promote respect for human rights. Regarding other possible mechanisms that could be used by public buyers in their procedures, General Comment 24 suggests the use of both punitive actions (where non-compliance would preclude access to commercial opportunities) and positive ones (where compliance with human rights standards results in a reward system granting premium or other advantages to companies). Both types of measures are necessary to conduct commercial transactions effectively, but they must be combined with adequate monitoring and enforcement mechanisms.[546] For example, UNCESCR suggests that States could use positive incentives to favour businesses that have in place due diligence mechanisms to protect human rights or deny to award public contracts to companies that do not promote or respect human rights.[547] Moreover, possible measures could be used not only to punish ex-post the contractor guilty of breaching the policies but also as incentives to encourage compliance. For instance, a breach of contract conditions could lead to administrative sanctions, such as debarment from future tender opportunities, award of damages and/or termination of the contract. Thus, excluding companies from the possibility of doing business with the State (at the qualification stage) is also a powerful means of persuading companies to comply with human rights and can lead to wider and more effective results of compliance than an action for damage against an individual contractor.[548] Different strategies and mechanisms to be used along the public procurement cycle management will be explored in Chapter 6. Another possibility could be setting up human rights requirements and terms of public contracts within the *general conditions of contracts* (GCC) to foster human rights in business. This would mean including preferential award to discriminated groups or to companies working to achieve specific non-discrimination objectives; excluding companies with

[543] ibidem
[544] Greco G. (1986) I contratti dell'amministrazione tra diritto pubblico e privato, Giuffrè, 46
[545] De Schutter (2014) The Power of Procurement: Public Purchasing in the Service of Realizing he Right to Food
[546] La Chimia A.M. (2018); Arrowsmith S. (2003) Government Procurement in the WTO , Kluwer Law International, 340
[547] CESCR para 50. The Committee also adds: "States can revoke business licences and subsidies from offenders and revise relevant public procurement contracts
[548] Arrrowsmith S (2003), Arrowsmith argues that excluding companies from the qualification stage is the most effective way to use procurement as policy tool to pursue horizontal policies

commercial contacts with high-risk countries from state suppliers lists or public procurement; excluding companies with a bad human rights record from state suppliers lists or public procurement, etc.[549] In addition, state agencies and independent monitoring and accountability mechanisms are useful to effectively oversee the private providers' activities, particularly in case of high risk services[550] – such as healthcare, education, security etc.[551]

Despite the potential breadth of UNGP 6 and multiple options available to procuring entities to promote human rights, only limited initiatives have been undertaken so far. As it will be outlined in chapter 5 and 6, this is the case of National Action Plans, not all of them worldwide include direct reference to public procurement and human rights. Some examples are evident in the European Union context, which will be explored in Chapter 5. Considering public buyers' initiatives at procedural level, some limitations can be observed in different public procurement legislations, particularly in terms of discretionary application of human rights considerations or limits of social requirements to the subject matter of the contract. Thus, there are key limits to consider the extent to which States can use procurement as a leverage to promote respect for human rights.[552] Such reflections will be applied to the EU public procurement context to better grasp the *status quo* on the matter. The limited number of initiatives at national level – some of which will be addressed in Chapter 6 - could curtail the impact that States actions could have to promote respect for human rights with companies with which they do business.

In conclusion, the State, legally bound to protect human rights related to business, as outlined by the Pillar I, has an obligation to ensure protection and at the same time respect of human rights under its public procurement activities. By setting specific requirements in its public purchase along the procurement cycle, for instance in contracts, it may foster responsible business conducts among suppliers in the private sector, influencing a shift towards human rights-based business conduct. States, indeed, have a potential as *mega-consumer* to drive a real shift to a responsible business environment.
Arguments on the existence of obligations need to be substantiated by reflections on the international state responsibility theory and potential attribution of responsibility for international wrongful acts, which is the specific object of the next paragraph (3.2).

3.2 Addressing Human Rights Risks while Procuring: Multi-Level Responsibilities through the State-Business Nexus Lens

Having analysed the possible multi-level obligations arising under the State-business nexus framework, the next question is to explore in practice whether the State as buyer could be held internationally responsible for human rights abuses committed by its suppliers. As it will be shown, the classical international State responsibility theory, ILC articles and international case-law do not reply explicitly and directly to such dilemmas in reference to public procurement, requiring further clarification. Indeed, problems regard the lack of clarity on the possibility to attribute responsibility for non-State actors (suppliers) acts to the State. Furthermore, both literature and the case-law on public procurement situations is limited, requiring to reflect further on correlated State-business nexus situations to derive arguments.
So, responsibility attribution matters and the notion of State "control" will be assessed under the UNGPs lens, with peculiar attention to the State-business nexus hypotheses, including situations involving

[549] Lagoutte, S. (2014), The State Duty to Protect Against Business-Related Human Rights Abuses. Unpacking Pillar 1 and 3 of the UN Guiding Principles on Human Rights and Business (September 15, 2014). Matters of concern Human rights' research papers Series No. 2014/1
[550] Ibid p. 28
[551] According to the Guidance on Social Care Procurement published by the Scottish Government (September 2010), human rights are incorporated into the service specifications, the selection and award criteria and contractual clauses.
[552] Arguably a restrictive interpretation does not apply to jus cogens violations of treaty obligations, especially those recalled by the procurement legislation itself such as ILO conventions and national labour and social security laws etc. For example, a prohibition to employ children applies to all of the company's activities, not just to those linked to the subject matter of the contract.

enterprises owned, controlled or supported by states; in the context of privatization; and human rights respect through commercial transactions.

The Responsibility for *Acta Jure Gestionis* and Attribution Dilemmas in Public Commercial Transactions

As recalled above, the State is the primary duty bearer and traditional subject of international human rights law, holding a legal responsibility to *protect, respect* and *fulfil* human rights. As a matter of fact, when the State has an obligation deriving from treaty or customary law, it also holds international responsibility with correlated legal consequences in case of its violation which can be defined as international wrongful act.[553] In case of public commercial transactions, what kind of responsibility may arise? To whom it could be attributed?

First of all, as a remark, when reflecting on States' commercial transactions, a fundamental distinction must be drawn to define the acts of the State, between *acta jure imperii* and *acta jure gestionis*. Indeed, the State, under domestic law, may act in the exercise of governmental or sovereign authority[554] performing *acta jure imperii.* States can also act in capacity of private and commercial actors performing so-called *acta jure gestionis* or *acta iure privatorum,* through conducts that involve purely commercial activities.[555] Identifying the nature of the act of the State is crucial to better understand the attribution of responsibility.[556] As it will be explored, the commercial act of a state organ may be attributed to the State in some circumstances and, thus, engage state responsibility unless the organ acts in a purely "private" (as opposed to "official" or "public" rather than "sovereign") capacity. Furthermore, the law of the State immunity shall be considered when reflecting on the distinction between *acta jure imperii* and *jure gestionis*.[557] According to a restrictive immunity approach, a State would enjoy immunity only for *acta iure imperii*.[558] Moreover, the Jurisdictional Immunities Convention has inspired a much more nuanced approach, nonetheless Article 10 clarifies that a State with all its subdivisions, including state enterprises and parastatal entities, does not enjoy immunity in proceedings arising out of a commercial transaction.[559] This must be remarked as recent practice shows progressive overlaps between the law of state responsibility and that of state immunity.[560] Indeed, the boundaries between the public and private spheres are blurred as States are increasingly entrusting persons or entities outside the state apparatus with public functions.[561] Outsourcing public functions to the private sector can enable States to achieve certain public goals in a more stable and efficient manner when persons or entities within the state organization do not have relevant capabilities, such as expertise, credibility, legitimacy and operational capacity.[562]

Starting with subjectivity dilemmas, as anticipated above, although States are the typical subjects of international law, thus also traditional holders of international responsibility, it has been widely debated and recognized that they conduct their functions and promote their interests more and

[553] Tanzi, A. (2017)
[554] On "governmental authority," see Crawford, *State Responsibility: The General Part* (n 11) 130: "If a private person can perform the function without the government's permission, it is not to be considered governmental. According to the restrictive theory of state immunity, this manifests as the well- known distinction between *acta iure imperii*, which attract immunity, and *acta iure gestionis*, which do not."
[555] Okada Y (2023), Can Acta Jure Gestionis Be Attributable to the State? A Restrictive Doctrine of State Responsibility, EJIL (2023), Vol. 34 No. 2, 383–414
[556] Binder C. and Wittich, S. (2022) A Comparison of the Rules of Attribution in the Law of State Responsibility, State Immunity, and Custom, in Kajtár,G. Başak C.,Milanovic M. (Eds) *Secondary Rules of Primary Importance in International Law*. .
[557] For a comprehensive overview on the relevance of State-business relationship on jurisdictional immunity, see Russo D., (2023) L'impresa come organo o agente di uno Stato nel Diritto Internazionale, Editoriale Scientifica, Napoli, Ch. 3 pp. 103-199
[558] Crawford, J. (2012) Brownlie's Principles of Public International Law (OUP 2012) 471.
[559] Crawford (1984) International Law and Foreign Sovereigns: Distinguishing Immune Transactions, British Yearbook of International Law
[560] Christenson (1983) 'The Doctrine of Attribution in State Responsibility', in R.B. Lillich (ed.), International Law of State Responsibility for Injuries to Aliens 321, at 321.
[561] Crawford, J (2013) State Responsibility: The General Part, p.130.
[562] Abbott et al. (2020), Competence-Control Theory: The Challenge of Governing through Intermediaries, in K.W. Abbott et al. (eds), The Governor's Dilemma: Indirect Governance Beyond Principles and Agents (2020) 3, at 4. Mégret (2021) Are There "Inherently Sovereign Functions" in International Law? American Journal of International Law (AJIL) (2021) 452, at 453.

more in synergy with private actors.[563] Through public procurement procedures and contracts, States interact with markets and business enterprises, exercising forms of direct or indirect influence on the private sphere. Other examples regard direct interventions in the market through political economy measures; situations where the State delegates the exercise of some public functions to SOEs and private suppliers or when public-private partnerships are established. Those situations create inevitable questions on attribution of responsibility to the State for acts committed by private contractors linked to the State conduct in different ways.

Although international law acknowledges the influential role and factual power of private enterprises, non-State actors are still recognised mainly in their capacity as addressees or objects of regulation. However, as debated by the scholarship, private actors could be conceived as "catalyst" of international law responsibility even if they are not direct bearers of international law obligations and do not hold direct responsibility.[564] As it is evident an increasing involvement of the State in the economy through formally distinct entities but connected to it,[565] different "twilight zones"[566] can be identified where the State and business interact closely.[567] In public procurement situations, public contracts could be conceived as effective legal instruments facilitating State-business transactions of goods, works, services connected with the public function. Such proximity of non-State actors to the State inspires the question whether the latter could be held responsible for abuses committed by the former, or whether instead a "private" veil[568] insulates states from responsibility for the acts of non-State actors.[569]

Referring to the International Court of Justice approach, substantial differences between State and business actors' subjectivity have been acknowledged, despite the increasing debates on the raising influence of non-State actors. Indeed, ICJ[570] confirmed a traditional view of international law embracing a clear separation between States and private corporations' responsibilities in a number of cases.[571]

> "A clear distinction between the obligations of public and private entities can be drawn: States have a duty that is undertaken through law; enterprises have a responsibility that is embedded in their governance. These fundamental divisions form part of the current international efforts to institutionalize human rights-related norms on and through states and enterprises, and most notably through the UNGPS. The problems of conforming to evolving norms becomes more difficult where states project their authority through commercial enterprises".[572]

Thus, the ICJ outlines the complexity of States projecting their authority through commercial enterprises, as in the case of suppliers in public procurement operations.

The UNGPs address broadly the problem of the State responsibility for the violation of human rights, however they do not impart any specific obligation and clarification regarding the attribution of responsibility to the State for a wrongful act committed by a corporation. Even in the case of public

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[563] Russo D. (2023) p. 24-28

[564] Condorelli L., Kreß C. (2010) The Sources of International Responsibility, Ch.18 The Rules of Attribution: General Considerations, in Crawford et al (2010) The Law of International Responsibility, Oxford

[565] Ryngaert C., Noortmann M., Reinisch, A. Concluding Observations on Non-State Actors, Chapter 17, p. 371

[566] Tomuschat (2008) In the Twilight Zones of the State, in Buffard E., Crawford J., Pellet A., Wittich S. (Eds) *International Law between Uniformalism and Fragmentation*, Festschrift in Honour of Gerhard Hafner, Leiden/Boston, p. 479 ss.

[567] The accumulation of power by non-state actors could be regarded as the result of a formal transfer of competences by States or of a conscious governmental choice to empower private entities to deliver goods, works, services, as in the case of private contractors. In such way, non-state actors, or the environment in which they operate, are not created ex nihilo. Thus, States could be seen as the very creators of non-state actors in some cases, either by formal act (when setting up international organisations) or incorporating private entities. Also, where they have not formally created non-state actors, States may facilitate their rise, by establishing a favourable regulatory framework.

[568] Ryngaert C., Noortmann M., Reinisch, A. Concluding Observations On Non-State Actors, Chapter 17, P. 371

[569] See Arts 4 – 11 of the International Law Commission' s (ILC) Draft Articles on the Responsibility of States for Internationally Wrongful Acts (2001) on the attribution of conduct of non-state actors to states. See also Part V of the ILC' s Articles on the Responsibility of International Organizations for Internationally Wrongful Acts (2011) on the responsibility of member states in connection with acts of international organisations. See on shared responsibility: Nollkaemper A. and Jacobs, D. (2013) Shared Responsibility in International Law: A Conceptual Framework, volume 34, Michigan Journal of International Law 360

[570] A landmark case is the ICJ (1951) Anglo-Iranian Oil Company

[571] Russo D. (2023) L'impresa come organo o agente di uno Stato nel diritto internazionale, Editoriale Scientifica, Napoli, p. 9

[572] ICJ (2019), Certain Iranian Assets (Islamic Republic of Iran v. USA), Preliminary Objections, para. 91. It confirmed that "companies are natural and legal persons engaging in activities of a commercial nature, even if the latter is to be understood in a broad sense"

contracts and State commercial transactions where the link between State and business is clear, no specific indication is provided. Only the 2008 Preliminary Report to the UNGPs outlines that:

> "The State itself may be held responsible under international law for internationally wrongful acts of its SOEs if they can be considered State organs or as acting on their behalf…".[573]

Thus, specific criteria and conditions to identify an enterprise as State organs or entities that act on its behalf are missing, requiring further scrutiny on this subject. Also, it must be noted that the State-business nexus is considered by the UNGPs only in the limited perspective of the State Duty to Protect human rights, namely the duty on the State to adopt adequate measures to prevent and redress possible violations committed by private parties in their jurisdiction. Substantially, the State-business nexus may not be connected to the subject of attribution, rather to the creation of "additional obligations" of control by the territorial State. The UNGPs do not define clearly possible criteria of connection, whether *de facto* or *de jure*, to attribute a wrongful act of business enterprises. Only Commentary to UNGP 4 refers to the criterion of control, as condition where the wrongful act of companies can be attributed to the State.[574] So, the main perspective in the UNGPs is based on the duty to prevent, the dilemma of attribution of responsibility is not addressed in details, leaving unanswered questions. For example, also the "Zero Draft" adopted in 2018, does not mention the attribution of responsibility for corporations at all related to the State-business nexus.

When considering public procurement situations, additional complexities must be taken into account: the State operates as a private actor by conducting business transactions and being a mega-consumer, thus it acts as Non-State actor despite being a State. As a matter of fact, when governments purchase goods, works and services via the global supply chain, they act as *mega-consumers* and private actors establishing commercial and contractual relationships with the private sector. The next paragraph will clarify the possible attribution of responsibility of suppliers contracted by the State and the connected procuring entity responsibility under international law as organ of the State. The uncertainty and twilight zones in international subjectivity of private actors and the corporate veil theory have impinged the development of clear rules on the attribution of international responsibility in case of human rights violations by business enterprises when linked to States' action and control. The focus will be, then, on disentangling attribution and control matters in the State-business nexus, analysing the International State Responsibility theory and supporting case-law, focusing mainly on ICJ sentences and ECtHR cases.

3.2.1 The International State Responsibility Theory: applying the Draft Articles on Responsibility of the State (DARS) to Public Procurement

Under international law, every State holds a responsibility for international wrongful acts which can be attributed to the State in specific circumstances and can trigger legal consequences for the breach of international obligations.[575] In details, international responsibility defines new international legal relations established under international law by reason of an international wrongful act of the State[576].

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[573] Ruggie J (2008), Report of the Special Representative of the Secretary General on the issue of human rights and transnational corporations and other business enterprises UN Doc A/HRC/8/5, 7 par. 3.2

[574] Commentary: "Where a business enterprise is controlled by the State or where its acts can be attributed otherwise to the State, an abuse of human rights by the business enterprise may entail a violation of the State's own international law obligations", p.7

[575] See, Anzilotti, G. (1955) *Corso di diritto internazionale*, 4th ed. (Padua, CEDAM) vol. I, p. 385; W. E. Butler, *Theory of International Law* (London, George Allen and Unwin, 1974), p. 415; and E. Jiménez de Aréchaga, "International responsibility", *Manual of Public International Law*, M. Sørensen, ed. (London, Macmillan, 1968), p. 533.

49 See, I. Brownlie, (1998) *Principles of Public International Law*, 5th ed., Oxford University Press, p. 435; Conforti, B. (2021) *Diritto internazionale* 12th ed., Milan, Editoriale Scientifica, p. 332; P. Daillier and A. Pellet, *Droit international public (Nguyen Quoc Dinh)*, 6th ed. (Paris, Librairie générale de droit et de jurisprudence, 1999), p. 742; P.-M. Dupuy, *Droit international public*, 4th ed. (Paris, Dalloz, 1998), p. 414; and R. Wolfrum, "Internationally wrongful acts, *Encyclopedia of Public International Law*, R. Bernhardt, ed. (Amsterdam, North-Holland, 1995), vol. II, p. 1398.

[576] ILC (2001) Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries, Supplement No. 10 (A/56/10) p. 32

The key question is to recognize whether international wrongful acts arise also in case of public procurement transactions, if a public entity procure goods, works, services from suppliers involved in human rights violations in their supply chains.

It must be clarified that case-law and practice on attribution of responsibility to the State for private contractors in procurement situations have been quite marginal. To search for an answer, core international law sources on international responsibility theory must be investigated to expand its possible application in case of State-business nexus and public procurement transactions. The State responsibility theory concerns principles governing when and how a State is held responsible for a breach of an international obligation. It has been codified and progressively developed by the International Law Commission (ILC)[577] issuing the *Draft Articles on the Responsibility of States for Internationally Wrongful Acts* (2001) - DARS.[578] Since the 1950s[579], ILC started working on its codification, then in the 1960s the appointed Special Rapporteur on State Responsibility, Prof. Roberto Ago, reconceptualised the ILC's work in terms of "primary" and "secondary" rules distinction. Indeed, the Draft Articles codify only secondary rules on breaches of primary rules and their consequences.[580] The final version of the Draft Articles was, then, adopted by the General Assembly on December 2001[581] and its customary legal status has been recognized by the UN Member States.[582]

Regarding its structure, the Draft Articles entail four parts: one defining the *internationally wrongful act of a State*, the second specific on the *international responsibility*, the third on the *implementation of the international responsibility* and the fourth on *other general provisions*. The attention will be on understanding the meaning of international wrongful acts and on exploring attribution of conduct theory, with peculiar focus on the notion of State control and the exercise of elements of public authority as crucial elements triggering State responsibility attribution.[583]

Defining an International Wrongful Act

Part One DARS lays down the general conditions necessary for State responsibility to arise. Article1 clarifies that "every internationally wrongful act of a State entails the international responsibility of that State".[584]Article 2 captures the conditions required to establish the existence of an internationally wrongful act of the State:

> "There is an internationally wrongful act of a State when conduct consisting of an act or an omission:
>
> - is attributable to the State under international law and
> - constitutes a breach of an international obligation of the State".

[577] ILC is a subsidiary body of experts established by the UNGA in 1948 to undertake its mandate (art.13.1.a of the UN Charter), to "initiate studies and make recommendations for the purpose of encouraging the progressive development of international law and its codification". By codifying customary norms of international law, it clarifies rules and set benchmark for interpretation to solve conflict of norms

[578] ILC (2001) Draft Articles on Responsibility of States for Internationally Wrongful Acts, extract from the Report of the ILC on the work of its fifty-third session, November 2001, Supplement No. 10 (A/56/10), chp.IV.E.1.

[579] The topic of state responsibility was one of the first 14 areas provisionally selected for the ILC's attention in 1949

[580] ILC, 'Report of the International Law Commission on the Work of its Fifty-third session' UN Doc A/56/10, 34.

[581] Resolution 56/83:"commended [the articles] to the attention of Governments without prejudice to the question of their future adoption or other appropriate action

[582] Arcari (2022) The future of the Articles on State Responsibility: a matter of form or substance? QIL, 93, p. 3ss., p. 10

[583] Russo (2023), p. 28.

[584] PCIJ applied the principle set out in art. 1 in different cases: in the *Phosphates in Morocco* case, PCIJ affirmed that when a State commits an internationally wrongful act against another State international responsibility is established "immediately as between the two States". ICJ has applied the principle on several occasions, for example in the *Corfu Channel* case, in the *Military and Paramilitary Activities in and against Nicaragua* case, and in the *Gabcíkovo-Nagymaros Project* case. The Court also referred to the principle in its advisory opinions on *Reparation for Injuries*, and on the *Interpretation of Peace Treaties (Second Phase)*, in which it stated that "refusal to fulfil a treaty obligation involves international responsibility". Arbitral tribunals have repeatedly affirmed the principle, for example in the *Claims of Italian Nationals Resident in Peru* cases, in the *Dickson Car Wheel Company* case, in the *International Fisheries Company* case, in the *British Claims in the Spanish Zone of Morocco* case and in the *Armstrong Cork Company* case. In the *"Rainbow Warrior"* case, the arbitral tribunal stressed that "any violation by a State of any obligation, of whatever origin, gives rise to State responsibility".

Thus, there are two constituent elements triggering international responsibility:[585]

- The element of attribution (subjective element)
- The element of international law breach (objective element)

Considering the subjective element, on the attribution of conduct, the general approach followed is that an international wrongful act is defined as such only when committed by a State and not by a non-State or private actor.[586] In the preparatory works of the Commission, it is evident the initial intention to codify such rule as in the following:

> "The conduct of a private individual or a group of individuals, acting in that capacity, is not considered to be an act of the State in international law".[587]

Although the codification of this disposition has been abandoned, the principle remains implicit in the Draft Articles.

Regarding the objective element, an international wrongful act of a State may consist in actions but also omissions or a combination of both. It reflects different relations under international law, for example situations of a wrongdoing State and one injured State, or it can be extended to other States or subjects of international law; wrongful acts may be centred on obligations of restitution or compensation but also give the injured State the possibility of responding by way of countermeasures. As clarified by art. 3, the characterization of an act of a State as internationally wrongful is solely governed by international law, regardless the characterization of the same act as lawful by internal law. Indeed, a State cannot, by pleading that its conduct conforms to the provisions of its internal law, escape the characterization of that conduct as wrongful by international law.[588] Therefore, an act of a State is characterized as internationally wrongful solely if it constitutes a breach of an international obligation, even if the act does not contravene the State's internal law - even if, under that law, the State was actually bound to act in that way.[589]

Defining Responsibility for Omission and Due Diligence Obligations

As stated above, international responsibility can be triggered for both action or inaction by the State. In multiple cases the State international responsibility has been invoked on the basis of an omission.[590] For instance, the ICJ in the *Corfu Channel* case held that it was a sufficient basis for Albanian responsibility that it knew, or must have known, of the presence of the mines in its territorial waters and did nothing to warn third States of their presence.[591] Furthermore, in the *United States Diplomatic and Consular Staff in Tehran* case, the Court concluded that the responsibility of the Islamic Republic of Iran was entailed by the "inaction" of its authorities which "failed to take appropriate steps", in

[585] The two elements were specified by PCIJ in the *Phosphates in Morocco* case. The Court explicitly linked the creation of international responsibility with the existence of an "act being attributable to the State and described as contrary to the treaty rights of another State". ICJ has also referred to the two elements on several occasions. In the *United States Diplomatic and Consular Staff in Tehran* case, it pointed out that, in order to establish the responsibility of the Islamic Republic of Iran: first, it must determine how far, legally, the acts in question may be regarded as imputable to the Iranian State. Secondly, it must consider their compatibility or incompatibility with the obligations of Iran under treaties in force or under any other rules of international law that may be applicable. Similarly in the *Dickson Car Wheel Company* case, the Mexico-United States General Claims Commission noted that the condition required for a State to incur international responsibility is "that an unlawful international act be imputed to it, that is, that there exist a violation of a duty imposed by an international juridical standard".

[586] Russo D. (2023) L'impresa come organo o agente di uno Stato nel diritto internazionale, Editoriale Scientifica, Napoli, P. 32

[587] Ago R, (1972) Fourth Report on State Responsibility, ILC Yearbook, 1972, vol.II 126, par. 146

[588] ILC (2001) Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries, Supplement No. 10 (A/56/10), Comment to Art. 3.

[589] See advisory opinions on *Exchange of Greek and Turkish Populations* and *Jurisdiction of the Courts of Danzig*. For example, in the *Reparation for Injuries* case, it noted that "as the claim is based on the breach of an international obligation on the part of the Member held responsible … the Member cannot contend that this obligation is governed by municipal law". ICJ case law: *Fisheries, Judgment, ICJ Reports 1951*, p. 116, at p. 132; *Nottebohm, Preliminary Objection, Judgment, ICJ Reports 1953*, p. 111, at p. 123; *Application of the Convention of 1902 Governing the Guardianship of Infants, Judgment, ICJ Reports 1958*, p. 55, at p. 67; and *Applicability of the Obligation to Arbitrate under s21 of the UN Headquarters Agreement of 26 June 1947, Advisory Opinion, ICJ Reports 1988*, p. 12, at pp. 34–35, para. 57.

[590] ILC (2001) Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries, Supplement No. 10 (A/56/10), Commentary art 2, par.4, p. 35.

[591] ICJ (1949) Corfu Channel, Merits, Judgment, ICJ Reports 1949, p. 4, at p. 23.

circumstances where such steps were evidently called for.[592] In other cases, responsibility can be triggered for a combination of actions and omissions.[593]

As recalled in the first paragraph of the Chapter, the general theory on international human rights law distinguishes between negative and positive obligations. Negative ones require the State to refrain from committing certain actions or to interfere in the juridical sphere of individuals. Positive ones require the State to realize certain actions imposing an obligation of intervention.[594] In the human rights field, a declination of the doctrine of positive obligations is the theory of *positive obligations with horizontal effects*[595] or with *Drittwirkung*.[596] Thanks to the UNGPs, the duty to protect human rights has been elaborated also in regard to international responsibility connected to the commission of wrongful acts from companies, defining the borders of the duty of the State to adopt adequate measures to prevent and repress such wrongdoings, based on the standard of due diligence.[597]

Indeed, international responsibility for omission can be linked to the violation of due diligence obligations by the State. Due diligence is generally recognized as the "adoption of appropriate rules and measures", as well as "a certain level of vigilance in their enforcement and the exercise of administrative control applicable to public and private operators".[598] It follows that the State may incur international responsibility not directly for the conduct by third parties in contrast with a given rule or the occurrence of harm as such, but also for having failed to take appropriate steps to prevent or address such conduct or harm.[599] Due diligence, indeed, constitutes the backbone of the State duty to protect human rights[600] and States may incur international responsibility if they fail to exercise due diligence to prevent, punish, investigate, or redress harm caused by private actors.

Furthermore, although international human rights treaties rarely refer to such term, human rights courts and quasi-judicial bodies have been unanimous in qualifying the due diligence nature of some State obligations in this field.[601] In *Vélazquez-Rodríguez v Honduras* case, the Inter-American Court of Human Rights claimed that an illegal act which violates human rights and which is initially not directly imputable to a State can lead to international responsibility of the State, not because of the act itself, but because of the lack of due diligence to prevent the violation or to respond to it.[602] Furthermore, while due diligence normally concerns State obligations regarding the activities of private parties under its jurisdiction, it can also be a feature of some primary obligations pertaining to the State's own conduct. For instance, the State obligation to take *all appropriate measures* to *achieve progressively* the rights protected under ICESCR regard both the activities of third parties and the State own legislative measures.[603]

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[592] ICJ (1980) United States Diplomatic and Consular Staff in Tehran, Judgment, I.C.J. Reports 1980, p-31-32.

[593] For example, under article 4 of the Convention relative to the Laying of Automatic Submarine Contact Mines (Hague Convention VIII of 18 October 1907), a neutral Power which lays mines off its coasts but omits to give the required notice to other States parties would be responsible accordingly.

[594] Mazzeschi P. (2008) Responsabilité de l'Etat pour violation des obligations positives relatives aux droits de l'homme, in Recueil des Cours vol. 333, p. 227; Nowak (2005) UN Covenant on Civil and Political Rights: CCPR Commentary, Kehel, p. 36-37

[595] See UN (2004) General Comment n.31 on the General Obligations Imposed on States Parties to ICCPR, UN doc CCPR/C/21/Rev1; UN (2017) General Comment n.24 on State's obligations under the ICESCR in the context of business activities, UN doc E/C/12/GC/24

[596] Mazzeschi P. (2008)
Since *Marckx v. Belgium case* (1979), the European Court has stated that the States have only the negative obligation to abstain from committing violations but also the positive obligation to guarantee the respect of rights. In the *X and Y v. Netherland* case (1985), the Court has started to apply the positive obligations doctrine also to the relationship between private actors, applying it since the *Lopes Ostra v. Spain* case (1994).

[597] Depuy, Reviewing the Difficulties of Codification: On Ago's classification of obligations of means and obligations of result in relation to State responsibility, in European Journal of International Law, 1999, p- 371 ss.

[598] ICJ (2010) Pulp Mills on the River Uruguay (Argentina v Uruguay) ICJ Rep 14.

[599] ICJ (1980) United States Diplomatic and Consular Staff in Tehran (US v Iran) para 63.

[600] Chinkin,C. 'A Critique of the Public/Private Dimension' (1999) 10 European Journal of International Law 387, 393; Chetail,V. 'The Legal Personality of Multinational Corporations, State Responsibility and Due Diligence: The Way Forward' in Denis Alland and Others (eds), Unity and Diversity of International Law Essays in Honour of Professor Pierre-Marie Dupuy (Martinus Nijhoff Publishers 2014), 124.

[601] See Pisillo Mazzeschi R (2008), p.187.

[602] Velásquez Rodríguez v Honduras (1988) IACtHR Series C No 4, para 172.

[603] CESCR (1966) International Covenant on Economic, Social and Cultural Rights, entered into force 3 January 1976) 993 unts 3, Article 3.

Connected to the theory on due diligence obligations of the State and related responsibility, it is essential to differentiate between a *direct* and an *indirect* responsibility. A direct responsibility emerges when the conduct of the company is attributed to the State, in case of enterprises acting as State agents.

Indirect responsibility is linked to the doctrine of positive obligations, which requires States to protect rights-holders against abuses committed by private persons/entities via deterrent measures, such as legislation, policies or specific operational steps.[604] In different circumstances, the State can be considered indirectly responsible for the conduct of private actors recalling the notion of positive obligations, for a State omission or failure to act in undertaking due diligence and preventive measures to avoid a violation of human rights by business[605]. Hence, a State may be responsible for harms arising from its failure to take measure and to regulate businesses,[606] with complicity or acquiescence with the acts of individuals.[607] But, besides the requirement of jurisdiction, the positive obligations require the existence of a "sufficient nexus",[608] namely the defaults of the state or specific public actors should have "sufficiently direct repercussions"[609] on human rights.[610]

So, in the field of public procurement, a responsibility of states may arise, and it may be *"direct"*, deriving from a breach to respect human rights, or *"indirect*", in case of due diligence violations. Furthermore, only negative obligations bind States to effectively prevent violations in terms of "duty of result", while positive obligations imply solely a duty of diligent conduct, in particular the duty to adopt adequate measures of prevention and repression[611]. Consequently, in the latter case, States could be exonerated from any responsibility simply by proving their due diligence, even when serious violations have occurred. Second, only negative obligations have a potential extraterritorial projection, while positive obligations are generally limited by the territorial scope of the functions of States. Hence, if one assumes the point of view of victims of human rights violations, the definition of the proper level of responsibility in terms of attribution – rather than due diligence – is not an irrelevant question. Therefore, founding responsibility on direct attribution encourages States to monitor activities of public enterprises and improves access to remedies for the victims.[612]

The differentiation between positive and negative obligations has been remarked also in some cases brought before the European Court of Human Rights- *Storck*[613], *Costello-Roberts*[614] and *Powell*[615] cases - highlighting the urgency to address State-business responsibility connected to human rights. Indeed, positive obligations of States should be extended also to the way in which domestic rules on public procurement are drafted, because States cannot fully discharge their responsibility by delegating fulfilment of their obligations to private entities or individuals.

Given such premises on the definition of a wrongdoing and possible responsibility in case not only of action but also omission by the State, the focus is then on understanding the attribution of such conduct to the State.

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[604] ICJ Cases: X and Y v Netherlands, App. No. 8978/80, Judgment, 26 March 1985, para.23; Osman v. UK [GC], App. No.23452/94, Judgment, 28 October 1998. See also Human Rights Committee, General Comment No. 3: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant (2004), CCPR/C/21/Rev.1/Add. 1326, para.8.

[605] ILC "The acts of private persons acting in a private capacity then constitute an external event which serves as a catalyst for the wrongfulness of the State conduct" in Yearbook of the International Commission, 1975, vol. 2 A/CN4/SERA/1975 para 4-5

[606] See ECtHR (2005) Fadeyeva v the Russian Federation [2005] ECHR No. 55273/00 §89 and §92.

[607] See Ireland v. UK, App. No.5310/71, Judgment, 18 January 1978, para.159.

[608] Fadeyeva v. the Russian Federation, App. No. 55273/00, Judgment, 30 November 2005, para.92.

[609] Moldovan and Others v Romania, App. Nos.41138/98 and 64320/01, Judgment, 30 November 2005, para.95, citing Ilaşcu and others v Moldova and Russia [GC] App.No. 48787/99, Judgment, 8 July 2004

[610] O'Brien C.M. & Ortega O.M. (2018), Discretion, Divergence, Paradox: Public and private Supply Chain Standards on Human Rights, p. 5

[611] Russo D. (2019)

[612] Chirwa (2004) "The Doctrine of State Responsibility as a Potential Means of Holding Private Actors Accountable for Human Rights", Melbourne Journal of International Law, p. 1.

[613] ECtHR (2005) Storck v Germany App no 61603/00, ECHR 16 June 2005, para 103. 8.

[614]ECtHR (1993) Costello-Roberts v UK App no 13134/27, ECHR 25 March 1993, para 27.

[615] ECtHR (1990) Powell and Rayner v UK App no 9310/81, ECHR 21 February 1990, para 42.

The Attribution of Conduct and its Dilemmas: Articles 4, 5 and 8

Overall, the attribution of conduct is the legal operation and process whereby it is determined whether the conduct of a physical person can be considered an act of the State and thus ascribed to it.[616] The *attribution of conduct* to a State is specifically addressed by art.4-11 in Part One, Chapter II[617] outlining the circumstances in which the State is responsible for acts or omissions attributable to it.

The general rule of attribution is that the only conduct attributed to the State at the international level is that of its organs of government, or of others who have acted under the direction, instigation or control of those organs, for example as agents of the State. Thus, organs include entities that are, very broadly, part of a state's structure. Such approach is adopted with a view to limiting responsibility to conduct which engages the State as an organization, and also so as to recognize the autonomy of persons acting on their own account and not at the instigation of a public authority.[618]

Among the rules stipulated under Chapter II, Articles 4, 5 and 8 are the most relevant provisions concerning the procedure to assess the attribution of conduct to a State.

To attribute a specific conduct to a particular State, an assessment of such link must be undertaken, understanding whether there is an organic link or rather a *de jure* or *de facto* connection.[619] Thus, when reflecting on the State-business nexus and on a public procurement transaction, it must be considered that essentially the State acts through a contracting authority establishing relationship with private suppliers through a public contract. Is it possible to attribute the wrongful conduct of private actors to the State? To reply, it is essential to assess the following:

1. Organic criterion (article 4):
    - Is there an organic link between the contracting authority stipulating the contract and the State?
    - Is there an organic link between the State and business – namely a maximum identification between the two - which must be *de jure* according to the internal law?
2. Two extra-organic criteria (if article 4 does not apply):
    - Is there a functional link (*de jure)* between State and business (article 5)?
    - Is there a factual link (*de facto*) based on instructions and control by the State linking State and business (article 8)?

Article 4: Conduct of Organs of the State – The Organic Criterion

Article 4 defines the *Conduct of Organs of a State* introducing the so-called "organic criterion"[620] under which States are fully responsible for the acts of their organs:

> "The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central Government or of a territorial unit of the State."

In case of attribution of conduct in public procurement situations, as first step this article is essential to demonstrate an organic direct link between the procuring authority – such as a local municipality or any public agency conducting procurement operations through public procurement procedures – and the State as subject of international law holding international responsibility.

The term "State organ" covers all the individual or collective entities making up the organization of the State and acting on its behalf, irrelevant of (1) the fact that the organ belongs to the executive, the

[616] Crawford, J (2013) State Responsibility: The General Part, p.130.
Binder C. and Wittich, S.(2022) A Comparison of the Rules of Attribution in the Law of State Responsibility, State Immunity, and Custom, in Kajtár,G. Başak C.,Milanovic M. (Eds) *Secondary Rules of Primary Importance in International Law*.
[617] on "Attribution of conduct to a State",
[618] ILC (2001) Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries, Supplement No. 10, p. 40
[619] Russo D. (2023), p. 34
[620] Ibid p. 35

legislative or the judiciary; (2) the position the organ holds in the organization of the state; [621] (3) the organ's character as one of the central government or of a territorial units of the State.[622] Thus, the definition of organ is extensive without considering any hierarchical or functional limitation. The fact that the State is responsible for the conduct of its own organs, acting in that capacity has long been recognized in international judicial decisions.[623] ICJ has confirmed the customary character of such approach in multiple cases, for example in "*Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights"*:

> "According to a well-established rule of international law, the conduct of any organ of a State must be regarded as an act of that State. This rule… is of a customary character".[624]

Furthermore, the Commentary outlines that it is irrelevant "for the purposes of attribution that the conduct of a State organ may be classified as "commercial" or as *acta iure gestionis*". Thus, differently from a more restrictive approach in the theory of State immunity, not only *acta iure imperii* but also *acta iure gestionis* could be attributed to a State.

Regarding the assessment of the *organic status*, according to art. 4.2 "an organ includes any person or entity which has that status in accordance with the internal law of the State". Thus, internal law is fundamental in determining the qualification of a State organ. Where the law of a State characterizes an entity as an organ, no difficulty would arise. Nonetheless, in some systems the status and functions of various entities are determined not only by law but also by practice, and an exclusive reference to internal law would be misleading. The internal law of a State may not classify, exhaustively or at all, which entities have the status of "organs". In such cases, while the powers of an entity and its relation to other bodies under internal law will be relevant to its classification as an "organ", internal law would not itself perform the task of classification. Furthermore, even if it does so, the term "organ" used in internal law may have a special meaning, and not the very broad meaning it has under article 4.

As second step, regarding the possible attribution of responsibility to non-State actors - private suppliers in case of public procurement – further complexities arise. Indeed, the wording of art. 4 and the ILC preparatory works suggest that the conduct of private persons is not as such attributable to the State, outlining a clear separation between States and corporations' responsibility. This was established for the first time in the landmark *Tellini* case[625]. Anyway, an extensive interpretation of the term "organ" opens the door to further reflections on the potential attribution of responsibility to non-State actors, although this has so far received marginal attention in the international state responsibility theory. ILC has highlighted that there are some situations in which the corporate veil can be pierced, making it possible to attribute enterprises acts to the State:

> "If such corporations act inconsistently with the international obligations of the State concerned the question arises whether such conduct is attributable to the State. In discussing this issue it is necessary to recall that international law acknowledge the general separateness of corporate entities at the national level, except in those cases where the corporate veil is a mere deviser or a vehicle for fraud and evasion."[626]

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[621] Binder C. and Wittich, S.(2022), p. 248

[622] See *Salvador Commercial Company* case, the tribunal said that: "a State is responsible for the acts of its rulers, whether they belong to the legislative, executive, or judicial department of the Government, so far as the acts are done in their official capacity.
See also *Chattin* case, UNRIAA, vol. IV (Sales No. 1951.V.1), p. 282, at pp. 285–286 (1927); and *Dispute concerning the interpretation of article 79 of the Treaty of Peace*, *ibid.*, vol. XIII (Sales No. 64.V.3), p. 389, at p. 438 (1955).

[623] See, *Claims of Italian Nationals* (footnote 41 above); *Salvador Commercial Company*, UNRIAA, vol. XV (Sales No. 66.V.3), p. 455, at p. 477 (1902); and *Finnish Shipowners (Great Britain/Finland)*, *ibid.*, vol. III (Sales No. 1949.V.2), p. 1479, at p. 1501 (1934).

[624] Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights, Advisory Opinion, I.C.J. Reports 1999 p. 87, para. 62.

[625] PCIJ (1923) Tellini Case, Commission stated that: The responsibility of a State is only involved by the commission in its territory of a political crime against the persons of foreigners if the State has neglected to take all reasonable measures for the prevention of the crime and the pursuit, arrest and bringing to justice of the criminal.

[626] ILC (2001) p. 25

The Commentary to the Draft Articles has also clarified that:

> "On the other hand, where there was evidence that the corporation was exercising public powers or that the State was using its ownership interest in or control of a corporation specifically in order to achieve a particular result, the conduct in question has been attributed to the State".[627]

ILC has, thus, recognized the formal separation between State and business as distinct juridical subjects,[628] however a business conduct could be attributed to the State only when the corporation has exercised public powers or the State has controlled the enterprise in order to achieve a particular result. Thus, the exercise of public powers or the state control to realize State objectives should be considered as main criteria for the attribution.

In the academic debate, some scholars have outlined the need to a more stringent control by the State especially when the protection of human rights is impinged.[629] Indeed, a too narrow approach on the matter risks to fuel situations in which the State would circumvent its responsibilities, inducing private actors to carry out conducts prohibited by international law on its behalf.[630] In this regard, the ICJ has also expressed the need to capture the substantial relationships linking State and privates:

> "It is appropriate to look beyond legal status alone, in order to grasp the reality of the relationship between the person taking action and the State to which he is so closely attached to appear to be nothing more than its agent: any other solution would allow States to escape their international responsibility by choosing to act through persons or entities whose supposed independence would be purely fictious".[631]

As such, it is crucial to expand the assessment considering two extra-organic elements:

- Whether the supplier exercise elements of governmental authority (article 5)
- Whether the supplier act under the instructions, direction or control of the State (article 8)

Article 5: Conduct of persons or entities exercising elements of governmental authority

Article 5 considers potential situations in which a wrongful act is committed by an entity not qualified as organ of the State as per article 4 *stricto sensu*. When article 4 definition is not applicable, two "extra-organic" criteria proposed by DARS can be used to evaluate the possible attribution of a conduct to the State:

- A functional criterion based on a formal or *de jure* link between the State and the supplier (article 5)
- A factual criterion based on instructions and control provided by the State, based on a *de facto* link (article 8)

Article 5 deals, specifically, with the conduct of bodies which are not State organs but, nonetheless, authorized to exercise elements of governmental authority, stating that:

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[627] ibidem

[628] Ryngaert C. (2015) State Responsibility and Non-state actors in Nortmann M., Reinesh A., Ryngaert C. (eds) non-State Actors in International Law. P. 163; Chinkin (1999) A Critique of the Public/Private Dimension, European Journal of International Law, p. 395:
"State responsibility is a legal construct that allocates risk for the consequences of acts deemed wrongful by international law to the artificial entity of the State. The human link is provided by the doctrine of attributability, but this maintains the fiction of public and private actions of individuals which nevertheless begs the question of how they are determined. Why should the State only be responsible for the international wrongful acts of state organs? The state claims jurisdiction over the totality of functions within its territorial control: it might therefore be appropriate to assert its responsibility for all wrongful acts emanating from it, or from nationals subject to its jurisdiction. Who does denial of state responsibility for the actions of non-state actors protect – the state, individual freedom of action, or the most powerful who are able to remain outside the scope of international regulation? Does preserving the private space of non-attributable acts enhance or impede the achievement of an international rule of law? Such questions require nuanced and contextual responses that are little assisted by too much emphasis on a distinction between public and private sphere of action

[629] Kress (2001), L'organe de facto en droit international public. Reflexion su l'imputation à l'état de l'acte d'un particulier à la lumière des développments récents, p. 93

[630] Ortega A. (2015), The attribution of international responsibility to a State for conduct of private individuals within the territory of another State, InDRET p. 24

[631] ICJ (2007) Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), sentence 26 February 2007, ICJ Report 2007, par. 392

> "The conduct of a person or entity which is not an organ of the State under art. 4 but which is empowered by the law of that State to exercise elements of the governmental authority shall be considered an act of the State under international law, provided the person or entity is acting in that capacity in the particular instance".

This article is particularly interesting in case of State-business nexus situations - particularly UNGP 4 and 5 - as its ratio behind is to regulate an increasing process of privatization of traditional public functions and the rise of parastatal entities[632], recognizing the growing risk of international State responsibility also connected to the conduct of such entities – including public companies or private ones - exercising public functions. Under the generic label "entity", parastatal entities, former State corporations which have been privatized holding public or regulatory functions[633], semi-public entities, public agencies, and in special cases, private companies are all envisaged. The primary requirement is that the entity must be empowered by the law of the State to exercise functions of a public character normally exercised by State organs. Thus, only when the State has adopted a formal act, as a law or a contract[634] through which the State clearly delegates its governmental authority to another entity - even if only to a limited extent or in a specific context – the link is demonstrated.[635]Another requirement – and at the same time a limitation to further expand the application of this article - is that the specific conduct at stake must relate only to the exercise of governmental authority and not other private or commercial activity in which the entity may engage.

When reflecting on the State-business nexus, it is crucial to define what "element of governmental authority" mean in practice, as it may be limiting for the purpose of attributing a private contractor conduct to a State. The Commentary to Article 5 clarifies the meaning of "governmental authority", stating that

> "What is regarded as governmental depends on the particular society, its history and traditions. Of particular importance is not just the content of the powers but also the way they are conferred on an entity, the purposes for which they are to be exercised and the extent to which the entity is accountable to government for their exercise".[636]

Such broad definition of "governmental authority" could allow an extensive interpretation referring not only to *acta jure imperii* but also to *acta jure gestionis*, for instance in the case of the management of essential services of public interest. These may include infrastructural services, supply of water, energy, education services etc.[637] most often regulated by procurement contracts and procedures. As such, an extensive interpretation of governmental authority/public functions could overcome some gaps in DARS on the attribution of state responsibility for private enterprises conduct, especially when

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[632] Parastatal entities can be classified into two major groups: states can enlist an existing private entity that is equipped with relevant capabilities in public services, or parastatal entities can be established by a state for the purpose of exercising specific public functions. As to the former category, examples provided by the commentary on Article 5 include private security firms acting as prison guards with powers of detention and discipline and private airlines exercising certain powers in relation to immigration control or quarantine. Parastatal entities falling under the latter category are prevalent in strategic sectors, such as national resources, energy and infrastructure, which is illustrated by the practice of investor-state dispute settlement (ISDS) tribunals (See C. Kovács, *Attribution in International Investment Law* (2018), at 129.)

[633]ILC (2001) Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries, Supplement No. 10 (A/56/10), Commentary art 5, par.2.

[634] Commentary art. 5, par. 7: "the internal law in question must specifically authorize the conduct as involving the exercise of public authority; it is not enough that it permits activity as part of the general regulation of the affairs of the community. It is accordingly a narrow category"
Cfr Francioni F. (2011), The Role of Home State in Ensuring Compliance with Human Rights, in Francioni F., Ronzitti N. (Eds) War by Contract. Human Rights, Humanitarian Law and Private Contractors, Oxford.
Raspal F. State Responsibility for Conduct of Private Military and Security Companies violating ius ad bellum p.396

[635] Momtaz (2010) State Organs and Entities Empowered to Exercise Elements of governmental authority in Crawford J., Pellet A., Olleson S. The Law of International Responsibility, Oxford p. 237

[636] Ibid, para 6; Spinedi M. (2006) La responsabilità dello Stato per comportamenti dei private contractors in Spinedi, Giannelli, Alaimo La codificazione della responsabilità internazionale degli Stati alla prova dei fatti, Milano, p. 99

[637] Comments to Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights, Principle n.12, 2012, Human Rights Quarterly, p. 1084:
"However even under the narrowest understanding of such functions, they should comprise law enforcement activities of armed forces the provision of basic infrastructure, certain essential public services such as water and electricity and traditionally public functions of the State, such as education and health"

providing public services.[638] Nonetheless, most difficulties in the practice are linked to demonstrating a functional link between the State and suppliers activities, thus not only the existence of a formal link with the State (through delegating act or a public procurement contract) but also proving that the company has been conferred the function to exercise "sovereign power".[639] Thus, a possible application of such article in public procurement context is advisable since private contractors or state-owned businesses are not generally assimilated to *de facto* organs of the state. However, the key limitation, also shown by limited application in case-law, is to demonstrate that such entities are empowered by internal law to exercise governmental authority[640] in cases of simple public transactions for goods, works, services.[641]. Given such difficulties, it is relevant to analyse under the international responsibility spectrum also situations where an entity acts under the direction or control of the State, covered by Article 8 DARS as it could be more appropriately applied to public procurement cases.

Finally, for a practical insight on the attribution of responsibility for wrongdoings committed by enterprises exercising public functions, selected ECtHR is considered.[642] For instance, in Castello Roberts case, the ECtHR highlighted the existence of a State responsibility extending to the protection of human rights in both public and private institutions, by stating that:

> "The State cannot absolve itself from responsibility by delegating its obligations to private bodies or individuals".[643]

In *Wos* case, the Court attributed the conduct of a private actor to the State upon the following:

> "The fact that a State chooses a form of delegation in which some of its powers are exercised by another body cannot be decisive for the question of State responsibility *ratione personae*. In the Court's view, the exercise of State powers which affects Convention rights and freedoms raises an issue of State responsibility regardless of the form regardless of the form in which the powers happen to be exercised, be it for instance by a body whose activities are regulated by private law. the convention does not exclude the transfer of competences under an international agreement to a body operating under private law provided that Convention rights continue to be secured. The responsibility of the respondent State thus continues even after such a transfer".[644]

The Court, thus, outlined that this would translate in a direct responsibility of the State. Similar conclusions have been developed in other cases, focusing not much on the obligation of the State in supervising and regulating the conduct of private actors, rather on the choice of the State to externalize "State powers".[645]

Article 8: Conduct Directed or Controlled by a State

Article 8 explores the specific case in which an entity acts under the instructions, direction or control of the State. This article is relevant to reflect further on public contracts and on the State-business nexus, applicable to legal relationships established between State and suppliers. As remarked

[638] Savarese (2006) Fatti di privati responsabilità dello Stato tra organo di fatto e complicità alla luce di recenti tendenze della prassi internazionale in Spinedi, Giannelli, Alaimo La codificazione della responsabilità internazionale degli Stati alla prova dei fatti, Milano
[639] Russo D. (2023), p. 42, n. 12
[640] ILC Commentary art. 5, para. 7
[641] The conduct of an entity must accordingly concern governmental activity and not other private or commercial activity in which the entity may engage. For example, the conduct of a railway company to which certain police powers have been granted is to be regarded as an act of the State under international law if it concerns the exercise of those powers, but not if it concerns other activities
[642] Russo D. (2023), p. 89
[643] ECHR (1993) Costello Roberts v. UK, case n. 13134, para. 27
[644] ECHR Case Wos v. Polonia, case n. 22860/02, para 72-73
[645] ECHR Synchev v. Ucraina, case n. 4773/02 Para. 54. In Sychev case, the Court affirmed that "the Court does not find it necessary to embark on a discussion of whether the liquidation commission was or was not in itself a State authority for the purposes of art. 34.1 of the Convention. The court notes that the fact that a State chooses a form of delegation in which some of its powers are exercised by another body cannot be decisive for the question of State responsibility ratione personae. In the courts' view the exercise of state powers which affects Convention rights and freedoms raises an issue of State responsibility regardless of the form in which these powers happen to be exercised, be it for instance by a body whose activities are regulated by private law"

by ILC, the conduct of private persons or entities is not attributable in principle to the State under international law. However, States can be responsible for acts of non-state actors in specific circumstances, when a factual relationship exists between the entity and the State and such acts are conducted under the State's instructions or where the State otherwise "directs or controls" such actions.[646] To clarify such matter, the following paragraph of ILC Commentary to article 8 is relevant:

> "…international law acknowledges the general separateness of corporate entities at the national level, except in those cases where the "corporate veil" is a mere device or a vehicle for fraud or evasion. The fact that the State initially establishes a corporate entity, whether by a special law or otherwise, is not a sufficient basis for the attribution to the State of the subsequent conduct of that entity. Since corporate entities, although owned by and in that sense subject to the control of the State, are considered to be separate, *prima facie* their conduct in carrying out their activities is not attributable to the State unless they are exercising elements of governmental authority within the meaning of art.5".

Thus, *a de facto* link between the State and the private entity – in case of public procurement contracts, the supplier to the State – must be assessed on case-by-case basis. Two circumstances[647] are distinguished by art.8:

- When private persons act on the instructions of the State in carrying out the wrongful conduct.
- When private persons act under the State's direction or control. The notion of State control is particularly relevant in case of public procurement transactions.

Firstly, in terms of State instructions, the attribution of conduct to the State authorized by it is widely accepted under the international jurisprudence.[648] This is the case of State organs supplementing their own action by recruiting or instigating private persons or groups acting as "auxiliaries" while remaining outside the official structure of the State. For instance, individuals or groups of private individuals who, though not specifically commissioned by the State and not forming part of its police or armed forces, are employed as auxiliaries or are sent as "volunteers" to neighbouring countries, or who are instructed to carry out particular missions abroad.[649]

In the second case, to determine whether a conduct is carried out "under the direction or control" of a State, a careful assessment is required. Different views on the "control test" have been developed in the case-law, representing an example of fragmentation in international law debates, as recalled by the ILC Report "Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law".[650]As evident from the DARS preparatory works, the interpretation of article 8 has been subject to evolution since its first formulation. Indeed, the approach was more flexible in the 1970s, while the current interpretation supported by the Commentary to art. 8 favours a restrictive interpretation: a conduct would be attributable to the State only if it directed or controlled the specific operation and the complained conduct was an integral part of that operation.

In the international case-law, two tests have been defined to assess the degree of control to be exercised by the State to be considered responsible of a conduct:

- The complete dependence or control test
- The effective control test

[646]ILC Art. 8, Conduct directed or controlled by a State, provides that: "The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct".

[647] In the text of article 8, the three terms "instructions", "direction" and "control" are disjunctive; it is sufficient to establish any one of them.

[648] See, e.g., the *Zafiro* case, UNRIAA, vol. VI (Sales No. 1955. V.3), p. 160 (1925); the *Stephens* case (footnote 147 above), p. 267; and *Lehigh Valley Railroad Company and Others (U.S.A.)* v. *Germany (Sabotage* cases*)*: "*Black Tom"* and *"Kingsland"* incidents, *ibid*., vol. VIII (Sales No. 58.V.2), p. 84 (1930) and p. 458 (1939).

[649] ILC Commentary art 8 para 2, p. 47

[650] UN doc A/58/10 p. 407

The first test considers whether the relationship between a State and non-state actor is of complete control on one side, and dependence on the other, making the non-state actor equivalent in law to an organ of the controlling state and its acts attributable to it.[651] If it is not, the *effective control test* is activated to determine if a specific operation of an organ - which is neither *de jure* nor *de facto* organ under state control - is directed by and attributable to the State. So, when it is demonstrated that a person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct, it is possible to attribute to the State a direct responsibility for the international wrongful act committed by the private actor.

Reflecting on the consolidated practice in the ICJ case-law to assess State responsibility in relation to non-state actors through the effective control test, *The Military and Paramilitary Activities in and against Nicaragua* case[652] is a landmark example. ICJ has adopted a restrictive approach, outlining that the circumstance in which US had financed, organized, supplied and equipped *contras* and had selected objectives and planned the operation in its entirety was not enough for the attribution to the State. ICJ recognized that US was responsible for the "planning, direction and support" provided to Nicaraguan operatives[653], but it rejected the broader claim of Nicaragua that all the conduct of the contras was attributable to the US by reason of its control over them, concluding that:

> "For this conduct to give rise to legal responsibility of the US it would be in principle have to be proved that State had effective control over the military and paramilitary operations of which the alleged violations were committed."[654]

The Court confirmed that a general situation of dependence and support would be insufficient to justify the attribution of the conduct to the State. There is, indeed, a fundamental difference between the effective control test - based on art. 8- and a *de facto* test- based art. 4. The effective control test does not require to demonstrate the existence of a general link of complete dependence between the private and the State but only that the control of the State regarded the specific operation during which the wrongful act happened.

Some years later, in 1999, the interpretation of the notion of "effective control" developed by ICJ and its restrictive application have been revised and criticised in *Prosecutor v. Tadic* case[655], proposing a more extensive approach: the "overall control" test. The International Tribunal for the Former Yugoslavia claimed that the principles of international law related to the attribution of international responsibility are not founded on rigid and static criteria, rather the relevant degree of control varies in relation to material circumstances on case-by-case basis[656]:

> "The requirement of international law for the attribution to States of acts performed by private individuals is that the State exercises control over the individuals. The *degree of control* may, however, vary according to the factual circumstances of each case. The Appeals Chamber fails to see why in each and every circumstance international law should require a high threshold for the test of control."[657]

The Appeals Chamber held that:

> "The degree of control by the Yugoslavian authorities over armed forces required by international law for considering the armed conflict to be international was *overall control* going beyond the mere financing and equipping of such forces and involving also participation in the planning and supervision of military operations".

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[651] O'Brien C.M. & Ortega O.M. (2018) Discretion, Divergence, Paradox: Public and private Supply Chain Standards on Human Rights, p. 6
[652] Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v United States), Judgment (merits), 27 June 1986, para 14.
[653] *Ibid* p. 51, para. 86.
[654] Ibid para. 115
[655] International Tribunal for the Former Yugoslavia, Sentence 15 July 1999, Prosecutor v. Dusco Tadic case
[656] Ibid para. 117
[657] *Prosecutor* v. *Duško Tadi´c*, International Tribunal for the Former Yugoslavia, Case IT-94-1-A (1999), ILM, vol. 38, No. 6 (November 1999), p. 1518, at p. 1541, para. 117. For the judgment of the Trial Chamber (Case IT-94-1-T (1997)), see ILR, vol. 112, p. 1.

Similarly, in the same year the ECtHR used the *overall control* test to apply the European Convention of Human Rights[658]. However, such developments have not fuelled a process of evolution in the ICJ general approach to the conceptualization of control. Indeed, in 2007, in the case concerning *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*[659], the ICJ has explicitly rejected the overall control approach developed in the Tadic case[660], stating that the control assessment must regard the specific wrongful act and not the overall military operation:

> "The overall control test has the major drawback of broadening the scope of State responsibility well beyond the fundamental principle governing the law of international responsibility: a State is responsible only for its own conduct. The overall control test is unsuitable, for it stretches too far, almost to breaking point, the connection which must exist between the conduct of a State's organs and its international responsibility".[661]

Reflecting on possible applications in case of public procurement and suppliers' operations, a restrictive approach on the effective control test promoted by ICJ could be limiting, particularly for demonstrating evidence of a possible link between wrongful acts committed by contractors and the State. To explore further the application of such criterion for the conduct of companies operating under the influence of the State, arguments could be extracted from case-law related to State-owned enterprises (SOEs); from the ECHR human rights case-law to explore established criteria to assess the control by the State over business; and from investment law dispute resolution, where the existence of a relevant link between State and companies has been showed more consistently.

State-Owned Enterprises and Human Rights Case-Law

Concerning the conduct of State-owned companies and controlled enterprises, the ILC has clarified that if such corporations act inconsistently with the international obligations of the State, such conduct could be attributed to the State. Indeed, as further outlined by the 2008 Preliminary Report:

> "The State itself may be held responsible under international law for internationally wrongful acts of its SOEs if they can be considered State organs or as acting on their behalf…"[662]

Since corporate entities, although owned by and thus subject to the control of the State, are considered to be separate, *prima facie* their conduct in carrying out their activities is not attributable to the State unless they are exercising elements of governmental authority within the meaning of article 5. This was the position taken, for example, in relation to the *de facto* seizure of property by a State-owned oil company, in a case where there was no proof that the State used its ownership interest as a vehicle for directing the company to seize the property.[663] On the other hand, where there was evidence that the corporation was exercising public powers,[664] or that the State was using its ownership interest in or control of a corporation specifically in order to achieve a particular result,[665] the conduct in question has been attributed to the State.[666]

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[658] ECHR (1996) Leizidou v. Turkey, case n 15318/89

[659] ICJ (2007) Case Concerning Application of the Convention on the Prevention and Punishment of the crime of genocide (Bosnia and Herzegovina V. Serbia and Montenegro)

[660] Ibid para 400

[661] Ibid para 404

[662] Ruggie J (2008), Report of the Special Representative of the Secretary General on the issue of human rights and transnational corporations and other business enterprises UN Doc A/HRC/8/5, 7 par. 3.2

[663] *SEDCO, Inc.* v. *National Iranian Oil Company*, *ibid*., vol. 15, p. 23 (1987). See also *International Technical Products Corporation* v. *The Government of the Islamic Republic of Iran*, *ibid.*, vol. 9, p. 206 (1985); and *Flexi-Van Leasing, Inc.* v. *The Government of the Islamic Republic of Iran*, *ibid.*, vol. 12, p. 335, at p. 349 (1986).

[664] *Phillips Petroleum Company Iran* v. *The Islamic Republic of Iran*, *ibid.*, vol. 21, p. 79 (1989); and *Petrolane* (see footnote 149 above)..

[665] *Foremost Tehran, Inc.* v. *The Government of the Islamic Republic of Iran*, Iran-U.S. *ibid.*, vol. 10, p. 228 (1986); and *American Bell International Inc.* v. *The Islamic Republic of Iran*, *ibid.*, vol. 12, p. 170 (1986).

[666] See *Hertzberg et al.* v. *Finland* (*Official Records of the General Assembly, Thirty-seventh Session, Supplement No. 40* (A/37/40), annex XIV, communication No. R.14/61, p. 161, at p. 164, para. 9.1) (1982). See also *X* v. *Ireland*, application No. 4125/69, *Yearbook of the European Convention on Human Rights, 1971*, vol. 14 (1973), p. 199; and *Young, James and Webster* v. *the United Kingdom, Eur. Court H.R., Series A, No. 44* (1981).

Considering further cases, in Yershova v. Russia case, the ECtHR held that a company's independent legal status under domestic law is not a decisive factor.[667] Thus, it grounded attribution in other factors, namely the existence of strong institutional and operational ties, such as public ownership and control over the company's management, together with the public relevance of the activities. In the latter regard, the ECtHR noted that:

> "As one of the main heating suppliers […] the company provided a public service of vital importance to the city's population".

Hence, as in the case law concerning the protection of investments, structural and functional considerations prevail over the company's domestic legal status.

ECtHR Case-Law on the notion of Control

The ECtHR case-law offers some interesting insights on the attribution of a non-State conduct to a State assessing the notion of control.

Different criteria of attribution have been developed by the Court, highlighting the importance to assess the *institutional and operational independence* of the non-State actor, understanding the degree of State control over its activity and its public nature. In details, the ECHR assesses the "non-governmental" nature of the non-State actor (business) to evaluate the legitimacy of the locus standi, according to art. 34 ECHR. In details the criterion of sufficient institutional and operational independence of the company has been used in the case law related to the attribution to a State of debts incurred by companies and offences committed by related companies.

The cases on debts incurred by companies regard the violation of art. 6 of ECHR and art.1 Protocol 1, where the Court has elaborated criteria to recognize the attribution of debts to a State, in case the company is assimilated to an organ or agent of the State, creating direct responsibility in case of insolvency upon the State.[668] Particularly, in case *Mykhaylenky*, the Court judged that a company operating in Chernobyl was under a stringent governmental control in terms of environmental protection but also health and safety and labour standards of its workers. Furthermore, the specific project at stake was managed for a period by the Ministry of Energy confirming the close control by the State and the absence of sufficient institutional and operational independence of the company from the State, considered core criterion of evaluation by the Court.

The latter criterion was used also in case *Yershova*, where the ECHR has elaborated indexes to assess the sufficient institutional and operational independence of a company:

> "The Court will have regard to such factors as the company's legal status, the rights that such status gives it, the nature of the activity it carries out and the context in which it is carried out and the degree of its independence from the authorities".[669]

Using such criteria, the Court evaluated that a company supplying heating in the city, despite formally distinct from the State, was connected to it by significant institutional links with the State, by the use of public funds and properties and the public nature of the service provided to the city. Thus, the Court concluded that

> "Given in particular the public nature of the company's functions, the latter control over its assets by the municipal authority and the latter decisions resulting in the transfer of these assets

[667] Yershova v. Russia, Application No. 1387/04, Judgment of 8 April 2010, para. 55.
On the contrary, in Fadeyeva v. Russia, Application No. 55723/00, Judgment of 9 June 2005, concerning a violation of Art. 8 of the European Convention by a formerly SOE then privatized by Russia, the Court concluded that "the Severstal steel plant was not owned, controlled, or operated by the State. Consequently, the Court considers that the Russian Federation cannot be said to have directly interfered with the applicant's private life or home. At the same time, the Court points out that the State's responsibility in environmental cases may arise from a failure to regulate private industry […]". Hence, the Court, excluding attribution, moved on to judge on indirect responsibility for breach of duty of diligence (paras. 89-92).
[668] See ECHR case n. 39745/02 Cooperativa Agricola Slobozia-Hanesei v. Moldova, para 18-19; Case 13820/04 Grigoryev and Kakaurova v. Russia, para 35; Case 2269/06 Kacapor and Others v. Serbia, para 98; Case 54522/00 Kotov v. Russia.
[669] ECHR (2010) Yershova v. Russia, case n. 1387/04

and the company subsequent liquidation, the Court concludes that the company did not enjoy sufficient institutional and operational independence from the municipal authority".[670]

Furthermore, a similar approach by the Court has been developed also for cases of attribution for corporate human rights misconduct. For instance, in *Saliyev* case[671], to attribute the violation of freedom of expression by a local newspaper to the State, the Court used the following criteria:

> "In order to determine whether any given legal person other than a territorial authority falls within the category of governmental organization, account must be taken of its legal status and where appropriate the rights that status gives it, the nature of the activity it carries out and the context in which it is carried out and the degree of its independence from the political authorities"[672]

The Court, thus, evaluated that the conduct was attributable to the State having assessed the existence of a mix of indexes of different nature linking the State and the company: on one side the indexes related to property and control and on the other side those related to the public nature of the service provided by the company.

Similarly, in *Novoseletskiy* case, the Court attributed the violation of the right to a private life committed by a public entity providing accommodation services to students to the State, given the public nature of the activity and the governmental supervision by the State on the management.[673] Also in this case, the proof to demonstrate the link between the State and the company act depends on the State control over the public entity activity and the public nature of the activity, as degrees of structural and operational independence of the entity at stake.

Finally, also in the *Islamic Republic of Iran Shipping v. Turkey* case, for example, the ECtHR had to interpret the notion of "governmental organisations" in order to establish whether the applicant enterprise was legally distinct from the State and therefore entitled to bring a claim under Article 34 of the European Convention. In this regard, it considered that the relevant notion included legal entities, regardless of their private or public legal personality, which participated in the exercise of governmental powers or ran a public service under government control.[674] It then concluded that the applicant was an entity independent of the State because it neither participated in the exercise of governmental powers nor had a public service role or a monopoly in a competitive sector. Despite not being a judgment on attribution, this conclusion nonetheless places services of public relevance on an equal footing with traditional governmental functions.

ICSID Jurisprudence

Further findings on Article 8 application relates to ICSID jurisprudence. For example, Article 8 DARS was applied in the *EDF case*[675], where it was emphasized that the Ministry of Transports of Romania had provided instructions to the companies at stake, thus, the tribunal, according to the Commentary to art. 8 approach, stated:

> "The evidence before the Tribunal indicates that Romanian State was using its ownership interest in or control of corporations (AIBO and TAROM) specifically in order to achieve a particular result within the meaning of the ILC Commentary. The particular result in this case was bringing to an end or not extending the contractual arrangements with EDF and ASRO and instituting a system of auctions".[676]

[670] Ibid para. 62
[671] ECHR (2010) Case n. 35016/03 Saliyev v. Russia
[672] Ibid, para. 64
[673] ECHR (2005) case Novoseletsikiy v. Ucraina, case n. 47148/99
[674] Islamic Republic of Iran Shipping v. Turkey, Application No. 40998/98, Judgment of 13 December 2007, para. 80.
[675] EDF (Services) Limited and Romania, ICSID ARB/05/13, 8 october 2009
[676] Ibid para. 221

In another case, the ICJ effective control test was put under discussion by an arbitral tribunal of ICSID[677], by applying article 8 and attributing the wrongful act of a company to the State[678], claiming on the notion of "control" that:

> "The Tribunal is aware that the level of control required for a finding of attribution under art. 8 in other factual contexts, such as foreign armed intervention or international criminal responsibilities may be different. It believes, however, that the approach developed in such areas of international law is not always adapted to the realities of international economic law and that they should not prevent a finding of attribution if the specific facts of an investment dispute so warrant".[679]

A further emblematic case on the attribution of responsibility to private contractors and public procurement contracts is the *Tulip* case[680]. The appellant claimed violations committed by Turkey through the control of a private corporation (Emlak) which managed public procurement of a construction project and which terminated the contract with the appellant for alleged failures. The Tribunal excluded that Emlak was a *de facto* organ of the State, but examined in depth the intensity of the link between the company and the State applying the control test:

> "Emlak was subject to the control of TOKI and therefore the Turkish State. As a result of this control over the voting shares and through its representation on the Board, TOKI was certainly capable also of exerting sovereign control over Emlak".

However, the Tribunal adopted a restrictive approach, although the government had used Emlak to promote public objectives as the development of social housing. Indeed, there were no proves that it had directed the choice of the contracting enterprise to terminate the contract with the appellant supplier. Rather, it was demonstrated that the choice was taken for commercial reasons and not for a public reason:

> "The evidence confirms that Emlak acted in each relevant instance to pursue what it perceived to be its best commercial interest within the framework of the contract"[681]

Thus, the Tribunal stated that despite the public procurement procedure and the public contract at stake, the contracting company had acted like a private company without any link with the State. So, the ICSID jurisprudence shows that the existence of an overall control by the State of a company is not enough to establish the attribution link if the wrongful conduct at stake is realized in the exclusive interest of the company. In case of public procurement contracts, the challenge would be to demonstrate that a specific conduct was taken for a public reason, which could be easier in case of contracts managing essential public services and goods.

In conclusion, it is evident that gaps exist in the DARS framework related to the development of a possible international corporate responsibility in case of human rights violations committed by contractors, also demonstrated by almost inexistent case-law on the matter. Nonetheless, article 8 application can be extended to private suppliers in case of public procurement context, justified also by further arguments from the international investment case-law and State-owned enterprises cases. Thus, in situations of public procurement and human rights violations, States could be considered responsible for non-state actors wrongdoings given the formal contractual link between the State and business (procurement contract) and upon demonstration of an *effective control*.

[677] Bayindir Insaat Turizm Ticaret v. Sanayi AS v. Islamic Republic of Pakistan, ICSID, ARB/03/29, 27 august 2009
[678]The Tribunal claimed that "each specific act allegedly in breach of the Treaty was a direct consequence of the decision of the NHA to terminate the contract, which decision received express clearance from the Government of Pakistan".
[679] Ibid par 130
[680] Tulip real estate Investment and Development Netherlands BV and Republic of Trukey, Case No. ARB/11/28
[681] Ibidem par 311

Legal Consequences and Conclusion

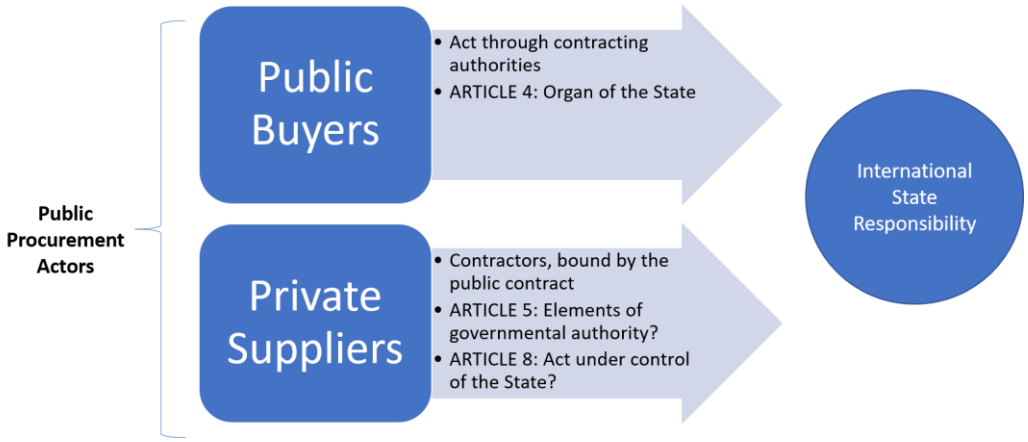
The State, legally bound to *protect, respect and fulfil* human rights obligations, can be held responsible for international wrongful acts committed by procuring agencies and its contractors when its acts or omissions are against human rights obligations. The responsibility entails multiple legal consequences illustrated in Part II, ILC DARS, referring to two different types of consequences: firstly, the state has the duty of *cessation* and non-repetition (art. 30), and a duty to make full r*eparation* (art. 31). Secondly, the articles create new rights for the injured states, principally, the right to invoke responsibility (artt.42,48) and a limited right to take countermeasures (art. 49-53). If the violations continue, the state has a duty to cease and make reparation, in the forms of *restitution, compensation or satisfaction*.

In the context of human rights risks potentially occurring in the public procurement supply chains, classical obligations to *protect, respect and fulfil* human rights combined with the newly emerged field of B&HR characterized by influential soft-law instruments and a smart mix of hard and law mechanisms, constitute key arguments for the State as buyer to act to promote human rights also while purchasing. Furthermore, the international State responsibility theory and the possibility to attribute non-state actors – as procurement suppliers- conduct to the State in specific circumstances, also when purchasing through public contracts, shed light on the urgency to act in such direction, although the case-law and practice on the matter is limited.

The analysis, reading the public procurement phenomenon under the UNGPs and State-business nexus framework, has evidenced the existence of potential obligations upon public buyers and related responsibilities. The interconnection between UNGPs and public purchasing has been addressed focusing on State-business transactions. The so-called *State-Business nexus* mentioned under the State Duty to Protect (Pillar I) has been at stake. Although the UNGPs do not provide a specific definition for State-business nexus, it takes three different forms described by UNGPs 4,5,6, which have been screened to understand whether the State-business nexus in its forms create obligations upon the public buyers in public procurement situations. Peculiar attention has been to UNGP 6 as most relevant for public procurement cases. Further reflections emerged on whether there are multi-level responsibilities in which the State as buyer may incur under international law, exploring whether the State as buyer could be practically held internationally responsible for human rights abuses committed by its suppliers. To reply, lights were shed on multiple dilemmas on the theory of international responsibility, exploring the possible attribution of conduct of non-State actors, as private suppliers – being catalysts of international responsibility - to the State. As it was shown, the classical international state responsibility theory and ILC articles do not reply explicitly to such dilemmas, thus reflecting on multiple cases related to the State-business nexus – even if not strictly related to public procurement- was necessary. Despite the limited case-law on the matter, possible elements of governmental authority and/or the establishment of control by the State could be used as legal arguments for the attribution of responsibility of public contractors to the State, acting in capacity of contracting authority.

The graph below grasps the multiple layers of subjectivity and possible attribution of responsibility in case of public procurement:

Image 3.1: Possible attribution of responsibility in case of public procurement



After having underlined potential obligations and legal consequences upon the State as buyer for human rights violations committed by suppliers, the focus of next Chapter will be on key obligations, due diligence measures and responsibilities raising specifically upon suppliers. The aim is indeed to set-up a comprehensive framework to clarify obligations and responsibilities of public procurement stakeholders – both public buyers and private contractors.

4. Role and Responsibility towards Human Rights: International Legal Perspective on Private Suppliers

When dealing with public procurement, private actors are inevitably involved as key stakeholders. Indeed, private suppliers are the typical party to public procurement contracts together with the public purchasers. Their size may range from small-medium enterprises (SMEs) to multinational corporations, operating in a specific business sector either nationally or internationally, whose selection will happen according to the specific procurement method and type of competition chosen by the contracting authority. In the bidding phase, private suppliers participate to the tender with their proposals and they are, then, selected by the procuring entity after careful assessment and evaluation of their qualification, compliance with the proposed requirements and adherence of the purchased good, work or service to the required specifications. After that, the procurement contract will be awarded to the selected supplier and the contract implementation and monitoring will happen in the contract management phase. It must be recalled that throughout the procurement cycle, requirements and criteria related to the respect of human rights by suppliers may be included to incentivize more responsible production of tenderers and to foster more responsible consumption of the procuring authorities.

Given such premises and after having analysed in the previous Chapter the role and responsibility of public actors in the procurement context under human rights law, what about the role and responsibility of private suppliers? It will be questioned whether business actors, falling under the umbrella of non-State international law actors, are addressees of specific obligations under international human rights law, exploring both hard and soft law sources. As clarified in Chapter 3, it is evident that non-state actors do not hold direct duties and responsibilities equal to the States to *protect, respect and fulfil* human rights. Nonetheless, emerging obligations and related responsibilities as the so-called "corporate responsibility to respect human rights" are to be explored. The dilemmas surrounding the emerging obligations upon business actors to respect human rights are at stake, to explore legal justifications for suppliers in public procurement transactions towards more responsible business conduct. In details, in the first section (4.1) the consolidation of a "Corporate Responsibility to Respect human rights" under the B&HR field is explored, unpacking the Pillar 2 of the UNGPs. Peculiar attention will be on human rights due diligence (HRDD) *iterative process* as core mechanism to operationalize the corporate responsibility to respect, addressing requirements, functions and legal consequences of its procedure. HRDD core steps will be unpacked for their possible inclusion in public procurement contracts, addressing its subsidiary components: human rights impact assessment; integration of the findings of human rights risk identification and impact assessment into company policies and practices; and corporate human rights reporting and communication.

Furthermore, in a second section (4.2) other private modes of regulations including the development and adoption of corporate codes of conduct and voluntary sustainability standards will be at stake, as instruments to foster more responsible supply and service delivery, exploring their legal force and effectiveness. Attention will be, specifically on compliance to international human rights related standards (shedding lights on ISO, SA and GRI standards) and social certification/labelling systems, often included as requirements, criteria, and verification means in public procurement processes.

After having explored raising obligations and assessed existing instruments to operationalize the corporate responsibility to respect human rights, in the third section (4.3), further reflections will be on accountability and liability dilemmas related to such responsibility. Attention will be, particularly, on due diligence obligations and liability regimes which may apply of course also to suppliers of the State in case of public procurement situations. The interconnection between liability, HRDD and domestic case-law will be at stake. To conclude, a snapshot will be provided on different regulatory efforts and a progressive trend towards making HRDD requirements mandatory in different domestic and regional

settings. Some examples of legislative initiatives, particularly in the European Union will be anticipated and then addressed more in details under Chapter 5.

4.1 Corporate Human Rights Responsibility and Standards of Conduct

4.1.1 Emerging Obligations and Corporate Responsibility to Respect Human Rights

As recalled in Chapter 3, business enterprises can be qualified as "Non-State actors" under international law. Such negative definition (*non*-State) encompasses entities that do not exercise governmental functions or whose conduct cannot be described as possessing a public nature - such as intergovernmental organizations, NGOs, paramilitary groups. For example, already after the Second World War, an evolutionary process has led to recognize the international subjectivity of international organizations.[682] Since the 1970s, lively debates in the international human rights landscape have questioned whether such traditional conception should have been overcome extending human rights obligations to non-State actors.[683] Indeed, the issue on the existence and nature of direct human rights obligations for non-State actors at international law, was and continues to be greatly debated by scholars.[684] Some authors question the distinction between subjects and objects in the international order and qualify corporations as "participants" in international society, along with States and international organisations, individuals and NGOs[685]. Whereas, some others emphasize the existence of obligations directly attributable to corporations by international customary law[686], for instance regarding the subset of *jus cogens* customary international law norms – such as piracy, forced labour, crimes against humanity classified as international crimes.[687] On this note, after the UNGPs endorsement, the Supreme Court of Canada held that legal claims against a business enterprise based on violation of customary international law norms and in particular jus cogens norms may succeed.[688]

The impact of international treaty law on corporations is another highly debated issue. Some authors, starting from the assumption that only States are the traditional international law subjects and primary duty bearers, recognize that human rights treaties do not establish directly enforceable obligations on business enterprises.[689] However, it must be recalled the horizontal application of human rights, which refers to the application of human rights obligations between private individuals or entities, rather than solely between individuals and the State.[690] Traditionally, human rights instruments primarily governed the relationship between individuals and the State, with States being the primary duty-bearers. However, recognition of the potential for private actors to violate human rights has led to the development of mechanisms to hold them accountable. For instance, treaty bodies have emphasized the States'

[682] ICJ (1949) Reparations for Injuries Suffered in the Services of the United Nations, p. 174

[683] Clapam A.(2006) Human Rights Obligations of Non-State Actors, Oxford University Press, 29-56. In chapter 2 a number of legal arguments are cited against the traditional dichotomy

[684] Gal-or N., Ryngaert C., Noorthman M. (2015) Responsibilities of the Non-state actor in armed conflict and in market place: theoretical considerations and empirical findings, Brill Nijhoff. Latorre A. (2020) In defence of direct obligations for businesses under international human rights law, BHRJ, 56

[685] Higgins (1994) Problems and Process: International Law and How we use it, Oxford, p. 49; Jagers The Legal Status of Multinational Corporations Under International Law, in Addo M. (1999) Human Rights Standards and the Responsibility of Transnational Corporations, The Hague, 1999. Reinish (2005) The Changing Legal Framework for Dealing with Non-State Actors in Alston P. (2005) Non-State Actors and Human Rights, Oxford, p.70

[686] For a reconstruction on obligations from international customary and treaty law, see Karavias (2013) Corporate Obligations under International Law, Oxford. For example, see art. 137.3 Convention on the Law of the Sea: "No State or natural or juridical person shall claim, acquire or exercise rights with respect to the minerals recovered from the Area except in accordance with this part. Otherwise, no such claim, acquisition or exercise of such rights shall be recognized"

[687] UNGA (2007) Business and Human rights: Mapping International Standards of Responsibility and Accountability for Corporate Acts: Report of the Special Representative of Secretary General on the issue of human rights and transnational corporation and business enterprises, parts III and IV

[688] Supreme Court of Canada (2020) Nevsun Resources Ltdcv. Araya case SCC 5.

[689] The States-only conception of international legal personality sits at the basis of the positivist school of thought, having been endorsed by scholars such as, among others, Heinrich Triepel and Lassa Oppenheim, while in legal practice it can be found, among others, in cases such as the ICJ SS Lotus and the Mavrommatis Palestine Concessions.

[690] Knox, J. H. (2008). Horizontal Human Rights Law. The American Journal of International Law, 102(1)

responsibility to regulate multinational corporations and other private parties in the discharge of their human rights duties, such as the General Comment n.31. The Human Rights Committee clarified that:

> "The positive obligations on State parties to ensure Covenant rights will only be fully discharged if individuals are protected by the State, not just against violations of Covenant rights by its agents, but also by acts committed by private entities."[691]

Particularly relevant is the reflection on the existence of an indirect responsibility of corporations to comply with substantive standards of protection. For example, requirements have been imposed on business actors via national laws in the area of employment and the environment.[692] Under international treaties, indirect responsibilities emerge in specific circumstances:

- One possible way concern including provisions calling on State parties to eliminate a prohibited conduct from corporate practice. For example, Article 2 CEDAW and Article 2.1.d of ICERD require States to take all appropriate measures to eliminate discriminations by both public and private entities, thus implicitly encompassing also business enterprises.
- Another type of obligations arises from corporate criminal liability provisions in treaties, suggesting that business actors do hold criminal and administrative liability. In the field of anticorruption[693], UN Conventions and treaty bodies and domestic courts have held that although human rights obligations are addressed to States, where their implementation is undertaken through corporate entities, the rights in question are also shouldered by the business actors in addition to the State. An example can be mentioned: in *Etcheverry v. Omint* case, the Argentine Supreme Court held that private health providers were under a duty to protect the right to health of their costumers and that their special relationship was not simply of contractual nature.[694] As a matter of fact, given the increasing privatization of public services - such as education, sanitation, water supply, utilities, healthcare etc.- the obligations of corporate entities administering such services, very often supplied through public procurement contracts, should be read as human rights duties to right-holders[695].
- It is also relevant to consider the horizontal application of human rights, particularly in the case of the European Convention on Human Rights (ECHR). This refers to the application of human rights obligations between private individuals or entities, rather than solely between individuals and the state. Traditionally, human rights instruments such as the ECHR were primarily understood as governing the relationship between individuals and the state, with the state being the primary duty-bearer. However, over time, there has been a recognition that private actors can also violate human rights, and there is a need for mechanisms to hold them accountable. The concept of horizontal application has been developed primarily through the case law of the European Court of Human Rights (ECtHR).[696] It means that the rights and freedoms protected by the ECHR can also be invoked in disputes between private individuals or entities.

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[691] Human Rights Committee, General Comment 31, para 8
In Arenz et al v. Germany (2004) para 8.5 and Cobal & Pasini Bertran v. Australia (2003) para 7.2, the Human Rights Committee discussed the admissibility of individual communications relating to abuse by private parties

[692] Methven O'Brien, C. (2019), Business and Human Rights. A Handbook for Legal Practitioners, Council of Europe, Strasbourg.

[693] See Article 2 and 3.2 of the 1997 OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and Article 26 of the 2003 UN Convention against Corruption.

[694] Argentinian Supreme Court (2001) Etcheverry v. Omint Sociedad Anonima y Servicios. Another relevant case is: Colombian Constitutional Court (2001) Restrepo and Lopez v. Salud Colmena

[695] CESCR (2011), Statement on the obligations of States parties regarding the corporate sector and economic, social and cultural rights, UN doc E/C.12/2011/1 para. 7

[696] The Court has recognized that private individuals or entities may be bound by human rights obligations in certain circumstances, particularly where there is a significant and direct relationship between the private actor and the enjoyment of human rights. The ECtHR has articulated several principles to determine when the horizontal application of human rights is appropriate: direct and significant involvement (private actor's actions have a direct and significant impact on the enjoyment of human rights by others); State responsibility (the Court assesses whether the state has failed in its positive obligations to protect human rights by allowing or facilitating the violation by private actors);

Besides international treaty law, in the early 1980s debates emerged on the possible imposition of direct human rights obligations on business actors, creating foundations beneath the B&HR crystallization. Initially, a standard-setting exercise raised in the form of non-binding guidelines issued by NGOs, business associations, international organizations inviting corporations to voluntarily adhere, due to legal commitment or reputational risks. At this stage, different instruments and initiatives were launched: the Caux Principles for Business, the Extractive Industries Transparency Initiatives, the UN Global Compact and the OECD Guidelines for Multinational Enterprises, among others. Despite their non-binding character, they attracted adhesion since the 1980s and were implemented in many cases through corporate policies and codes of conduct. Moreover, the advancement of CSR trend fostered a process of voluntary social reporting initiatives, inducing more transparent human rights and environmental record of business. Despite the euphoria towards voluntary mechanisms, the lack of effective accountability for business-related human rights abuses for victims and raising scandals triggered frustration[697] and international political concern. [698]

Thus, with an effort to move from voluntary to more binding obligations, as explored in Chapter 2, the Human Rights Commission proposed the adoption of the *UN Draft Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises* imposing full obligations to protect, respect and fulfil human rights on corporations, exactly as the ones imposed on State. Such expansive approach linked corporate liability not only to the corporate control over a particular conduct, but also to its overall influence and activity, which was eventually rejected by the business community. Nonetheless, it fostered the development of the *Protect, Respect, Remedy Framework* promoted by John Ruggie and the subsequent adoption of the *UNGPs*, the most significant (soft law) norms on the responsibility and accountability of corporate actors for their social, environmental and human rights impacts.[699] Ruggie's approach based on "principled pragmatism" - aimed at "reducing corporate-related human rights harms to the maximum extent possible in the shortest possible period of time"[700]- emphasizes the role of human rights in imposing ethical and social expectations over business.[701] Ruggie maintained that such expectations are implicit in existing human treaties, so new international law instruments establishing corporate duties to uphold human rights are not needed. Accordingly, the State's role as primary bearer of the *State duty to protect human rights* constitutes the first pillar – already described in Chapter 3 – followed by *the corporate responsibility to respect* and not harm human rights, asserted as second pillar, which is at stake in the next paragraph. It must be recalled that Ruggie's approach, amplifying but remaining anchored in established international legal principles without creating new hard law obligations and standards, constitutes a compromise supported by both States and business actors, leading eventually to the UNGPs endorsement.

Since their adoption, the UNGPs and other international instruments have helped to consolidate the legitimacy of human rights respect by business. As a matter of fact, the legal nature of the *corporate responsibility to respect human rights* has been subject to judicial considerations in different judicial cases. For example, in a Colombian constitutional decision, the Court held that "the UNGPs confirm the well-established maxim of international law that companies must respect human rights".[702] In 2021,

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Functions of a public nature (the Court may also consider whether the private actor is exercising functions that are typically performed by the state or whether the private actor is acting on behalf of or under the control of the state).

[697] Preuss, L. and Brown, D. (2012), "Business Policies on Human Rights: An Analysis of Their Content and Prevalence Among FTSE 100 Firms", Journal of Business Ethics Vol.109, Issue 3, pp.289-299

[698] Popular protests in this period culminated with the 1999 "Battle of Seattle". See: Dhanarajan, S. and Methven O'Brien, C. (2015), Human rights and businesses: Emergence and development of the field in Asia, Europe and globally, Singapore: Asia-Europe Foundation, 35-100.

[699] UNCHR (2008) "Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie". UNCHR (2011), "Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie.

[700] Ruggie, J.G. (2008), "Response Letter to Arvind Ganesan of Human Rights Watch".

[701] Ruggie, J.G. (2013), Just business: multinational corporations and human rights. First edition. New York: W. W. Norton & Company.

[702] Constitutional Court of Colombia (2015), Judgement SU 123/18, 15 November 2018, para 13.2

the Hague District Court relied upon UNGP 11 to interpret the unwritten standard of care under Dutch law to find that Royal Dutch Shell has an obligation to reduce greenhouse gas emissions arising from the "Shell group's entire energy portfolio".[703] The UNGPs were held to

> "Constitute an authoritative and internationally endorsed "soft law" instrument and in line with the content of other widely accepted soft law instruments and suitable as an interpretative guideline due to their 'universally endorsed content', irrespective of whether or not Shell had committed to them".[704]

The Court relied also on the European Commission's recognition of the expectation that businesses respect human rights in accordance with the UNGPs.

As it will be shown later on, enforcement and accountability gaps constitute still a key challenge hampering the compliance to the corporate responsibility to respect and its effectiveness. Indeed, most B&HR builds upon soft law mechanisms and only a few of them encompass some elements of enforcement. For instance, the OECD Guidelines on Multinational Enterprises, although voluntary for businesses, requires the adhering States to set up National Contact Points (NCP) to "further the effectiveness" of the Guidelines, where complainants can issue a complaint alleging that businesses are in violation of the Guidelines and seek for resolution. This is problematic, as evidence and cases show that business practices harmful to human rights still persist[705], while new ones have continued to emerge in different sectors.[706] Thus, doubts and dilemmas inevitably emerge on the sufficiency of existing B&HR instruments, questioning the UNGPs' penetration and effectiveness at corporate level.[707] Thus, strengthening the implementation, enforcement and effectiveness of human rights in the business setting is necessary, requiring further incentives for suppliers to foster corporate responsibility to respect human rights. In this regard, public procurement procedures and contract clauses could play an important role in driving enterprises towards more responsible business supply chains, by *hardening* the corporate responsibility to respect human rights with requirements in this direction.

In the next section, the UNGP Pillar 2 specificities will be addressed, unpacking recommended practices and requirements for suppliers to fulfil their responsibility to respect human rights.

4.1.2 Unpacking the UNGPs Pillar 2: Corporate Responsibility to Respect Human Rights

The UNGPs' Pillar 2 captures the *Corporate Responsibility to Respect Human Rights*, requiring two main actions for business enterprises: (1) avoiding to infringe human rights and (2) addressing adverse human rights impacts in which they are involved. In a nutshell, business enterprises should seek to prevent or mitigate impacts they "caused or contributed to", as well as those "directly linked" to their operations, products or services through their business relationships, whether contractual or non-contractual.[708] Concerning the structure, Pillar 2 comprises five *foundational principles* (UNGP 11-15) followed by nine *operational* ones which elaborate further upon the practical implementation requirements for businesses.

Starting with the foundational principles, UNGP 11 defines the *Corporate Responsibility to Respect* stating that:

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[703] Klimaatzaak tegen Royal Dutch Shell (2021) ECLI:NL:RBDHA:2021:5339, paras 4.4.11- 4.4.21, 4.4.55 , 4.4.13, 4.4.15
[704] Ibid para 4.4.11
[705] ILO (2020), "Achieving decent work in global supply chains TMDWSC/2020 Report for discussion at the technical meeting on achieving decent work in global supply chains".OHCHR (2022) "Panel discussion on the tenth anniversary of the Guiding Principles on Business and Human Rights". OHCHR (2022), "Sustainable Global Supply Chains: G7 Leadership on UNGP Implementation"
[706] O'Brien, C., Jørgensen, R., Hogan, B. (2021) Tech Giants: Human Rights Risks and Frameworks
[707] Deva S. (2012), Regulating Corporate Human Rights Violations: Humanizing Business London; New York: Routledge. Cernic, J. L., and Van, H. T. (2015), Human rights and business: Direct corporate accountability for human rights, Wolf Legal Publishers, Oisterwijk.
[708] UNHRC (2011), UNGP 13

> "Business enterprises should respect human rights. This means that they should avoid infringing on the human rights of others and should address adverse human rights impacts with which they are involved".

Such responsibility is framed expansively, encompassing both the avoidance of infringements and the need to address adverse human rights impacts, whether through actions that prevent, mitigate or remediate harms including as part of State judicial processes.[709] Furthermore, in terms of *State-business nexus*, the business responsibility to respect human rights equally applies to State-owned enterprises or controlled by the State, whose acts attributable to the State are under heightened responsibility to respect human rights as highlighted by the Working Group in the Commentary to UNGP 4.[710]

Regarding the legal status of the corporate responsibility to respect human rights, it is not framed in mandatory language ("shall"), rather as a recommendation ("should"). Indeed, the Commentary to UNGP 11 describes it as "a global standard of expected conduct"[711] applicable wherever a business enterprise operates and "over and above compliance with national laws". The corporate responsibility is, indeed, independent from State's duty.[712] Even if States are not in compliance with their own human rights obligations, this does not provide businesses with an excuse for failing to meet their own responsibilities.

The legal nature of the corporate responsibility to respect human rights under the UNGPs has been contested by scholars.[713] The UNGPs general principles clarify that they do not create new obligations under international law, nor they should be seen as undermining any existing legal obligations of States.[714] Rather, Pillar 2 is built around a vision of business enterprises as "specialized organs of society performing specialized functions" and should, therefore, not be subject to precisely the same expectations or obligations of States under international law.[715] While the State duty to protect places an obligation on States to "respect, protect, fulfil human rights", business enterprises have a "responsibility" rather than a "duty" to respect such rights. Some commentators have criticized this approach as too narrow, suggesting that it should foster expectation for businesses to have a responsibility to "do good" rather than merely "do not harm". Anyway, the Commentary to UNGP 11 clarifies that while business enterprises may support or promote human rights, this cannot be used "to offset a failure to respect human rights".[716]

Further foundational principles under Pillar 2 clarify that the corporate responsibility to respect human rights arises in relation to all internationally recognized human rights (UNGP 12), not just those that are at a given moment binding in a specific jurisdiction (UNGP 11). It applies both to the activities of the enterprise and to its business relationships (UNGP 13),[717] irrespective of the size, structure and context of the enterprise at stake (UNGP 14). UNGP 15 provides also substantive content to the corporate responsibility to respect identified in UNGP 13, requiring business enterprises to enact "policies and processes appropriate to their size and circumstances" by adopting a *policy commitment* to human rights, a *human rights due diligence* process and a *remediation process* of harms caused by

[709] Seck, S. (2023) "Guiding Principle 11: The Responsibility of Business Enterprises to Respect Human Rights" in Choudhury, B. (ed), The UN Guiding Principles on Business and Human Rights: A Commentary, Cheltenham: Edward Elgar, 2023, 85.
[710] UNHRC (2011), Commentary to UNGP 4
[711] UNHRC (2011), Commentary to UNGP 11
[712] ibid
[713] Nolan, J (2013) The Corporate Responsibility to Respect Human Rights: Soft Law or Not Law? in Deva S. and Bilchitz D. (2013) Human Rights Obligations of Business, Cambridge University Press. Lopez, C.(2013) "Ruggie Process: From Legal Obligations to Corporate Social Responsibility?" in Deva S. and Bilchitz D. (Eds) Human Rights Obligations of Business, Cambridge University Press, 58
[714] UNHRC (2011), General Principles
[715] Ibid
[716] UNHRC (2011), Commentary to UNGP 11
[717] The responsibility to respect human rights requires that business enterprises: (a) Avoid causing or contributing to adverse human rights impacts through their own activities, and address such impacts when they occur; (b) Seek to prevent or mitigate adverse human rights impacts that are directly linked to their operations, products or services by their business relationships, even if they have not contributed to those impacts. UNGP 13 explains that the protection of human rights depends on the participation of the business sector in the prevention, mitigation and remediation of human rights harms.

the enterprise or to which it contributed. These components are further elaborated in UNGP 16 to 24, and will be explored in the next paragraphs.
Thus, the corporate responsibility to respect human rights has become increasingly accepted as *social norm* with legal implications and influence on the business conduct, on judicial decision-making and on the development of State law. Such *increasingly authoritative standard* can play an important role in driving suppliers towards more responsible business conduct. Responsible production of suppliers and consumption of public authorities may be consolidated even more if included and promoted through procurement procedures and public contracts.

Human Rights Due Diligence Components: Impact Assessment, Integrating Findings, Reporting

To give effect to the *corporate responsibility to respect* and not harm human rights, companies should deploy dedicated corporate policies and internal measures, encapsulated into the so-called process of *human rights due diligence* (HRDD).[718] The concept of human rights due diligence is the object of extensive literature[719] and several pieces of general[720] and sectoral international guidance[721]. HRDD is a key component to realize the corporate responsibility to respect human rights in practice and is defined under the UNGPs as a *cyclical process* through which companies 'identify, prevent, mitigate and account for how they address their impacts on human rights.[722] As clarified by the 2008 Framework Report:

> "To discharge the corporate responsibility to respect human rights requires due diligence. This concept describes the steps a company must take to become aware of, prevent and address *adverse human rights impacts*".[723]

Clarifying the latter, *"adverse human rights impacts"* occur when an action removes or reduces the ability of an individual to enjoy his or her human rights.

Regarding the scope, HRDD substantive content is addressed to business impacts on all human rights enumerated in the International Bill of Human Rights[724] and the labour standards contained in the ILO's Declaration on Fundamental Principles and Rights at Work[725] at a minimum. Based on businesses' specific circumstances, additional standards, such as those relating to indigenous peoples [726] or conflict-affected areas[727] may be relevant. Nonetheless, companies may adjust the scale and intensity of the due diligence exercise to their individual character and context, taking into account factors such as company size, industry sector, and the seriousness and extent of human rights impacts to which the company's activities may give rise.[728]

The innovation of the terminology *human rights due diligence* must be highlighted. Indeed, in the words of Ruggie, "due diligence" is a useful tool to bridge gaps between international human rights law and the corporate sector. HRDD has a peculiar and unique meaning, never used in relation to

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[718] See Bonnitcha and R McCorquodale (2017), The Concept of 'Due Diligence in the UNGPs 28(3) EJIL 899; J Ruggie and J Sherman, (2017) The Concept of 'Due Diligence' in the UNGPs: A Reply to Jonathan Bonnitcha and Robert McCorquodale' 28(3) EJIL 921; Fasterling B. (2017) Human Rights Due Diligence as Risk Management: Social Risk Versus Human Rights Risk 2 BHRJ 225.
[719] Martin-Ortega, O. (2014) Human Rights Due Diligence for Corporations: From Voluntary Standards to Hard Law at Last 32 NQHR 55–57; Salcitto and Wielga (2017) What does Human Rights Due Diligence for Business Relationships Really Look Like on the Ground? 2 BHRJ
[720] OHCHR (2012), The Corporate Responsibility to Respect Human Rights: An Interpretative Guide, OHCHR Interpretative Guide)
721 OECD (2018) Due Diligence Guidance for Responsible Supply Chains in the Garment and Footwear Sector; OECD (2016) Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High- Risk Areas.
[722] UNHRC (2011), Guiding Principle 5
[723] UNCHR (2008) Report of the Special Representative of the Secretary General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, John Ruggie, Protect, Respect and Remedy: A Framework for Business and Human Rights, para. 56
[724] United Nations General Assembly (1948), Universal Declaration on Human Rights (10 December 1948, GA Res. 217A),
United Nations General Assembly (1966), International Covenant on Civil and Political Rights,
United Nations General Assembly (1966), International Covenant on Economic, Social and Cultural Rights,
[725] ILO (1998) Declaration on Fundamental Principles and Rights at Work
[726] ILO (1989) Convention concerning indigenous and tribal peoples in independent countries (no. 169); United Nations General Assembly (2007), Declaration on the rights of indigenous peoples A/RES/61/295
[727] UNHRC (2011), UNGP 12
[728] UNHRC (2011), UNGP 14

human rights impacts of business before the UNGPs' adoption.[729] As a matter of fact, due diligence is commonly used in both business and in human rights law, but with different meaning. In the business management jargon, it refers to the assessment process conducted by a company to identify, manage and mitigate commercial risks in its business activities- arising for instance due to business transactions, mergers and acquisitions, investments.[730] In human rights law, it generally refers to the obligation to undertake all reasonable measures to ensure that human rights violations do not occur.[731] Merging together the corporate and human rights law interpretation of due diligence, OHCHR tried to define HRDD:

> "An ongoing management process that a reasonable and prudent enterprise needs to undertake, in the light of its circumstances (including sector, operating context, size and similar factors) to meet its responsibility to respect human rights".[732]

Differently from a usual business risk management approach, HRDD is "concerned with risks *people*, specifically from adverse human rights impacts that a business enterprise, may *cause* or *contribute* to through its own activities, or which may be directly linked to its operations, products or services by its business relationships".[733] Thus, it can be conceived as:

> "A comprehensive attempt to uncover human rights risks, actual and potential, over the entire life cycle of a project or business activity with the aim of avoiding or mitigating those risks".[734]

In terms of scope, as anticipated, HRDD covers not only the company's own adverse human rights impacts, but also those which may be directly linked to its operations, products or services by its business relationships, including its suppliers, contractors and sub-contractors.[735] Beside the corporate responsibility to avoid its own adverse human rights impacts[736], two other scenarios can be considered[737]: (1) if the company's activities are not directly causing the impact, but still are contributing to it, the company should adopt measures to cease or prevent its contribution and use its leverage to mitigate such impact. (2) If there is no contribution at all to the adverse human rights impact, but the latter is linked to the company's operations, products or services by its business relationships,[738] the company should nonetheless take steps to gain and use *leverage* to prevent and mitigate the impact, to the greatest extent possible.

Moreover, HRDD has been defined as *an ongoing and cyclical process*, since human rights risks of a business may change over time as its "operations and operating context evolve". Very often, business due diligence consists of one-off process taking place before a specific transaction and concluding once the transaction is over. In contrast, HRDD must be developed on a continuing basis, keeping the supplier constantly aware of its impacts on rightsholders. Indeed, business activity is prone to change, thus in case of a project "HRDD should start at the earliest pre-contract stages of a project's life-cycle and continue through operations, to the project's decommissioning and post-closure stages".[739] Similarly, in case of public transactions, HRDD should be planned strategically since the very beginning of the contract implementation and monitored throughout the entire procurement process – more practical

[729] The concept of due diligence as part of a State human rights obligations was first expressed by the Inter-American Court of Human Rights in the case *Velazquez Rodriguez v. Honduras*, Judgement 29 July 1988
[730] Sherman J.,Lehr A. (2010), 'Human Rights Due Diligence: Is it Too Risky?', Harvard University Working Paper 55/2010, 3
[731] Bonnitcha J., McCorquodale R. (2017) The Concept of Due Diligence in the UNGPs, 28, EJIL, 921
[732] OHCHR (2012), The Corporate Responsibility to Respect Human Rights – An Interpretative Guide, para 6
[733] UNCHR (2008) Report of the High Commissioner for Human Rights Improving Accountability and Access to Remedy for Victims of business-related human rights abuse: the relevance of human rights due diligence in determination of corporate liability, para. 8
[734] UNCHR (2009) Report of the Special Representative of the Secretary General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, John Ruggie: Towards Operationalizing Protect, Respect and Remedy Framework, para. 71
[735] UNHRC (2011), UNGP 18
[736] UNHRC (2011), UNGP 13
[737] UNHRC (2011), UNGP 19
[738] According to the Commentary to UNGP 13, 'business relationships' is intended as relationships with business partners, entities in its value chain, and any other non-State or State entity directly linked to its business operations, products or services.
[739] Shackelford, S. (2017) Human Rights and Cybersecurity Due Diligence: A Comparative Study, U. Mich. JL Reform 859,871

insights on the procurement cycle and strategies are given in Chapter 6.

In terms of application at operational level HRDD entails multiple stages. First of all, the preliminary requirement to undertake HRDD is adopting a corporate policy expressing the company's commitment to respect human rights, as stated under UNGP15. Company human rights policies should be public, to give external stakeholders a clear platform for engagement with, and scrutiny of, companies whose activities affect them.[740]After adopting a human rights policy, due diligence is envisaged as comprising four key steps, enucleated in UNGPs17-20. In details, UNGP 17 defines the following parameters:

1) Assessing actual and potential impacts of business activities on human rights ("human rights risk and impact assessment");
2) Acting on the findings of this assessment, including by integrating appropriate measures to address impacts into company policies and practices;
3) Tracking how effective the measures the company has taken are in preventing or mitigating adverse human rights impacts; and
4) Communicating publicly about the company's due diligence process and its results.

The key components of such cyclical process - impact assessment, integrating findings, and reporting- are unpacked in the next paragraphs, specifying further what actions and instruments suppliers of public purchasers may adopt to comply with the corporate responsibility to respect human rights.

a) Human Rights Impact Assessment

Human rights impact assessment (HRIA) is the first step of the HRDD process, aiming at assessing business adverse human rights impacts. UNGP 18 is the reference principle detailing HRIA: to correctly capture human rights risks, business enterprises should identify and assess any actual or potential adverse human rights impacts with which they may be involved either through their own activities or as a result of their business relationships. As recalled above, human rights adverse impacts occur when an action removes or reduces the ability of an individual to enjoy his or her human rights.[741] Companies can be connected to such impacts in a variety of ways, directly or indirectly. Indeed, companies may be responsible for the following "trichotomy" of actions[742]:

- *Causing* a human rights impact through intended or unintended actions
- *Contributing to* a human rights impact, by being one of a number of entities whose conduct together curtails human rights; or
- Impacts *directly linked* to a business' operations, products or services, through its business relationships (for example with suppliers, joint-venture partners, direct customers, franchisees and licensees)[743]

The initial step of HRDD process is the identification and assessment of the existence and nature of adverse human rights impacts, playing a crucial role in informing the subsequent steps.[744] The purpose of HRIA is, indeed, to recognize specific impacts on peculiar people, considering the specific context of operations. The Commentary clarifies that this process typically includes:

> "Identifying who may be affected, cataloguing the relevant human rights standards and issues and projecting how the proposed activity and associated business relationships could have

[740] UNHRC (2011), UNGP 16
[741] International Business Leaders' Forum and International Finance Corporation (2010), Guide to Human Rights Impact Assessment and Management
[742] Bueno N., Bright, C. (2020) Implementing Human Rights Due Diligence Through Corporate Civil Liability 69(4) International & Comparative Law Quarterly
[743] UNHRC (2011), UNGP 13
[744] Bright, C., da Graça Pires, C. (2023). Guiding Principle 18: Human Rights Impact Assessments. In Chouduri B. (ed) The UN Guiding Principles on Business and Human Rights: a Commentary Edward Elgar, p. 137

adverse human rights impacts on those identified".[745]

Practically, to perform a HRIA, suppliers can draw on internal or independent human rights expertise. A crucial element is consulting stakeholders, namely undertaking meaningful consultation with potentially affected rights-holders and other relevant stakeholders. Unlike classic risk management tool, where the focus is on the risk to the business, HRDD requires meaningful engagement of rightsholders. As the Interpretative Guide clarifies:

> "Business human rights risks are the risks that its operations pose to rightsholders. This is separate from any risks that involvement in human rights impact may pose to the enterprise, although the two are increasingly related."

Given the dynamic nature of business activities, assessments of human rights impacts should be undertaken at regular intervals[746]. For example, prior to a new activity or relationship; prior to major decisions or changes in the operation (for instance, market entry, product launch, policy change, or wider changes to the business); in response to or anticipation of changes in the operating environment; and periodically throughout a project/activity/relationship life-cycle.[747]

Regarding the scope of application, the assessment should be conducted throughout the entire supply chain upstream and downstream phases. As the OHCHR Interpretative Guide observes, while it may be difficult in "multi-tiered" and complex supply chains to be aware of all of the human rights abuses linked to the company operations, this does not reduce the corporate responsibility to respect human rights. Such abuses may still be challenged in a "legal context" and are to be addressed since the very beginning.[748]Indeed, companies should address potential human rights impacts through prevention or mitigation, while actual ones should be subject to remediation. Thus, an effective HRIA must be both forward-looking - identifying potential impacts in advance, and thus planning actions to prevent and mitigate human rights harms- but also include ex-ante assessments - to be conducted prior to any new business activity and prior to any significant business decisions or changes in operations.

Other than the UNGPs' guidance on HRIA, other tools and methodologies have been issued by international organizations and associations, articulating different steps.[749] Sector-specific HRIA resources have also been developed[750] as well as thematic HRIA guidance.[751] Also companies themselves have often devised HRIA methodologies tailored to their own operating environments.[752] Despite the access to multiple instruments and methodologies, empirical studies have shown that a few assessments have been published by companies so far, making their effectiveness hard to ascertain. [753] On the other hand, the company HRIAs that have been disclosed have frequently been

[745] UNHRC (2011), UNGP 19
[746] UNHRC (2011), Commentary UNGP18
[747] UNHRC (2011), UNGP 18
[748] OHCHR (2012) The Corporate Responsibility to Respect Human Rights: Interpretative Guide UN Doc HR/PUB/12/02, 36
[749] Screening, planning and scoping, data collection and baseline development, analysing and disaggregating impacts, impact mitigation and management, monitoring, reporting and evaluation steps. See: Abrahams, D. and Wyss, Y. (2010), "Guide to human rights impact assessment and management (HRIAM)", International Business Leaders Forum and International Finance Corporation. Gotzmann, N., (2019), Handbook on Human Rights Impact Assessment, Edward Elgar Publishing, Social and Political Science. World Bank (2013), "Human Rights Impact Assessments: A Review of the Literature, Differences with other forms of Assessments and Relevance for Development", Commissioned by the Nordic Trust Fund. Danish Institute for Human Rights (2020), Human Rights Impact Assessment Guidance and Toolbox.
[750] International Council on Mining and Metals (2012), "Integrating human rights due diligence into corporate risk management processes". IPIECA and Danish Institute for Human Rights (2013), "Integrating human rights into environmental, social and health impact assessments. A practical guide for the oil and gas industry"
[751] For example: UNICEF (2014), "Children's rights in sustainability reporting. A guide for incorporating children's rights into GRI-based reporting; IBIS Denmark (2013), "Guidelines for implementing indigenous peoples' right to free prior and informed consent"; DIHR (2019), Human rights and state-investor contracts
[752] Wiss Y., Bensal T. (2019), Knowing and showing: The role of HRIA in the food and beverage Sector, in Gotzmann (Ed.) Handbook on Human Rights Impact Assessment, Edward Elgar Publishing, Cheltenham, pp. 170-186.
[753] Wachenfeld, M., Wrzoncki, E. and de Angulo, L. (2019), Sector-wide impact assessment: A big picture approach to addressing human rights impacts in Gotzmann (Ed.), 2019, Handbook on Human Rights Impact Assessment, Edward Elgar Publishing, Cheltenham, pp. 85-186.

criticized for being too restrictive in scope or in terms of the adequacy of the process adopted[754]. Thus, civil society organisations and national human rights institutions (NHRIs) often undertake HRIAs going beyond corporate practice, for instance by involving rights-holders, increasing transparency and disclosure to highlight shortcomings of specific business HRIAs and more generally to demonstrate the availability of alternative methodologies.[755] In conclusion, some positive changes may happen thanks to transparency reporting requirements and due diligence legislative initiatives that are flourishing in some jurisdictions. [756]

b) Acting upon HRIA: Businesses Responses to Human Rights Risks and Leverage

The next step after having identified and assessed human rights impacts, is to respond to them by preventing future abuses and addressing any uncovered ones. As clarified by UNGP 19, to prevent and mitigate adverse human rights impacts, business enterprises should, first of all, *integrate* the findings from the impact assessment across all relevant internal functions and processes, and take appropriate action. Businesses are expected to address all their actual or potential impacts, but, prioritizing them is crucial, namely at first seeking to prevent and mitigate their severest impacts, or those whose delay in response would make consequences irremediable.[757]

The Integration of the identified impacts and responses requires to establish and implement organization-wide standards for action. This means requiring a macro-process of "embedment" of the human rights policy "into all relevant business functions" through an "horizontal" integration.[758] Indeed, at governance level, the responsibility for addressing human rights impacts should be assigned to the appropriate level and function within the business enterprise and internal decision-making, budget allocations and oversight processes should enable effective responses to such impacts.
Furthermore, UNGP 18 states that appropriate action will vary according to: (i) whether the business enterprise *causes* or *contributes* to an adverse impact, or whether it is involved solely because the impact is *directly linked* to its operations, products or services by a business relationship. It will also vary according to (ii) the extent of its leverage in addressing the adverse impact.
Considering the already mentioned "trichotomy", three scenarios are to be taken into account:

- Where impacts are *caused* by elements within the business itself, the enterprise should immediately cease or prevent the impact, and provide for, or collaborate in, remediation.
- If a company has *contributed to* or is *directly linked* to impacts, it should cease its own contribution, exercise *leverage* over other entities involved, and provide, or cooperate in, remediation. According to the UNGPs, *leverage* is a company's ability to effect change in the wrongful practices of another entity (a business, a public or other social actor), with which it has a relationship. Modalities of leverage range from capacity building, formal representations or informal lobbying, to amending contract terms for suppliers.[759] If a company has leverage over a business partner, it is expected to exercise it. If, on the other hand, the company lacks leverage, it is expected to seek ways to increase it, for example, by offering incentives, or applying sanctions to the relevant entity, or collaborating with others to influence its behaviour.[760]

[754] Salcito, K., (2019), "Company-commissioned HRIA: Concepts, practice, limitations and Opportunities" in Götzmann (Ed.) 2019, Handbook on Human Rights Impact Assessment. De Winter-Schmit, Slacito K., (2019), "The Need For A Multidisciplinary HRIA Team: Learning And Collaboration Across Fields Of Impact Assessment" in Gotzmann (ed.) 2019, Handbook on Human Rights Impact Assessment
[755] International Centre for Human Rights and Democratic Development (n.d.), "Getting it right. Human rights impact assessment guide" International Federation for Human Rights (2011), "Community-based human rights impact assessments"
[756] O' Brien C., Martin-Ortega O., (2022), "Commission Proposal on Corporate Sustainability Due Diligence: Analysis From A Human Rights Perspective", Policy Department for External Relations Directorate General for External Policies of the Union.
[757] UNHRC (2011), UNGP 24
[758] Fasterling B. (2023) UNGP 19: Acting Upon Human Rights Impact Assessments in Chouduri B. (ed) The UN Guiding Principles on Business and Human Rights: a Commentary Edward Elgar,145
[759] Shift (2013) "From audit to innovation: advancing human rights in global supply chains"
[760] UNHRC (2011), UNGP 19

- Where a business enterprise has not contributed to an adverse human rights impact, but that impact is nevertheless *directly linked* to its operations, products or services by its business relationship with another entity, the situation is more complex. Among the factors to be considered to determine an appropriate action in such situations are the enterprise's leverage over the entity concerned, how crucial the relationship is to the enterprise, the severity of the abuse, and whether terminating the relationship with the entity itself would have adverse human rights consequences. Where the relationship is "crucial" to the enterprise, ending it raises further challenges. For example this is the case of product or service essential to the enterprise's business, and for which no reasonable alternative source exists, where the severity of the adverse human rights impact must be considered. Indeed, the more severe the abuse, the more quickly the enterprise will need to see change before it takes a decision on whether it should end the relationship. Particularly, as long as the abuse continues and the enterprise remains in the relationship, it should be able to demonstrate its own ongoing efforts to mitigate the impact and be prepared to accept any consequences – reputational, financial or legal – of the continuing connection.

c) Tracking Human Rights Impacts

After having assessed and addressed human rights impacts, the next steps in the HRDD are first to track responses and then to communicate human rights impacts. UNGP 20 outlines that to verify whether adverse human rights impacts are being addressed correctly, business enterprises should track the effectiveness of their responses. Tracking should:

- Be based on appropriate qualitative and quantitative indicators;
- Draw on feedback from both internal and external sources, including affected stakeholders.

Substantially, tracking is a monitoring "inward-looking process" which forms the basis for disclosure (UNGP 21) which is instead an "outward-looking process". Indeed, UNGPs 20 and 21 are closely interconnected, with the tracking of information that is prerequisite for the subsequent reporting.
There are various examples of tracking tools used by transnational companies in global supply chains to track their suppliers' compliance with corporate human rights policies. Usually, the latter are contractually imposed, for example through buyer's supplier code of conduct.[761] Companies can use a variety of verification tools, such as questionnaires and surveys for their suppliers, as well as internal and external audit systems. Indeed, self-audit or third-party audit may serve as effective ways to verify suppliers' compliance with human rights policies.[762] Furthermore, to support companies in the tracking process, international organizations and standards setting bodies have developed different international benchmarks and indicators for HRDD. For example, the Global Reporting Initiative (GRI) provides GRI Standards for sustainability reporting – more on GRI standards will be explored later in this chapter. The DIHR Human Rights Compliance Assessment Quick Check,[763] part of a larger open-source database of 1000 indicators, assists companies in their assessment of corporate policies, procedures and practices on human rights. Companies can also use the UN Guiding Principles Reporting Framework which contains guidance for companies in their reporting, internal and external audits and the use of indicators and other metrics.[764] The Corporate Human Rights Benchmark, assesses the human rights disclosure of global companies across different sectors that present a high risk of negative human rights impacts.[765]

[761] R hmkorf A. (2015) Corporate Social Responsibility, Private Law and Global Supply Chains (Edward Elgar), p. 79-125
[762] R hmkorf A. (2023) UNGP 20: Tracking Business Human Rights Responses in Chouduri B. (ed) The UN Guiding Principles on Business and Human Rights: a Commentary Edward Elgar,1551
[763] Doing Business with Respect for Human Rights, "Chapter 3.5: Tracking Performance"
[764] Shift and Mazars LLP (2015) UN Guiding Principles Reporting Framework
[765] World Benchmarking Alliance, Corporate Human Rights Benchmark

d) Communicating Human Rights Impacts: Corporate Human Rights Reporting

After having adequately tracked potential and actual risks and adverse impacts, the final step for the companies is to "communicate" publicly how to address the identified threats.[766] As provided by UNGP 21:

> "To account for how they address their human rights impacts, business enterprises should be prepared to communicate this externally, particularly when concerns are raised by or on behalf of affected stakeholders. Business enterprises whose operations or operating contexts pose risks of severe human rights impacts should report formally on how they address them".

The Commentary outlines that external communication can be conducted in different ways: formal and informal public reporting, in-person meetings, online dialogues, consultations with rights-holders, among others. In all instances, information provided by companies should be: (i) published in a format, and with a frequency, matching the scope and severity of impacts; (ii) accessible to intended audiences; (iii) sufficient to permit evaluation of the adequacy of company responses; (iv) designed not to pose risksto rights-holders or others such as human rights defenders, journalists, local public officials or company personnel, or to breach legitimate commercial confidentiality requirements. The reporting should cover topics and indicators concerning how enterprises identify and address adverse impacts on human rights. Independent verification of human rights reporting can also strengthen its content and credibility, and sector-specific indicators can provide helpful additional detail.[767]

Since the UNGPs endorsement, reporting and non-financial information disclosure have grown exponentially[768] and the reporting process has been evolving in the last few decades, shifting from voluntary to binding requirement in some jurisdictions. As a matter of fact, corporate "non-financial" reporting as a device through which companies analyse, document and deliver a public account of their sustainability performance has become increasingly prominent, to the extent some have pointed to a so-called "*disclosure revolution*"[769], shifting from a kind of reporting that was purely voluntary and undertaken on reputational grounds.[770]

Alongside voluntary corporate reporting, statutory reporting requirements have increasingly emerged at regulatory level in some jurisdictions, at national and regional level. One of the first examples of mandatory reporting obligations is the UK Companies Act enacted in 2006. Since then, legally required non-financial reporting has proliferated, both in the UK and in other jurisdictions. The Modern Slavery Act,[771] enacted in 2015, constitutes a key piece of legislation[772]making provision about tackling slavery, servitude and forced or compulsory labour and about human trafficking throughout supply chains. The legislation includes reporting provisions, whose effectiveness has, however, been questioned. Indeed, the Act does not prescribe any enforcement mechanism or any sanction for failure to act, thus businesses can substantially choose whether or not to report about human rights impacts and responses.

In France, "soft" (*comply or explain*) obligations mandating corporate social reporting by publicly-listed companies were firstly introduced in 2001. In 2012, the reporting duty was strengthened and

[766] UNHRC (2011), UNGP 20 and 21
[767] UNHRC (2011), Commentary UNGP 21
[768] R hmkorf A. (2023), p. 164
[769] Cooper, S. and Owen, D. (2007), "Corporate social reporting and stakeholder accountability: the missing link", Accounting, Organizations and Society, Vol. 32 No. 7-8, pp. 649-667. Islam, M. and McPhail, K. (2011), "Regulating for corporate human rights abuses: the emergence of corporate reporting on the ILO's human rights standards within the global garment manufacturing and retail industry", Critical Perspectives on Accounting, Vol. 22 No. 8, pp. 790-810.
[770] Villiers C. (2018) The Limits of Disclosure in Regulating Global Supply Chains, 23, Deakin L. Rev. 143, 162-165
[771] UK Public General Acts (2015), Modern Slavery Act
[772] Section 54 "Transparency in supply chains": businesses with annual turnover of 36£ million or more must issue an annual statement of the steps the organization has taken during the financial year to ensure that slavery and human trafficking is not taking place in any of its supply chains and in any part of its own business. The act also contains a list of discretionary factors the company may include information about, falling under UNGP 21 as they relate to the company's policies regarding slavery and human trafficking, such as due diligence processes s

extended to human rights, with explicit reference to the UNGPs.[773] Furthermore, it is relevant to mention the French Duty of Vigilance Law, adopted in 2017 requiring large companies to publish an annual vigilance plan[774]. Under the plan, companies must report on human rights impacts and the plan must contain appropriate measures of risk identification and appropriate measures of prevention. Disclosure of such plan is mandatory, enabling third parties to hold companies accountable in case they failed to adequately report and thus creating an incentive for companies to carefully develop and implement it.[775] Other more recent examples on reporting obligations are the Child Labour Due Diligence Law adopted in the Netherlands in 2019[776] and the Supply Chain Law enacted in Germany in 2021, [777] both requiring companies to prepare an annual report on the fulfilment of their due diligence obligations – more on national legislations in EU Member States related to reporting and B&HR will be examined in Chapter 6, with link to public procurement.

At regional level, a relevant legislative example is the EU Corporate Sustainability Reporting Directive (CSRD), proposed in 2021 and recently adopted, superseding the EU Non-Financial Reporting Directive (2014). The CSRD provides "the foundation of a consistent flow of sustainability information through the financial value chain", expanding the scope of the previous Directive, applying to all large companies(approximately 49,000). Whereas the EU Non-Financial Directive was welcomed as a step towards greater corporate accountability,[778] it was also criticised *inter alia* for its narrow scope (covering only 6,000 of 42,000 large companies incorporated in the EU); its potentially wide-ranging exemptions in relation to information that should be disclosed; weak provisions on supply chain reporting which was required only "when relevant and appropriate"; and for failure to provide for monitoring or mechanisms to sanction company defaults on fulfilling reporting duties. Furthermore, instead of the non-binding guidance provided for under the 2014 Directive,[779] the CSRD requires mandatory EU sustainability reporting standards, imposed through delegated acts. More on CSRD and the EU regulatory framework will be examined in Chapter 5.

Despite the steps ahead in reporting, still, some scholars consistently question the value of corporate sustainability reporting[780] as accountability mechanism.[781] One survey of corporate reports undertaken by GRI and the UNGC identified innovative approaches by companies on human rights reporting but concluded that, overall, it was weak in terms of balance, completeness, and inclusion of most relevant issues.[782] Other studies pointed out the instrumentalization of reporting to serve corporate ends[783] in conflict with sustainability goals,[784] for example criticising published reports as exercises in "green-

[773] République Française (2012), Décret n° 2012-557 du 24 avril 2012 relatif aux obligations de transparence des entreprises en matière sociale et environnementale. French Ministry of Foreign Affairs and International Department (2016), Extra financial reporting made mandatory for large companies in view of a standardization of European standards

[774] Cossart S. et al (2017) The French Law on Duty of Care: a Historic Step Towards Making Globalization Work for all, 2BHRJ 317.

[775] Sherpa, (2019) Vigilance Plans Reference Guidance

[776] Hoff (2019) Dutch child labour due diligence law: a step towards mandatory human rights due diligence law, Oxford Human Rights Hub

[777] Lieferkettengesetz (2021), S. 24(1) No 10, 11, 24(2)

[778] European Coalition for Corporate Justice (2014), "EU Directive on the disclosure of non-financial information by certain large companies: an analysis".

[779] European Commission (2021), Proposal for A Directive of The European Parliament and of the Council amending Directive 2013/34/EU, Directive 2004/109/EC, Directive 2006/43/EC and Regulation (EU) No 537/2014, as regards corporate sustainability reporting, COM/2021/189 final. Baumüller & Grbenic (2021) Moving from non-financial to sustainability reporting: analyzing the EU Commission's proposal for a Corporate Sustainability Reporting Directive (CSRD)

[780] Marquis, C., Toffel, M.W., Zhou, Y. (2011) Scrutiny, norms, and selective disclosure: a global study of greenwashing, Working Paper No. 11-115, Harvard Business School Organizational Behavior Unit. Lim A. (2017) "Global corporate responsibility disclosure: A comparative analysis of field, national, and global influences, International Sociology. Vol. 32 No. 1, pp-61-85.

[781] McCorquodale, R., Nolan, J. (2021) The Effectiveness of Human Rights Due Diligence for Preventing Business Human Rights Abuses, Neth Int Law Rev, Vol.68, pp. 455–478. Favotto, A. and Kollman, K. (2022) When rights enter the CSR Field: British firms' engagement with human rights and the UN Guiding Principles, Human Rights Review, 23(1), pp. 21-40.

[782] Umlas, E. (2009), Corporate human rights reporting: an analysis of current trends, Realizing Rights: The Ethical Globalization Initiative, UN Global Compact, Global Reporting Initiative.

[783] Diouf, D., & Boiral, O. (2017), The Quality of Sustainability Reports and Impression Management: A Stakeholder Perspective, Accounting, Auditing & Accountability Journal, Vol. 30, No.3).

[784] Cho C.H., Laine, M., Roberts, R.B., Rodrigue, M. (2015), Organized hypocrisy, organizational façades, and sustainability reporting, Accounting, Organizations and Society, Vol. 40, (C), pp. 78-94

washing", based on companies' selective approach to the information that is communicated.[785]

In conclusion, the UNGPs maintain that "independent verification of human rights reporting can strengthen its content and credibility" (UNGP 21) and "professional" assurance of corporate sustainability reports have been advanced as one solution to such dilemma. Proposed new laws further foresee a strengthened role of auditors.[786] Nonetheless, the quality and reliability of assurance has also been consistently questioned[787]. Ultimately, a possible solution could a mix of mandatory disclosure rules, participatory monitoring, and continuing, enhanced investor and civil society scrutiny.[788] Moreover, it must be acknowledged the co-existence of a multitude of public and private governance approaches-including public procurement contracts and procedures- in the domain of corporate human rights disclosure, their oversight and evaluation.

4.2 Other Corporate Self-Regulatory Instruments: Codes of Conduct and Standards

After having depicted the entire HRDD process and steps as recommended under the UNGPs, it is relevant to consider other corporate self-regulatory instruments which go hand-in-hand with the HRDD process and which could be useful to operationalize it.[789] Indeed, the UNGPs and other international soft law initiatives with recommendatory nature are not the only existing instruments. The attention will be on codes of conduct, voluntary monitoring and multi-stakeholder initiatives, standard-setting mechanisms and their legal status.[790] They are all interesting examples of private modes of regulation – flourished particularly in recent years at corporate level[791] - where the private sector is directly involved in the production of such standards, playing an active role in their enforcement.[792]

> "Standard-setting and regulation are increasingly being accomplished through private means. This includes not only traditional programs of industry self-regulation but also systems of transnational private regulation in which coalitions of non-state actors codify, monitor and in some cases certify firms' compliance with labor, environmental, human rights or other standards of accountability. For instance, in the past two decades, controversies over sweatshops, child labor, tropical deforestation have spurred the formation of dozens of non-governmental certification associations".[793]

Different authors analyzing the rise of transnational private regulation phenomenon, have advanced arguments on the weakness of public regulation at the international level on the matter, being too general to be directly applicable to a particular sector. As a reaction, businesses resort to voluntarily regulating

[785] Adams, C.A. (2004), "The ethical, social and environmental reporting-performance portrayal gap", Accounting, Auditing & Accountability Journal, Vol. 17 No. 5, pp. 731-757. Horiuchi, R., Schuchard, R., Shea, L., and Townsend, S. (2009), "Understanding and preventing greenwash: a business guide", BSR and Futerra. Gray, R. (2010), "Is accounting for sustainability actually accounting for sustainability…and how would we know? An exploration of narratives of organisations and the planet", Accounting, Organizations and Society, Vol. 35 No. 1 Boesso, G., Kumar, K., and Michelon, G. (2013), "Descriptive, instrumental and strategic approaches to corporate social responsibility: Do they drive the financial performance of companies differently?" Accounting, Auditing & Accountability Journal, Vol. 26 No. 3, pp. 399-422.
[786] European Commission, 2021, art.1(10), art. 3(12)
[787] Kaspersen, M., Johansen, T.R. (2014) "Changing social and environmental reporting systems", Journal of Business Ethics, pp. 1-19. Electronics Watch (2014), Electronics Watch. Improving working conditions in the global electronics industry Workers' Rights Consortium (2016), The Workers' Rights Consortium
[788] O'Brien, Martin-Ortega (2020), EU HRDD Legislation: Monitoring, Enforcement and Access to Justice for Victims. Options for the EU: Briefing 2, June 2020, Policy Department for External Relations, Directorate General for External Policies of the European Parliament,603.505
[789] Bernaz (2017) p 362
[790]"Corporate self-regulatory initiatives" and "voluntary monitoring initiatives" are used by Blackett A,(2001) Global Governance, Legal Pluralism and the Decentered State: A Labour Law Critique of Codes of Corporate Conduct, Indiana Journal of Global Legal Studies, p. 401
[791] Scott C., Cafaggi F., Senden L. (2011) The Conceptual and Constitutional Challenge of Transnational Private Regulation 38, Journal of Law and Society 1, p. 6
[792] Bernaz N. (2017) p.209
[793] Bartley T. (2007) Institutional Emergence in the Era of Globalization: The Rise of Transnational Private Labor and Environmental Conditions, American Journal of Sociology 297, p. 297-298

themselves as a way to avoid or mitigate reputational risks, [794] being increasingly aware of a corporate *duty of care* about human rights.[795]

4.2.1 Codes of Conduct and their Legal Nature related to the Duty of Care

Starting from the codes of conduct, they are examples of leverage-driven approaches addressing and redressing human rights harm.[796] Overall, codes of conduct refer to companies' policy statements that define ethical standards for their conduct. There is a great variety in the ways such statements are drafted[797] and different formats of corporate documents used.[798] Corporate codes of conduct are voluntary instruments whose implementation depends entirely on the willingness of the concerned company and credibility which influences the extent to which codes are respected and enforced by industry, unions, consumers and governments. Credibility, in turn, depends very much on monitoring and enforcement efforts: namely, the extent to which contractors and subcontractors, workers, the public, NGOs and governments are aware of the code's existence and meaning.[799] Codes of conduct are most often voluntary but may also be mandated by law or industry regulations in certain jurisdictions or sectors.

Although codes of conduct are explicitly mentioned under UNGP 16 on the adoption of corporate human rights policies, their use dates back much earlier than the UNGPs' endorsement. For example, human rights commitments in the textiles sector emerged in the 1990s.[800] Later on, companies adopted codes applicable not only to the parent company and its subsidiaries but also indirectly to their suppliers and sub-contractors expected to follow the policy as well.

> "Some of these private initiatives have been so extensive as to lead many firms either to cancel contracts or compel suppliers found to violate company guidelines to reform, to withdraw their operations from countries that violate labor rights norms or to engage in constructive dialogue with suppliers and local firms."[801]

Assessing the legal nature of codes of conduct is crucial, particularly when reflecting on a raising corporate duty of care extending inevitably also to suppliers in public procurement processes. The *duty of care* refers to an increasingly legal and ethical obligation of businesses to take reasonable measures to prevent harm to individuals and communities that may be affected by their operations. Such duty, as evidenced by case-law, is rooted in principles of tort law and is applicable to various aspects of corporate conduct. Particularly, codes of conduct often reflect the company commitment to fulfilling its duty of care toward stakeholders by setting out expectations for ethical conduct, compliance with laws and regulations, and respect for human rights. Thus, compliance with the principles outlined in the code of conduct can help companies fulfill their duty of care obligations by reducing the risk of human rights abuses, fostering accountability, and providing mechanisms for addressing grievances and remedying harm. Conversely, the failure to adhere to the standards and principles outlined in the code

[794] For an analysis of the different factors: Borck J., Coglianese C. (2011) Beyond Compliance: Explaining Business Participation in Voluntary Environmental Programs, in Parker, Nielsen (eds) Explaining Compliance: Business Responses to Regulation, Edward Elgar, pp. 139-169
[795] Van Dam C., Gregor F. (2017) Corporate responsibility to respect human rights vis-à-vis legal duty of care, in Álvarez Rubio J, Yiannibas K. (2017) Human Rights in Business: Removal of Barriers to Access to Justice in the European Union, Routledge.
[796] O'Brien C., Botta G. (2022)
[797] Beckers (2018) recalls a distinction in three categories: (1) Compliance codes: directive statements giving guidance and prohibiting certain kinds of conduct. (2) Corporate credos: broad general statements of corporate commitments to constituencies, values and objectives. (3) Management philosophy statements: formal enunciations of the company or CEO's way of doing business.
Beckers A., (2018) Enforcing Corporate Social Responsibility Codes, On Global Self-Regulation and National Private Law, Bloomsbury, p.47
[798] For example, a US Labour Department survey (2015) distinguishes corporate codes of conduct from other corporate documents as: (1) circulated letters stating company policies on a certain issue to all suppliers, contractors and/or buying agents. (2) Compliance certificates, which require suppliers, buying agents, or contractors to certify in writing that they abide by the company's stated standards. (3) Purchase orders or letters of credit, making compliance with the company policy a contractual obligation for suppliers.
[799] International training Center of ILO, Definitions, available at https://training.itcilo.org/actrav_cdrom1/english/global/code/main.htm
[800] Hassel A. (2008) The Evolution of a Global Labor Governance Regime, Governance: An International Journal of Policy, Administration and Institutions p. 239
[801] Westfield E. (2002) Globalization, Governance, Multinational Enterprises Responsibility: Corporate Codes of Conduct in the 21st Century", Virginia Journal of International Law, p. 1098

of conduct may indicate a breach of the duty of care, exposing the company to legal, reputational, and operational risks. Specific case-law have outlined the correlation between the duty of care and corporate codes of conduct, highlighting role of codes of conduct as relevant factors for deciding the admissibility of cases in different jurisdictions.[802] In *Vedanta Resources PLC v. Lungowe* case[803], the UK Supreme Court ruled that Vedanta, as the parent company, owed a duty of care to the claimants, despite the operations being carried out by its subsidiary. The court found that there was a sufficient level of control exercised by Vedanta over the operations of the subsidiary, and that Vedanta had assumed responsibility for implementing appropriate standards of environmental protection and human rights through corporate codes of conduct and policies. Thus, the code of conduct and policies were key factors in establishing the duty of care owed by the parent company. Also, in *Okpabi v. Royal Dutch Shell PLC* case,[804] the relevance of corporate codes of conduct and policies in establishing the duty of care owed by a parent company to individuals affected by the activities of its subsidiary was recognized. Indeed, the Court considered Shell's published documents, including sustainability reports and voluntary commitments to environmental and social responsibility, as indicative of the company's responsibility for the actions of its subsidiaries.

Furthermore, including codes of conduct as requirement to suppliers in public procurement may have an influence in hardening soft mechanisms. As recalled above, codes of conduct are entirely voluntary instruments whose uptake depends on credibility and willingness of single business actors, however they may become mandatory when incorporated in formal contracts. According to some scholars, companies can indirectly create a legally enforceable obligation by means of adopting a corporate code.[805] As premise, it must be recalled one of the most fundamental principle of contract law - *pacta sunt servanda* – which stresses the importance of keeping agreements and promises, and not deviating from them, even if they were voluntarily created in the first place.[806] It must be examined, further, what substantive legal obligations are created and which remedies are foreseen in case of breaches. Beckers (2018) questions to what extent it may be possible to enforce the voluntary corporate commitments on socially responsible corporate conduct. Different examples are examined, which can apply also to public contracts and public procurement situations: (1) when corporate codes are incorporated into a bilateral contract; (2) cases where the codes are not an integral part of the contract but appear in the ancillary documents of the contract; (3) situations where corporate codes are unilateral declarations to the public.[807]

- Incorporation of codes into contracts: a tendency of large enterprises is to incorporate their own corporate codes explicitly into contracts of companies with business partners, and suppliers including reference to the company code of conduct. If the corporate code appears explicitly in the contracts terms there are no complex legal problems involved. Arguably, once a contract is concluded between a company and its contractual partner, any term that refers to the requirement to comply with the corporate code is a valid and legally binding term of the contract. Thus, the deliberate incorporation into contracts is a way through which voluntary codes can be transformed into legally binding obligations.[808]

[802] McCorquodale R. (2019) Parent Companies can have a Duty of Care for Environmental and Human Rights Impacts: Vedanta v Lungowe, Cambridge Core Blog
[803] UK Supreme Court (2019) Vedanta Resources PLC v. Lungowe
[804] UK Supreme Court (2021) Okpabi v. Royal Dutch Shell PLC
[805] Beckers A.(2018) Enforcing Corporate Social Responsibility Codes, On Global Self-Regulation and National Private Law, Bloomsbury, p.47
[806] Lukashuk, I. I. (1989). The Principle Pacta Sunt Servanda and the Nature of Obligation Under International Law. The American Journal of International Law, 83(3), 513–518.
[807] Such classification has been developed by Beckers A., (2018)
[808] Empirical studies on the use of supplier codes of conduct have been conducted by McBarnet and Kurkchiyan (2007) Corporate social responsibility through contractual control? Global supply chains and "other-regulation", in The New Corporate Accountability: Corporate Social Responsibility and the Law. Oxford, Oxford Univ. Press

For example, in case of suppliers' contract there can be terms making adherence to the corporate code an explicit obligation of the supplier. This obligation is normally linked to other provisions in the contract, which specify the right of the company to monitor compliance in the form of conducting audits. Thus, when included in a supplier contract, the corporate code becomes a binding contractual obligation for the supplier which can be enforced by the company as the contractual partner by invoking the contractually agreed remedies or the general remedies available under contract law. It has to be emphasized that such provisions solely create an obligation on the side of the supplier and do not create an obligation on the side of the buying company.[809] Furthermore, another way in which codes of conduct may become mandatory through contracts is the adoption of Model Contract Clauses on B&HR, developed firstly by the American Bar Association[810] and under implementation in Europe.[811] Indeed, they are set of model contract clauses aiming to improve human rights and environmental performance in global supply chains, particularly they seek to improve the effectiveness of contracts as tools for preventing and addressing adverse human rights impacts.

- Codes of conduct as ancillary documents: the legal enforcement of the codes becomes slightly more complex when a corporate code does not appear in the form of an express term in the written contract, but is incorporated in its ancillary documents only. The parties to the contract often choose to include their corporate codes not in the contractual document directly but rather in the general terms and conditions[812] or particularly in long-term relations, in the umbrella agreements that sets out the general conditions for an individually placed order for the supply of goods.[813] The enforcement of codes that appear in these documents is merely a question of whether and to what extent these ancillary documents become contractually binding.
- Public declarations as contract terms: In case of unilateral declaration, it is more controversial to attribute binding character to codes of conduct. The question whether the publicly declared corporate code could be enforceable has already been subject to court ruling. In the US case of Doe v Wal-Mart Stores[814], it became an intensely debated question whether the publicly declared code could became relevant in the interpretation of the supplier contract. Yet, the shift in focus from bilateral agreements to the public declaration also leads to additional options concerning the actors that could eventually enforce such codes, such as consumers that reply on the code when purchasing products or even the code beneficiaries.[815]

  There are some contributions on how public declarations could become enforceable obligations, for example it has become a prominent suggestion to interpret these declarations as pre-contractual public statements that courts could read into the contract. For example, a reference can be made to a specific statutory provision allowing public statements of traders to be read into contracts when interpreting the characteristics and quality of the good that is subject to a sales contract. The provision has its origin in the 1999 Consumer Sales Directive, and reads that goods are presumed to be in conformity with the contract if they "show the quality and performance which are normal in goods of the same type and which the consumer can reasonably expect, given the nature of the goods and taking into account any public statements

[809] Cafaggi, Randa (2013) Public and Private Regulation: Mapping the Labyrinth, The Dovenschmidt Quarterly 16-33
[810] Snyder D., Maslow S., Balancing Buyer and Supplier Responsibilities: Model Contract Clauses to Protect Workers in International Supply Chains, Version 2.0, Working Group to Draft Model Contract Clauses to Protect Human Rights in International Supply Chains, American Bar Association Section of Business Law
[811] Responsible Contracting Project (2023) European Model Clauses (EMCs)
[812] Vytopil (2012), Contractual Control and Labour-Related CSR Norms in the Supply Chain: Dutch Best Practices. Utrecht Law Review, Vol. 8, No. 1, pp. 155-169
[813] McBarnet and Kurkchiyan (2007), p. 69
[814] Jane Doe and others v. Wal-Mart Stores, United States Court of Appeal for the 9th Circuit, 572 F3d 677, opinion delivered by Judge Gould
[815] See Collins (1986) Contract and Legal Theory in W Twining (ed) Legal Theory and Common Law, Oxford Basil Blackwell, 136-54

on the specific characteristics of the goods made about them by the seller, the producer or his representative, particularly on advertising or on labelling".

Furthermore, the case of benefit corporations- "B-Corps" -is also relevant in terms of legal impact of public declarations. Benefit corporations are indeed specific type of for-profit corporate entities that are legally required to consider the impact of their decisions not only on shareholders but also on other stakeholders, including employees, customers, suppliers, communities, and the environment. This broader mandate is enshrined in their codes of conduct, articles of incorporation or governing documents. The legal force of the public statement, most often incorporated in the statute, is linked to the possibility to challenge it as fraudulent advertising. Another important element is that some jurisdictions have enacted laws or regulations to formally recognize and provide legal frameworks for benefit corporations, including provisions related to corporate governance, reporting requirements, and accountability mechanisms tailored to benefit corporations' social and environmental missions, providing potential relevant legal force to codes of conduct and declarations.

Finally, regarding the codes of conduct impacts, some researchers and reports have outlined multiple challenges in monitoring compliance to corporate codes of conduct and their degree of effectiveness, criticizing the tendency to a "tick-box" approach to monitoring workplace standards for purchasers.[816] Monitoring the application of the code down the supply chain through auditing mechanisms is only one type of activity in which companies may engage and research has shown that it is insufficient in itself to significantly improve working conditions. Companies are expected to do more than mere auditing, whether internal or external, and to have elaborated human rights policies in place as grievance mechanisms.

> "While codes of conduct and monitoring systems can help to uncover and assess the severity of human rights problems, they are not in and of themselves solutions to those problems". [817]

Furthermore, some researches have suggested that codes of conduct may have pro-active effects stimulating multi-stakeholder initiatives.[818] For example, an effective multistakeholder initiative and shared code of conduct was adopted after the Rana Plaza incident in 2013, triggering a significant multi-actor mobilisation.[819]

4.2.2 The Role and Landscape of International Standards

International voluntary standards constitute another example of private mode of regulation.[820] Overall, a standard can be defined as "a rule for common and voluntary use, decided by one or several

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[816] O'Rourke, D. (2002), "Monitoring the monitors: A critique of corporate third-party labor monitoring" Corporate responsibility and labour rights: Codes of conduct in the Global Economy Journal, Earthscan, London
Lebaron, G., & Lister, J. (2015), "Benchmarking global supply chains: The power of the 'ethical audit' regime" Review of International Studies, Vol.41 No.5, pp. 905-924.
LeBaron G. & Lister, J. (2022), "The hidden costs of global supply chain solutions", Review of International Political Economy, Vol. 29 No.3, pp. 669-695

[817] Santoro, M. (2003) Beyond Codes oof Conduct and Monitoring: An Organizational Integrity Approach to Global Labour Practices, Human Rights Quarterly, p 401

[818] Egels-Zandén, N., Lindholm, H. (2015) Do codes of conduct improve worker rights in supply chains? A study of Fair Wear Foundation, Journal of Cleaner Production, Volume 107, pp. 31-40,

[819] In May 2013, within a few weeks of the tragedy, brands and retailers entered into a 5-year binding agreement with Bangladeshi and global trade unions. The Accord on Fire and Building Safety in Bangladesh committed more than 150 companies to collaborative efforts to ensure safety in almost half of the country's garment factories, through measures such as independent inspections by trained fire and building safety experts; public reporting; mandatory repairs and renovations to be financed by brands; a central role for workers and unions in both oversight and implementation; supplier contracts with sufficient financing; and adequate pricing and worker training.
See: Accord on Fire and Building Safety in Bangladesh (2013), "The Bangladesh Accord on Fire and Building Safety". Rahim, M. (2020), Humanizing the Global Supply Chain: Building a 'Decent Work' Environment in the Ready-made Garments Supply Industry in Bangladesh in Deva S., Brichall D. (eds,) 2020, Research Handbook on Human Rights and Business, Elgar Edward Publishing

[820] Rasche A. (2022) Voluntary standards for business and human rights: reviewing and categorizing the field, in Marx et al (ed) Research Handbook on Global Governance, Business and Human Rights. Bakker, F., Rasche, A., Ponte, S. (2019). Multi-Stakeholder Initiatives on Sustainability: A Cross-Disciplinary Review and Research Agenda for Business Ethics. Business Ethics Quarterly, 29(3), 343–383.

people or organizations".[821] It refers to a written, technical document defining the characteristics that must be present in a product or service and the procedure to control their conformity to such features. Two key elements of standards are their voluntary nature and the fact that they are collectively decided. Regarding the voluntary nature, standards are not enforced through legal sanctions. However, alternative sanctioning mechanisms can be established to enforce such rules. For example, third parties could require firms to comply with them: investors may put pressure on firms to comply with certain standards or large buyer firms could force suppliers to support certain initiatives, thereby making their adoption a precondition for business[822]. Another way is through peer-pressure[823], hampering the possibility for suppliers to gain access to important markets[824]. Considering public procurement, public buyers could require compliance with human rights and labour rights standards by including them as requirements, qualification or award criteria in public tenders, for example by requesting specific labels or management systems to suppliers as means of proof. It must be highlighted that standards, despite their voluntary nature, may shift to mandatory, being incorporated into contracts and, thus, become tied to legal sanctioning, eventually changing the legal nature of the standard. [825]

Voluntary sustainability standards[826] are important instrument to regulate corporate behaviour in the context of social corporate responsibility and sustainability.[827] The current landscape of voluntary standards for B&HR is characterized by wide variety[828], with its number[829] increasing significantly in the last two decades.[830] Indeed, by the 2000s, certifications have become the "gold standard" of private modes of regulation,[831] also impacting consumers choices[832]. According to Ecolabel Index, the number of voluntary sustainability standards grew by almost 400% between 1989 and 2016.[833] Additionally, individual companies created their own standards for social and environmental engagement, verifying compliance either internally or through third party auditing.[834] As standards proliferated, more rigorous initiatives flourished for independent evaluation processes, impact assessment and transparency.[835] Nowadays, hundreds of voluntary sustainability standards exist worldwide and more than 10000 companies participate in voluntary sustainability standard-setting - including 13 of the 20 largest companies by revenue. Regarding industry-specific sustainability standards, most of them focus on

[821] Brunsson, N., Rasche, A., Seidl, D. (2012). The Dynamics of Standardization: Three Perspectives on Standards in Organization Studies. Organization Studies, 33(5-6), 613-632.
[822] Guler I., Guillen MF, Machperson J.M. (2002) Global Competition, and the diffusion of Organizational Practice: International Spread of ISO 9000 Quality Certificates, Administrative Science Quarterly 47(2), 207-3
[823] Perez-Batres L.A. Miller V., Pisani MJ. (2011), Institutionalizing Sustainability: Empirical Study of Corporate Registration and Commitment to the United Nations Global Compact Guidelines, Journal of Cleaner Production 19(8) 843-51
[824] King A Lenox M., Terlaak A. (2005) The Strategic use of decentralized institutions: exploring certification with the ISO 140001 Management Standard. Academy of Management Journal, 48(6), 1091-106
[825] For an overview on labels and certification in the EU law context see: Caranta R. (2016), Labels as enablers of sustainable public procurement in Sjafjell B., Wiesberg A. (eds) Sustainable Public Procurement under EU Law: New perspectives on the State as Stakeholder, pp. 99-113
[826] Voluntary sustainability standards refer specifically to standards, verification schemes and certification systems created by coalitions of non-state actors for voluntary adoption by businesses aiming to communicate commitment to social, environmental, fair trade or sustainability objectives.
[827] Rasche A. (2022) p. 163
[828] Fransen, L., Kolk, A. and Rivera-Santos, M., The Multiplicity of International Corporate Social Responsibility Standards: Implications for Global Value Chain Governance (October 24, 2019). Multinational Business Review
[829] Bennett E. (2019) Business and Human Rights: The Efficacy of Voluntary Standards, Sustainability Certifications, and Ethical Labels, in Marx et al (ed) Research Handbook on Global Governance, Business and Human Rights p. 177
[830] Gilbert D., Rache A. Waddock S. (2011) Accountability in a global economy: the emergence of international accountability standards. Business Ethics Quarterly 21(1), 23-44
[831] MSI (Multistakeholder Integrity) (2020) Not Fit-for-Purpose: theGrand Experiment of Multistakeholder Initiatives in Corporate Accountability, Human Rights and Global Governance, Pittsfield, MA
[832] Bostrom M., Micheletti M., Oosterveer P.(2019) Studying political consumerism, Oxford Handbook of Political Consumerism pp. 1-25
[833] Marx A. (2018) Integrating Voluntary Sustainability Standards in trade policy: the case of the European Union GSP scheme. Sustainability 10(4364), pp. 1-22
[834] Giuliani E. et al (2017) Decoupling standards from practice: the impact of in-house certifications on coffee farms environmental and social conduct. World Development, 96, 294-314. Thorlakson T. (2018) A move beyond sustainability certification: the evolution of the chocolate industry's sustainable sourcing practices, Business Strategy and the Environment, 27 (8), 1653-65
[835] In 2002, the International Social and Environmental Accreditation and Labelling Alliance (ISEAL) was established to improve sustainability impact, credibility, uptake and effectiveness, identifying best practices in social and environmental standard-setting

agriculture, forestry, fishing, mining, energy, consumer goods.[836] Despite the proliferation of standards worldwide, key challenges regard the extreme fragmentation in the standards-setting landscape, with lack of uniform standards and codification on the matter. The risk is to foster ambiguity in their enforcement and application[837] leading to adverse consequences. An emblematic example of ineffective implementation of standards in the global supply chains was provided by the KiK case.[838] The case involved KiK Textilien und Non-Food GmbH (KiK), a German textile company, and its alleged involvement in a factory fire in Pakistan. Despite KiK having a code of conduct and claiming to adhere to international labor standards, including those outlined by the ILO, the tragic incident raised questions about the effectiveness of such standards in ensuring worker safety and protection of human rights in the company's supply chain. The case highlighted gaps in the implementation and enforcement of CSR standards, as well as challenges related to monitoring and oversight of suppliers' compliance with them.

Standards can be classified in different categories, given distinct (1) mode of governance and (2) purposes.[839] The mode of governance refers to whether they are *single-stakeholder standards* - governed primarily by a single stakeholder group (as a specific firm)[840] - or *multi-stakeholders initiatives* - governed by a coalition of multiple stakeholders (such as business, governments, NGOs).[841]

In terms of purpose, most existing standards address both social and environmental goals, often implicitly or explicitly associated with human rights,[842] which may address the rules that govern private sector activities (de jure) as well as the practices tacking place in the business setting (de facto). Three categories can be identified:

- **Certification standards**: these standards are usually tied to global supply chains and aim at monitoring relevant production facilities, such as factories, particularly in specific sectors highly exposed to human rights risks. Most certification standards do not directly monitor relevant production facilities but accredit certification bodies to carry out audits on their behalf. Certification standards are compliance-driven instruments; the main goal is to comply with the underlying rules as well as possible. Non-compliance is usually punished by either revoking a certificate or requiring corrective actions from relevant organizations.

  The Forest Stewardship Council, the Marine Stewardship Council, Social Accountability 8000 are a few examples.
- **Reporting standards:** such standards offer frameworks that firms can adopt to standardize the disclosure of environmental, social and governance information. A core example of regulatory framework setting-up reporting standards to foster more consistency and uniformity among standards is represented by the EU Corporate Sustainability Reporting Directive (CSRD)[843] –

[836] Approximately 40% certify agriculture, forestry and fishing. 27.5% mining and energy. 15% consumer goods. 7.5% industrials, 5% consumer services. 2.5% technology.

[837] The need to regulate sustainability standards is outlined in the Preamble of the European Union (2022) Corporate Sustainability Reporting Directive (CSRD), Directive EU 2022/2464 of the European Parliament and of the Council of 14 December 2022 amending Regulation (EU) No 537/2014, Directive 2004/109/EC, Directive 2006/43/EC and Directive 2013/34/EU, as regards corporate sustainability reporting

[838] ECCHR (2020) Factory fire in Pakistan: Questionable judgement neglects systematic failure in fire protection.
In September 2012, a devastating fire broke out at the Ali Enterprises garment factory in Karachi, Pakistan, resulting in the deaths of over 250 workers and injuring many others. Following the incident, it was revealed that the factory had been producing garments for KiK, among other buyers.See also: Nowak, L., Poell J. (2018) Supply chain liability under the law of negligence: What does Jabir and Others v KiK Textilien und Non-Food GmbH mean for European companies with supply chains in the sub-continent and other common law countries?

839 Rasche, p. 165

[840] Initiatives which are exclusively driven by corporations and business associations. Examples of business led initiatives are the Business Social Compliance Initiative (BSCI), the Alliance for Bangladesh Worker Safety. See: Bres, Mena, Salles Djellic (2019) Exploring the formal and informal roles of regulatory intermediaries in transnational multistakeholder regulation. Regulation & Governance 12249

[841] Multi-stakeholders' initiatives include stakeholders from different sectors in the development of the rules that underlie the standard and also its governance. In most cases, they rely on input from NGOs and businesses, although governmental actors, unions, business associations and academics participating in their setting-up process. The UNGC is an example of "business-led multistakeholder initiative".

[842] "Fair trade" is the concept, movement, products, organizations or businesses promoting the fair-trade vision. "Fairtrade" is the certification managed by Fairtrade international: Raynold L., Bennet E., (2015) The Handbook of Research on Fair Trade, Edward Elgar Publishing p.5,6.

[843] EU (2022) Corporate Sustainability Reporting Directive (CSRD), Directive EU 2022/2464 of the European Parliament and of the Council of 14 December 2022 amending Regulation (EU) No 537/2014, Directive 2004/109/EC, Directive 2006/43/EC and Directive 2013/34/EU

which will be addressed also in Chapter 5 on the European Union regulatory context. The rationale behind CSRD is to tackle the already mentioned fragmentation in the standards-setting landscape, promoting uniform standards. Indeed, the CSRD provides uniform reporting standards and clear requirements for companies covered by the Directive on their social, environmental, and governance performance. All companies must report on the basis of uniform European Sustainability Reporting Standards (ESRS) developed by EFRAG.[844] These standards outline the information that companies are expected to disclose regarding their environmental, social, and governance (ESG) impacts, risks, and performance, including reporting principles and metrics,[845] facilitating comparability, consistency and transparency in corporate disclosures.

Further examples of reporting standards include the Global Reporting Initiative and the Carbon Disclosure Project.[846] Reporting standards have a more indirect influence on B&HR (when compared to the rather direct effects of certification instruments), because they provide stakeholders groups with transparency about the actions and omissions of a firm vis-à-vis its human rights obligations. Usually, reporting frameworks specify what information has to be reported (for example, specific indicators) and how disclosure is supposed to take place (for example through the involvement of stakeholder's groups). Most reporting standards do not verify the information that is provided by companies. However, firms can hire assurance providers in order to have the information externally verified.

- **Principle-based standards:** they offer broad values-based principles that act as a foundation for firms' engagement with the B&HR agenda (example include the UN Global Compact and the Principles of Responsible Investment). Often such standards act as an "entry point" for firms to learn about their human rights obligations and to establish relevant partnerships. Standards that are based on principles operate without any formal monitoring mechanisms, but use other means of enforcement. The UN Global Compact, for instance publicly delists participants that do not report on implementation progress vis-à-vis its ten principles. The assumption is that firms will try to avoid delist because they are likely to experience negative reputational effects.[847] The lack of monitoring and verification mechanisms shows that such standards should not be understood as a label or seal of approval.

4.2.2.1 Sustainability Standards and Labels in Public Procurement

In the public procurement context, sustainability standards, certifications and labels[848] are commonly used as verification instruments included in tenders to verify compliance with labour and social rights[849] in the production and distribution chains associated to procurement practices.[850] Along

[844] European Commission (2023) Commission Delegated Regulation (EU) 2023/2772 of 31 July 2023 supplementing Directive 2013/34/EU of the European Parliament and of the Council as regards sustainability reporting standards

[845] Standards define reporting principles and KPIs that companies should consider when disclosing ESG information. These principles and metrics help companies assess and communicate their sustainability performance in a meaningful and standardized manner. Standards may cover a wide range of topics, including environmental impact, human rights, labor practices, supply chain management, diversity and inclusion, and anti-corruption measures.

[846] Macmillan P., Barnett C., Cloke P., Clarke N., Malpass A (2011) Globalizing Responsibility: the political rationalities of ethical consumption Wiley Blackwell

[847] Fair World Project, Commerce Equitable France, FairNess, Forum Fairer Handel (2020) International Guide to Fair Trade Labels

[848] Labels are information shortcuts; through a symbol they convey a message that a given product or service present a number of valuable characters. This may include desirable environmental or sustainability features (eco-labels) concerning the product and service itself and its life-cycle. Social labels are usually more about the contractor than just the goods and services, which are the subject matter of the contract, so that may be linked to management schemes. They may also deal with the way the contract is implemented and as such may be treated as contract performance conditions. In other words, labels may potentially provide information to all aspects. Caranta R. (2016), p. 100

[849] Corvaglia A.M. (2017) Public Procurement and Labour Rights: Towards Coherence in International Instruments of Procurement Regulation, Hart, p. 91

[850] O' Rourke D. (2003) Outsourcing Regulation: Analysing Non-governmental systems of labour standards and monitoring, 31, The Policy Studies Journal 1

the stages of the procurement process, standards and certification mechanisms could either be used in the product specifications or in connection with award criteria or contract clauses, implying differences in their application throughout the different procurement cycle steps.

- In the selection and award phase: social standards and labelling schemes assume a crucial role in the management of relevant information during the selection and award procedure. Indeed, labels and certifications have the main function of providing the purchasing authorities with valuable sources of information and assurance concerning compliance with the environmental as well as social and labour law criteria associated with the production of the procured products and services[851], as specified in the award criteria. In this respect labelling and certification schemes provide the additional value offered by third party or independent certification. Taking advantage of their verification and certification process, the use of labels in public procurement reduces the administrative burdens and the costs for public authorities of actually verifying the bidders respect for the standards defined in the technical and award specifications along the procurement process. [852]
- If incorporated in the contract specifications, codes and standards can also serve as a reference resource for the technical descriptions of the products and services to be procured.[853] However the use of codes and standards in the technical specifications may result in discriminatory effects, although not specifically discriminating on the base of the suppliers' country of origin but exposing the procuring authority to the risk of indirect discrimination between the competitors.

More specifically, requirements and sustainability criteria should be based on verifiable standards and technical competencies, for examples using:

- Industry environmental and social standards: many international industry certifications have been established, encouraging businesses to market products and services that enhance environmental assets, improving the global supply chain, and reducing the environmental impact of production sites.
- Sustainable Procurement Labels: Labels are useful when specifying sustainability requirements and can be used in two different ways in the context of technical specifications. Labels help bidders define the characteristics of the goods or services being procured, and to check compliance with these requirements, by accepting the label as one means of proof of compliance with technical specifications. By providing a means of third-party verification, labels can help to save time while ensuring that high environmental standards are applied in public procurement. Standard certificates and labels are valuable tools for implementing sustainable procurement. When applied appropriately[854], labels can be useful in preparing conformance specifications and award criteria and verifying compliance.
- Management system standards: recognized international standards on management system and sustainability are developed by the International Organization for Standardization (ISO)[855] or

[851] Semple A. (2012) The Role of Environmental and Social Labels in Procurement, Public Procurement Analysis

[852] A verification of the independence of the review of the eco-label certification and the strictness of the standards required would be recommendable. See as best practice the policy strategy on the inclusion of social considerations by the Ministry of Economic Development in New Zealand, Guide 4 to Sustainable Procurement – Define Specifications and Invite Tenders.

[853] Semple A. (2012)

[854] For labels to be used appropriately: (1) The label must be a credible, internationally recognized certification or accreditation scheme. (2) The use of a particular label needs to be relevant to the subject matter of the procurement. (3) Vendors should not be required to register under one label, and equivalent labels should be allowed.

[855] ISO Standard for Environmental Management Systems is the most common international standard and can provide assurances that environmental impacts are being measured and improved. Also, ISO 14020:2000 on Environmental Labels and Declarations. ISO 45001: 2018 - Occupational Health and safety Management, and ISO 20400:2017 on Sustainable Procurement establish guiding principles for the development and use of sustainable procurement practices and management.

the Social Accountability International, such as social sustainability standard SA8000 on Social Accountability and OHSAS 45001 on Occupational Health and Safety Management[856].

In conclusion, throughout the procurement process, the use of standards has potentially multiple benefits. In terms of human rights and social impacts, the use of fair-trade labels in the procurement process provides a powerful instrument for promoting social and labour objectives to the contracting authorities, benefiting suppliers and society overall.[857] Furthermore, the adoption of voluntary initiatives has an indirect impact on the process of award and selection, strengthening the reputation of the suppliers that adopt them.[858] On the other hand explicit reference to such verification systems in the bidding documents has a direct impact on the management and monitoring of the procurement process, as a channel of information to the procuring authorities and suppliers.
Some specific and non-exhaustive examples of voluntary standards relevant for public procurement processes will be explored below.

ISO 24000 on Sustainable Procurement

The International Organization for Standardization (ISO) is an independent, non-governmental international organization with a membership of 169 national standards bodies. Its purpose is to prepare and adopt International Standards through ISO technical committees, supported by international, governmental and non-governmental organizations in such process.[859] Indeed, through its members, it brings together experts to share knowledge and develop voluntary, consensus-based, market-relevant international standards ensuring that products and services are safe, reliable, and of high quality. Several ISO standards guide businesses in adopting sustainable and ethical practices, blending quality with ethics and sustainability.

ISO 24000[860] is a technical document providing guidance to any organization, public or private, regardless of its size, location and activity, on integrating sustainability within procurement processes[861]. Indeed, it is addressed to stakeholders involved in, or impacted by, procurement decisions and processes. Such standard is specific on sustainable procurement aiming at assisting organizations in meeting their sustainability responsibilities by providing an understanding of (1) what sustainable procurement is in a nutshell; (2) how to recognize sustainability impacts and considerations across different aspects of the procurement activity - such as policy, strategy, organization, process; (3) how to implement sustainable procurement at different levels. In such regard, the most relevant clauses included in the standard are:

- Clause 4: It describes the principles and core subjects of sustainable procurement and examines why organizations undertake sustainable procurement. Important consideration is given to managing risks (including opportunities), addressing adverse sustainability impacts through due diligence, setting priorities, exercising positive influence and avoiding complicity.
- Clause 5: provides guidance on how sustainability considerations are integrated at a strategic level within the procurement practices of an organization, to ensure that the intention, direction

[856] Social Accountability International. SA8000 Standard.
[857] An example are the standards for small producers elaborated by Fairtrade Labelling Organization International (FLO). Under such standards the supervision of labour conditions plays a crucial part in the management of production practices, together with environmental protection. FLO fair trade in fact clearly "regards the core ILO conventions as the main reference for good working conditions".
[858] Doni N. (2006) The importance of Reputation in Awarding Public Contracts, 77 Annals of Public and Cooperative Economics. Spagnolo G. (2012) Reputation, Competition and Entry in Procurement, International Journal of Industrial Organization, p. 291
[859] A total of 25063 International Standards covers almost all aspects of technology, management and manufacturing. 825 technical committees and subcommittees to take care of standards development.
[860] ISO 20400:2017 Sustainable procurement — Guidance
[861] The implementation of ISO 24000 takes into account the particular context and characteristics of each organization, scaling the application of the concepts to suit the size of the organization. The adoption of this document by large organizations promotes opportunities for small and medium-sized organizations in their supply chains.

and key sustainability priorities of the organization are achieved. It is intended to assist top management in defining a sustainable procurement policy and strategy.

- Clause 6: describes the organizational conditions and management techniques needed to successfully implement and continually improve sustainable procurement. The organization ensures that such conditions and practices are in place in order to assist individuals with responsibility for the procurement of goods or services integrate sustainability considerations into the procurement process.
- Clause 7: addresses the procurement process and is intended for individuals who are responsible for the actual procurement within their organization. It is also of interest to those in associated functions, as it describes how sustainability considerations are integrated into existing procurement processes.

ISO 26000 on Social Responsibility

The International Guidance Standard on Social Responsibility – ISO 26000 – adopted in 2010 - is a voluntary international standard providing guidance to companies and other organizations on social responsibility and sustainable development.[862] Unlike other ISO Standards, which are auditable and can give rise to certification, ISO 26000 "is not intended or appropriate for certification purposes or regulatory or contractual use", rather it provides companies with guidance on corporate social responsibility. The latter is defined as "the responsibility of an organization for the impacts of its decisions and activities on society and the environment through transparent and ethical behaviour that: (i) contributes to sustainable development, including health and the welfare of society; (ii) takes into account the expectations of stakeholders; (iii) is in compliance with applicable law and consistent with international norms of behaviour; (iv) is integrated throughout the organization and practiced in its relationships .

This is a generic standard meant to be used not only by business enterprises but by any type of public and private organization "regardless of their size, location, whether operating in developed or developing countries".

ISO 26000 recognizes human rights as a core component of social responsibility and identifies various human rights issues that business enterprises should consider in discharging this responsibility, including due diligence processes and resolving grievance. As a matter of fact, ISO 260000 is built around seven main principles[863] including respect for human rights and seven core subjects[864] that companies should address, including again human rights. A specific human rights chapter is included in the standard, based on the UN Universal Declaration on Human Rights and broadly aligned with the expectations set out in the UNGPs[865]. It envisages seven steps for integrating social responsibility in an organization's decisions and activities, through guidance on stakeholder identification and engagement, due diligence and communication on social responsibility performance.[866] The ISO 26000 Guidance clarifies a company's human rights responsibilities by offering information on "its scope, its relationship to social responsibility, its related principles and considerations and its associated issues".[867]

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[862] Bijlmakers S. (2022) No ISO fix for human rights: a critical perspective on ISO 26000 Guidance on Social Responsibility in Marx et al Research Handbook on Global Governance, Business and Human Rights, p. 205

[863] Accountability, transparency, ethical behaviour, respect for stakeholder interests, respect for the rule of law, respect for international norms of behaviour, respect for human rights.

[864] Organizational governance, human rights, labour practices, environment, fair operating practices, consumer issues, community involvement and development.

[865] ISO (2010) International Guidance Standard on Social Responsibility (Standard n. 26000), clause 6.3.3

[866] Due diligence, human rights risk situations, avoidance of complicity, resolving grievances, discrimination and vulnerable groups, civil and political rights, economic social and cultural rights, fundamental principles and rights at work

[867] ISO, Gasiorowski-Denis E. (2016) ISO 26000 in the Post-2015 Development Agenda, ISO News.
See also Annex A to ISO 26000 containing a non-exhaustive list of examples of existing social responsibility voluntary initiatives and tools for additional guidance and comparison, as well as a bibliography list containing references to recommended authoritative sources.

Various linkages between ISO 260000 and UNGPs have been identified by scholars. Both instruments are based on the UDHR, provide substantive guidance on respect for human rights, recognize that due diligence is needed to discharge the corporate responsibility to respect human rights and provide guidance on how to integrate human rights into an organization's operations and practices[868]. Despite the alignment with the UNGPs, nonetheless some criticisms have been moved on the impacts of ISO 26000 on operationalizing the UNGPs standards, stating that the standard does not interpret or add clarity to the UNGPs or HRDD. Neither it does guide enterprises in their translation or adaptation of the UNGPs to a company's specific circumstances. One criticism is also that ISO 26000 solely re-write international authoritative documents and that being a "guidance standard" it is a voluntary standard whose effectiveness depends on the voluntary uptakes of organizations and it cannot be used "to provide a basis for legal actions, complaints, defences and other claims in any international, domestic or other proceedings". The human rights chapter indicates that

> "To respect human rights, organizations have a responsibility to exercise due diligence to identify and prevent and address actual or potential human rights impacts resulting from their activities or the activities of those with which they have relationships. Due diligence may also alert an organization to a responsibility to influence the behaviour of others, where they may be the cause of human rights violations in which the organization may be implicated".[869]

Anyway, despite the limits, ISO 26000 could reinforce the implementation of the UNGPs and could serve as potential source of leverage authority together with other instruments and initiatives that can give effectiveness to the corporate responsibility to respect human rights regime more broadly. Such effectiveness will depend on the extent to which its use by companies is disruptive of traditional business practices and drives actual business respect for human rights including in supply chains.

SA 80000

Founded in 1997, the Social Accountability International (SAI) is a global non-governmental organization advancing human rights and decent work promoting, through social certifications, socially responsible workplaces which benefit business while securing fundamental human rights.[870] The SA8000 Standard and Certification System[871] provides a framework for organizations of all types, in any industry, and in any country to conduct business in a way that is fair and decent for workers and to demonstrate their adherence to the highest social standards. SA8000 is based on internationally recognized standards of decent work, including the Universal Declaration of Human Rights, ILO conventions, and national laws, addressing specifically: child labor, Forced or Compulsory Labor, Health and Safety, Freedom of Association & Right to Collective Bargaining, Discrimination, Disciplinary Practices, Working Hours, Remuneration, Management System.

Th SA8000 applies a management-systems approach to social performance and emphasizes the need for continual exchange, dialogue and improvement, denying a checklist-style auditing. Reflecting on possible interconnections between the UNGPs and SA800, the standard has been aligned with the UNGPs in 2014. There are key differences to outline: the UNGPs provide a global standard of conduct and framework for understanding human rights risk, while SA8000 sets-out a practical standard for compliance. The second key distinction is that while the UNGPs refer to all human rights, SA8000, on the other hand, contains specific auditable requirements on labour rights. For business, the UNGPs describe three key processes necessary for implementation of the corporate responsibility to respect

[868] Danish Business Authority (2016), A comparison of 4 international guidelines for CSR
[869] ibid
[870] SAI empowers workers and managers at all levels of businesses and supply chains, using its multi-industry SA8000® Standard, as well as Social Fingerprint®, TenSquared, and other training and capacity-building programs
[871] SA International, SA8000, available at https://sa-intl.org/programs/sa8000/

human rights. These processes are referred to as: policy commitment, human rights due diligence and access to remedy, which are all aligned with implementation of SA8000.

The Global Reporting Initiative

The Global Reporting Initiative (GRI)[872] is an international certification body established in 1997 helping businesses and other organizations to take responsibility for their impacts, by providing them with the global common language to communicate those impacts. [873] Used by more than 10,000 organizations in over 100 countries, the GRI Standards are advancing the practice of sustainability reporting, and enabling organizations and their stakeholders to take action that creates economic, environmental and social benefits for everyone. As confirmed by 2022 research from KPMG, the GRI Standards are among the most widely used sustainability reporting standards globally.[874]

Standards enable consistent reporting, which helps organizations meet the data needs of their stakeholders. Any organization – large or small, private or public, regardless of sector, location, and reporting experience – can use the Standards to report in a standardized, comparable way. They address a comprehensive range of topics: from anti-corruption to water, biodiversity to employment, tax to forced labor, they cover relevant topics across the economic, environmental and social dimensions. The Standards help organizations to prepare a complete sustainability report that covers all topics where they have significant impacts. Alternatively, they can select and report on individual topics to meet specific stakeholder demands or comply with regulatory requirements.

Aligned with best practice for impact reporting, the GRI Standards are aligned with international instruments for responsible business behaviour, including the UNGPs, ILO Conventions, and the OECD Guidelines for Multinational Enterprises. Organizations can also use the Standards to report on their impacts and progress on the UN SDGs.

The GRI Standards comprise of three series of standards which can be used by suppliers in the sustainability reporting process:

- Universal Standards: they support companies in identifying their material topics by laying out important principles when preparing a report.[875] They also contain disclosures on the organization's specific context, such as its size, activities, governance and stakeholder engagement.
- Sector Standards: they support companies within specific sectors to determine their material topics and what to report for each topic. For example, an oil company reporting in accordance with the GRI Standards is required to use the Oil and Gas Sector Standard
- Topic Standards: GRI has produced 33 topic standards which contains disclosures that organizations use to report their impacts in relation to a topic and how it manages these impacts. For example, GRI 204- issued in 2016- is specific on Procurement Practices[876]

This approach of identifying and reporting on material topics helps companies create reports that focus on the impacts of their activities and operations and meet the information demands of their stakeholders.

4.3 Accountability Gaps, Liability Dilemmas and Regulatory Efforts

Under section 4.1 and 4.2, the focus has been on the crystallization process of a corporate responsibility to respect human rights emerging upon business (non-State) actors, who are often suppliers also in public procurement transactions. The attention has been on the full package of

[872] Its mission is to develop reporting and verification guidelines in respect of economic, environmental and social performance
[873] GRI, Global Reporting: Four in five-largest global companies report with GRI
[874] KPMG Report (2020) "The time has come" confirms that (1) 73% of the largest 250 companies in the world reporting on sustainability use GRI; (2) 67% of the largest 100 companies in 52 countries reporting on sustainability use GRI. They have been adopted by leading companies in more than 100 countries, and are referenced in policy instruments and stock exchange guidance around the world. Over 160 policies in more than 60 countries and regions reference or require GRI.
[875] GRI 1: Requirements and principles for using the GRI Standards; GRI 2: Disclosures about the reporting organization; GRI 3: Disclosures and guidance about the organization's material topics
[876] GRI, How to use the GRI Standards

instruments and actions that companies could enact to comply with their responsibility to respect human rights and operationalize human rights due diligence, which public buyers could require within public procurement tenders and contracts. The attention has been on the HRDD process as recommended by the UNGPs and on other existing forms of private regulation, as codes of conduct and voluntary sustainability standards. However, not much has been said yet on the legal consequence for suppliers connected to such responsibility and what is the status of regulatory frameworks in this direction. This will be at stake in the following section, which addresses the current uptake of the corporate responsibility to respect at international level outlining existing accountability gaps and ambiguity on legal consequences. What are the legal responsibilities for business in practice? Is HRDD triggering liability regimes?

Since the adoption of the UNGPs, the relationship between HRDD and corporate liability has been a source of uncertainty - the limited reference to legal liability in the UNGPs is part of what is sometimes called the *accountability gap*[877] - requiring further scrutiny to assess to what extent the failure to exercise HRDD may lead to liability.[878] Thus, in the first paragraph (4.3.1) the interconnection and differences between due diligence and liability will be at stake, discovering the approach followed by courts in selected domestic case-law (para 4.3.2). In the last paragraph (4.3.3) the attention is on an ongoing process towards regulating corporate HRDD, showing effort to regulating and clarifying legal responsibility issues. Some examples of regulatory efforts proliferating after the adoption of the UNGPs are mentioned, suggesting an increasing interest by both States and business in regulating such matter. A progressive trend towards establishing mandatory human rights due diligence in some jurisdictions are evident, particularly in the European Union context - which will be assessed more in details referring to public procurement legal regime in the next chapter (Chapter 5).

4.3.1 Human Rights Due Diligence Uptake and Liability Regimes

As already anticipated, despite the soft law nature of the UNGPs, the corporate responsibility to respect human rights and HRDD have increasingly become a "norm of expected conduct for all business enterprises".[879]

At international level, it is worth mentioning that also other B&HR-related instruments have gradually incorporated notions on due diligence related to human rights, providing further *impetus* in the consolidation of an international standard. For instance, the latest version of the OECD MNE Guidelines reflects the HRDD approach, promoting a process based on assessing actual and potential human rights impacts, integrating and acting upon the findings, tracking responses as well as communicating how such impacts are addressed. The 2018 OECD Due Diligence Guidance for Responsible Business Conduct, endorsed by all the 48 adhering States, further clarifies the practical measures to be adopted by companies in order to prevent or mitigate adverse human rights impacts associated to their activities.[880] In a similar vein, due diligence has been incorporated in the last revision of the ILO Tripartite Declaration recommending both domestic and multinational companies to assess any actual or potential adverse human rights impact stemming from their own activities or from their business relationships.[881] Another example is the Equator Principles[882], revised with an aim to align with the UNGPs.[883] While such standards are technically non-binding, they can give rise to practical

[877] Ramasastry A. (2015) Corporate Social Responsibility versus Business and Human Rights: Bridging the Gap Between Responsibility and Accountability 14 JHR 248;
[878] Bueno N. and Bright C. (2020) Implementing Human Rights Due Diligence Through Corporate Civil Liability 69(4) International & Comparative Law Quarterly
[879] UN General Assembly (2018), Report of the Working Group on the Issue of Human Rights and Transnational Corporations and other Business Enterprises: Corporate HRDD, Emerging Practices, Challenges and Ways Forward' UN Doc A/73/163, para 92,
[880] OECD, 'Due Diligence Guidance for Responsible Business Conduct' (Paris 2018).
[881] ILO (2017), Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy, para 10 (d).
[882] Equator Principles Association (2003), About the Equator Principles; A financial industry benchmark for determining, assessing and managing environmental and social risk in projects
[883] Equator Principles (2020), "Equator Principles EP4"

consequences as well as legal duties, if incorporated voluntarily into corporate policies, investment agreements[884] and purchase contracts.[885] Particularly in public procurement contracts, requiring HRDD mechanisms to suppliers would be a crucial step to foster more responsible business conduct.

Despite different possibilities for legal traction, evidence suggests that the adherence to effective HRDD processes amongst businesses remains marginal, even in sectors highly exposed to human rights risks.[886] Cases show that business practices harmful to human rights still persist,[887] while new ones have continued to emerge in different sectors.[888] Such situation fuels a persistent corporate accountability gap, exacerbated even more by ambiguities and unclarity on liability regimes for corporate human rights abuses, which question the UNGPs' penetration and practical effectiveness. In terms of uptake, the Corporate Human Rights Benchmark (CHRB) showed that almost half (46.2 %) of the biggest companies worldwide failed to show any evidence of identifying or mitigating human rights in their supply chains.[889] By 2016, only 350 corporations had human rights policies in place amongst approximately 80,000 transnational firms worldwide.[890]Another study from the EU showed that only one fifth of major companies assessed had a human rights policy in place.[891]Although supply chains traceability and HRDD processes have increased in some sectors, nonetheless evidence shows enforcement gaps of such voluntary schemes. For example, the CHRB Report 2023 assessed 110 biggest business enterprises from the textiles and extractive industry showing that while 61% of companies have a part of a human rights due diligence process in place, only 27% engage with rightsholders during this process.[892]

Given the low uptake and enforcement gaps, clarifications on the legal risks and liability of suppliers are needed. As recalled by Ruggie, the corporate responsibility to respect human rights is rooted in a "transnational social norm", not an international legal norm.[893] Thus, requiring HRDD does not entail legal liability *per se*[894] as due diligence in the UNGPs is pictured as a voluntary process. Nonetheless, it is often matched by considerations similar to liability, suggesting that due diligence is not totally deprived of a legal dimension.[895]

In details, the UNGPs clarifies that:

> "The responsibility of business enterprises to respect human rights is distinct from issues of legal liability, which remain defined largely by national law provisions in relevant jurisdictions".[896]

Nonetheless, the relationship between HRDD and legal liability is addressed by the UNGP 17 Commentary:

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[884] DIHR (2019), Human rights and state-investor contracts. OHCHR (2021), Human rights-compatible international investment agreements, Note by the Secretary-General

[885] Martin-Ortega, O., (2018), Public Procurement as a Tool for the Protection and Promotion of Human Rights: a Study of Collaboration, Due Diligence and Leverage in the Electronics Industry, Business and Human Rights Journal, Cambridge University Press, vol. 3 No.1, pp 75-95.

[886] Business and Human Rights Resource Centre (2022), "Closing the gap: Evidence for effective human rights due diligence from five years measuring company efforts to address forced labour"

[887] ILO (2020), "Achieving decent work in global supply chains TMDWSC/2020 Report for discussion at the technical meeting on achieving decent work in global supply chains". OHCHR (2022) "Panel discussion on the tenth anniversary of the Guiding Principles on Business and Human Rights". OHCHR (2022), "Sustainable Global Supply Chains: G7 Leadership on UNGP Implementation"

[888] Methven O'Brien, C., Jørgensen, R., Hogan, B. (2021) Tech Giants: Human Rights Risks and Frameworks

[889] Corporate Human Rights Benchmark, World Benchmarking Alliance (2020), "Corporate Human Rights Benchmark: Key Findings Report"

[890] Business and Human Rights Resource Center (2019), "List of large businesses, associations & investors with public statements & endorsements in support of mandatory due diligence regulation"

[891] Torres-Cortés, F., Salinier, C., Deringer, H., et al., (2020), "Study on due diligence requirements through the supply chain: final report", European Commission, Directorate-General for Justice and Consumers, Publications Office

[892] World Benchmarking Alliance (2023) Corporate Human Rights Benchmark Insights Report 2023

[893] Ruggie J and Sherman, J (2017) 'The Concept of 'Due Diligence' in the UN Guiding Principles on Business and Human Rights: A Reply to Jonathan Bonnitcha and Robert McCorquodale' 28 European Journal of International Law 921, 923.

[894] McCorquodale R, Blanco-Vizarreta C. (2023) UNGP 17: HRDD in Choudury (ed) The UNGPs: A Commentary, p. 126

[895] Robert McCorquodale and Lise Smit, 'Human Rights, Responsibilities and Due Diligence: Key Issues for a Treaty' in Surya Deva and David Bilchitz (eds), Building a Treaty on Business and Human Rights: Context and Contours (cup 2017), 223.

[896] UNCHR (2011) UNGP 12, commentary.

> "Conducting appropriate human rights due diligence should help business enterprises address the risk of legal claims against them'.[897]

Therefore, HRDD is relevant from a legal risk management perspective, since engaging in it may help avoiding corporate legal liability. It is worth considering that further reasons to undertake HRDD have been confirmed in different empirical finding, first of all reputational costs. For instance, one study found that 66% of 152 companies surveyed across the world considers reputational risks a top incentive for undertaking HRDD, apart from avoiding legal implications.[898]

Nonetheless, authors have expressed concern on the risk that HRDD may be understood as a narrow compliance-orientated processes, allowing businesses to claim that they are compliant with the UNGPs adopting a box-ticking approach.[899] However, again the UNGP 17 Commentary emphasizes that:

> "Business enterprises conducting such due diligence should not assume that, by itself, this will automatically and fully absolve them from liability for causing or contributing to human rights abuses."[900]

Therefore, HRDD is not merely a formal process but also a standard of expected conduct in order to prevent adverse human rights impacts. From this, it follows that the appropriateness of HRDD process should take into account liability considerations.[901]

Understanding Liability Regimes under the UNGPs

Defining further possible liability regimes in case of human rights harms caused by companies' actions or omissions, two types of liability could be triggered*: strict liability* or *fault-based liability*.[902] Overall, in case of *strict liability*, a party is hold liable for harm or damages caused by its actions or products, regardless of fault or intent. Thus, the focus is on the fact that harm occurred rather than on whether the party acted negligently or intentionally. So, it may apply to situations where a company's activities result in harm to individuals or communities, even if the company did not act negligently or intentionally. On the other hand, *fault liability* requires proof of wrongdoing or fault to the party responsible for the harm, holding individuals or entities accountable for their actions or omissions, if they breach the *duty of care* owed to others. Thus, fault liability may apply when a company's actions or decisions are found to be negligent, reckless, or intentional. For example, negligence is a specific type of fault liability involving a failure to take reasonable precautions or to fulfil a duty of care owed to others, resulting in harm to individuals or communities. For example, if a company fails to conduct adequate due diligence on its supply chain to identify and address human rights risks, it may be found negligent if human rights abuses occur as a result of its oversight.[903]

The already mentioned *Vedanta*[904] and *Okpabi*[905] cases are two of the most straightforward examples regarding corporate tortious liability for human rights violations. In these cases, the judges introduced a presumption of negligence element into the fault-based duty of care.[906] They argued that when a corporation introduces a policy framework to avoid human rights abuses, it could be safely assumed that it has knowledge and control over the "risky" corporate activities, *without the need to look for proof of actual knowledge and control*. By rendering actual fault inconsequential, corporate civil

[897] UNCHR (2011) UNGP 17, commentary.
[898] McCorquodale, Smit, Neely and Brooks (2017) Human Rights Due Diligence in Law and Practice: Good Practices and Challenges for Business Enterprises BHRJ Vol 2(2), 195-224
[899] Bonnitcha and McCorquodale (2017) p 910; B Fasterling and G Demuijnck, 'Human Rights in the Void? Due Diligence in the UN Guiding Principles on Business and Human Rights' (2013) 116 JBE 805–806.
[900] UNHRC (2011) Guiding Principle 17, Commentary.
[901] Smit L. et al (2020) Study on Due Diligence Requirements through the Supply Chain: Final Report (European Commission 2020) 260
[902] O'Brien, C., Holly, G. (2021). Briefing on Civil Liability for Due Diligence Failures October 2021, Danish Institute for Human Rights.
[903] Ibid
[904] UK Supreme Court (2019) Vedanta Resources PLC and another (Appellants) v Lungowe and others (Respondents)
[905] UK Supreme Court (2021) Okpabi and others (Appellants) v Royal Dutch Shell Plc and another (Respondents), UKSC 3
[906] Burrows, A. Principles of the English Law of Obligations, Oxford

liability becomes stricter, and the (harm-based) corporate duty of care comes closer to an obligation of results.[907]

Moreover, to assess the responsibility of businesses in preventing and addressing human rights abuses and related liability regimes, it is crucial to reflect on *obligations of means* and *obligations of results* and understand what applies in case of HRDD in the UNGPs. Indeed, such differentiation has implications on how businesses are held accountable for human rights abuses.

- An *obligation of means* refers to a standard of conduct requiring a party to take reasonable and diligent measures to achieve a particular outcome or objective. The focus is, thus, on the efforts made by the party to fulfil its duty, rather than on the specific outcome achieved. An example is requiring businesses to take reasonable steps to prevent and address human rights abuses within their operations and supply chains, through policies, procedures, and due diligence processes, as well as providing training and capacity-building initiatives for employees and business partners. With an obligation of means, businesses may be held accountable for their efforts to prevent human rights violations and to fulfil their responsibility to respect human rights, even if harm still occurs despite their best efforts to prevent it.[908]
- An *obligation of results* imposes a higher standard of accountability, requiring a party to achieve a specific outcome or result, rather than merely taking reasonable steps to pursue that outcome. Under this standard, the focus is on whether the desired outcome has been achieved, regardless of the efforts or means employed to achieve it. An example of such obligation is requiring businesses to ensure that human rights abuses do not occur within their operations and supply chains. This means that businesses would be held responsible for preventing harm and ensuring respect for human rights, and they may be held liable if human rights violations occur, regardless of the measures they have taken to prevent them. Meeting an obligation of results may require businesses to demonstrate that they have effectively identified and addressed human rights risks, implemented appropriate safeguards and mitigation measures, and provided remedies for harm caused by their operations.[909]

Overall, the concept of "due diligence" is often associated with an obligation of means, as it focuses on the measures taken by businesses to identify, prevent, and address human rights risks, rather than guaranteeing specific outcomes.

Reflecting further on the meaning of “due diligence” in the UNGPs and the correlation with obligations of means or obligations of results, Bonnitcha and McCorquodale[910] have stressed out that the UNGPs invoke two different concepts of due diligence without explaining how they relate to each other, creating uncertainty on responsibility to provide remedy: (i) a process to manage business risks and (ii) a standard of conduct required to discharge an obligation.

Indeed, according to their reasoning UNGPs 17–21, describe a range of processes and procedures that business should have in place to identify, avoid and monitor their human rights impacts, thus referring to due diligence as a set of business processes and so more as an obligation of means.[911]

In contrast, in a 2009 report to the Human Rights Council, Ruggie defined due diligence as the “diligence reasonably expected from, and ordinarily exercised by, a person who seeks to satisfy a legal

[907] Kotsamani P. (2023) EU Corporate Human Rights Due Diligence Obligations: From Means to Results, Opinio Juris

[908] O'Brien, C., Holly, G. (2021).

[909] Ibid

[910] Bonnitcha J., McCorquodale R. (2017) The Concept of ‘Due Diligence’ in the UN Guiding Principles on Business and Human Rights, The European Journal of International Law Vol. 28 no. 3

[911] UNGP 17 is explicit that due diligence refers to a ‘process’ of investigation and control implemented by a business enterprise. This emphasis on due diligence processes is consistent with the Framework’s explanation of how business enterprises should ensure that they respect human rights: ‘What is required is due diligence – a process whereby companies not only ensure compliance with national laws but also manage the risk of human rights harm with a view to avoiding it.’This concept of due diligence is also reflected in UNGP 15: ‘In order to meet their responsibility to respect human rights, business enterprises should have in place policies and processes … including … (b) A human rights due diligence process to identify, prevent, mitigate and account for how they address their impacts on human rights.’

requirement or to discharge an obligation".[912] Taken in isolation, this definition clearly refers to due diligence as a standard of conduct and thus to an obligation of result. Eventually, Ruggie suggests that due diligence is a standard of conduct that businesses must meet to discharge their responsibility to respect human rights."[913]

Embracing one of the two conceptions of due diligence has inevitable consequences on liability: if due diligence, is understood as a standard of conduct, then a business is only responsible for adverse human rights impacts that result from its failure to act with reasonable diligence.[914]

In contrast, if businesses breach their responsibility to respect human rights whenever they infringe human rights – that is, if the responsibility to respect human rights is akin to a strict liability standard and does not entail a fault element – then a business's responsibility to redress situations in which it has infringed human rights is independent of any debate about whether the business has acted with sufficient diligence or care.[915]

Bonnitcha and McCoquordale embraces the interpretation of due diligence as business process, clarifying that businesses have a strict liability for their own adverse human rights impacts.[916] This means that businesses have a responsibility to provide a remedy whenever they infringe human rights; while due diligence, understood as a standard of conduct, is not relevant.

> "However, due diligence, as a standard of conduct, is relevant in defining the extent to which businesses are responsible for the adverse human rights of third parties. Due diligence processes are the means by which businesses should ensure that they discharge these responsibilities. This interpretation, we believe, clarifies how the two concepts of due diligence relate to each other within the scheme established by the Framework and the Guiding Principles."

To assess liability regimes more specifically in relation to HRDD and UNGPs, it must be recalled that an appropriate HRDD must be adopted by a company upon the findings of actual or potential human rights impacts which varies according to whether the company *causes, contributes to or is directly linked* to that human rights impact. The question arises as to whether this *trichotomy* of involvements is or should be reflected in legal liability regimes, and, if so, how this should be done.

In the light of legal uncertainty on the circumstances under which due diligence could serve as a defence, the OHCHR issued a Guidance on Corporate Accountability[917], clarifying that corporate civil liability should be properly aligned with the responsibility of companies to exercise HRDD.[918] Particularly, domestic civil liability regimes should take into consideration the effectiveness of measures taken by companies to identify, prevent and mitigate adverse human rights impacts of their activities. A distinction between liability within corporate groups and supply chain liability is also proposed by OHCHR:

- Corporate groups liability: civil liability regimes should be clear on the expected standards for the management and supervision of different entities within the group with respect to the identification, prevention and mitigation of human rights impacts associated with or arising from the group's operations.[919] In other words, it recommends precision about the type and

[912] UNHRC (2009) Business and Human Rights: Towards Operationalizing the 'Protect, Respect and Remedy' Framework, Report to the UN Human Rights Council (Business and Human Rights Report), UN Doc. A/HRC/11/13, 22 April 2009, para. 71

[913] UNHRC (2011) Report to the UN Human Rights Council on 'Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework', UN Doc. A/HRC/17/31, 21 March 2011, para. 6.

[914] On this interpretation, a business enterprise does not breach its responsibility to respect human rights if it has acted diligently in its attempt to avoid causing adverse human rights impacts, but, due to unfortunate or unforeseen events, it has caused serious adverse human rights impacts.

[915] On this interpretation, a business enterprise is responsible for all of its adverse human rights impacts regardless of whether those impacts were unexpected or costly to prevent.

[916] Bonnitcha J., McCorquodale R. (2017), p. 908-910

[917] OHCHR, Improving Accountability and Access to Remedy for Victims of Business-Related Human Rights Abuse: Explanatory Notes for Guidance, UN Doc. A/HRC/32/19/Add.1, 10 May 2016

[918] Ibid, Policy Objective 14.1

[919] Ibid Policy objective 12.3.

degree of control and supervision that will give rise to parent company liability in domestic regimes.

- Supply chain liability: Similar to the above, however, the Guidance makes express reference to the so-called "causation, contribution and linkage trichotomy"[920] by specifying that:

  > "Relevant adverse impacts are those that a business enterprise may cause or contribute to as a result of its policies, practices or operations"[921].

  Only the first two degrees of involvement (causation and contribution) should give rise to liability when it comes to the harm caused by an entity in the supply chain.

Moreover, another OHCHR Report[922] clarifies three particular ways in which the non-observance of HRDD could trigger legal liability in domestic regulatory regimes:

- The non-observance of mandatory HRDD can raise the prospect of legal liability regardless of whether, or the extent to which, damage flows from that non-compliance. Namely, the mere fact of not complying with a due diligence process may be subject to sanction.
- HRDD and the question of whether it was exercised may also be among the threshold factual issues, for instance in the context of assessing the potential breach of a duty of care in a tort claim.[923] In such case, the question is whether compliance with the due diligence obligation would have prevented the damage from occurring.[924]
- HRDD can be integrated into strict liability mechanisms, in which case it will not have a bearing on whether the company is prima facie liable, but may raise the possibility of a legal defence by the company.[925]

To conclude the reflection, it is interesting to mention that different interpretations of due diligence as obligation of result have been embraced, for example by the European Union and by national jurisdictions case-law.

As it will be explored more in depth in the next Chapter, the newly adopted EU Corporate Sustainability Due Diligence Directive is an example of interpretation of HRDD as obligation of result, indeed for the first time since its conception in the UNGPs, HRDD is linked to corporate civil liability for damages.[926] It establishes a general obligation to the corporation to introduce a HRDD policy and implement a monitoring mechanism. As such, the duty to identify potential adverse human rights impact does not entail fault-based civil liability. It is an obligation of result, and non-compliance has certain consequences for the corporation. These can take the form of administrative sanctions or remedial action by the monitoring body established pursuant to Articles 17-18 of the Commission's Proposal; or sanctions or remedial action ordered by a civil court if the national civil /torts law allows for such a procedure.

Furthermore, the Dutch case of *Milieudefensie* offers a landmark example of the legal consequences of violating such duty.[927] Shell argued before the Hague District Court that, even in case its environmental

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[920] BRIGTH

[921] Ibid Policy objective 12.4.

[922] OHCHR (2018), Improving Accountability and Access to Remedy for Victims of Business-Related Human Rights Abuse: The Relevance of Human Rights Due Diligence to Determinations of Corporate Liability, UN Doc A/HRC/38/20/Add.2, 1 June 2018

[923] Ibid para 12.

[924] Section IV. A. as in the case of the French Duty of Vigilance Law

[925]OHCHR (2018) para 12.

The UK Bribery Act 201040 and the Italian Legislative Decree 231/200141 are examples of such defence mechanisms in relation to corporate criminal and administrative liability.

[926] the content and scope of HRDD as described in Articles 6-8 of the Commission's Proposal provides an indirect guideline on the nature of corporate human rights-related duties in national law. Article 6 requires the corporations to monitor their activities, as well as those of their subsidiaries and to a certain extend the activities of their suppliers, to evaluate any risks on human rights. The principal way of doing so is by drafting a HRDD policy including as a minimum a description of the corporation's HRDD approach, a relevant code of conduct, and a process to monitor compliance. Additionally, corporations can use a mix of other methods to make their HRDD policy more effective, such as independent reports and consultations.

[927] The Hague District Court (2021) Milieaudefensie case - claimants, attorney-at-law mr. R.H.J. Cox of Maastricht vs. ROYAL DUTCH SHELL PLC in The Hague, defendant. C/09/571932 / HA ZA 19-379

policy is found inadequate, the corporation has no duty of limiting its CO2 emissions, as 'the mere adoption of a policy does not cause damage'. However, the court ruled that, for the corporation's own activities, Shell's duty of vigilance is an *obligation of result* and not of means and of best efforts. Conclusively, Shell has been required to reduce its CO2 emissions by at least 45% by the end of 2030 to mitigate the climate and health risks of its activities.

4.3.2 Civil Liability in Domestic Courts

When reflecting on the interconnection between HRDD and liability regimes, it must be considered also what has emerged from the case-law on the matter so far. Indeed, domestic case law on parent company liability is gradually crystallizing the idea that the non-observance of HRDD requirements may give rise to liability[928] connected to an increasingly recognized corporate *duty of care* and such considerations may be inevitably important also for States' suppliers.

First of all, the company law principle of separate legal personality –*corporate veil* – must be recalled: each (separately incorporated) company within a corporate group is regarded as a distinct legal entity having a separate existence from its owners and managers.[929] Consequently, a parent company is not automatically held liable for the harmful acts or omissions of its subsidiary on the basis merely of the shareholding. It is only in exceptional circumstances that the corporate veil may be lifted so that a parent company can be considered liable for the wrongful acts of its subsidiaries.[930] Nonetheless, in the last few decades case-law in some jurisdictions has shown that a parent company may be directly liable for its own acts or omissions in relation to the harms resulting from the activities of its subsidiaries.

Furthermore, it must be clarified that the *duty of care* and HRDD are distinct concepts, the former is jurisprudential, the second one is normative, but they are closely related and mutually reinforcing.[931] While duty of care focuses on the legal obligation to prevent harm, HRDD provides a systematic approach for fulfilling this obligation in the context of human rights. Thus, HRDD helps companies fulfil their duty of care by identifying and addressing human rights risks throughout their operations and value chains. It provides a framework for assessing the effectiveness of existing policies and procedures in preventing human rights abuses and for implementing measures to mitigate or remediate adverse impacts. By integrating HRDD into their risk management processes, companies can demonstrate their commitment to fulfilling their duty of care obligations and respecting human rights. This helps build trust with stakeholders, enhance reputation, and mitigate legal, operational, and reputational risks associated with human rights violations.[932]

In details, civil litigation for business-related human rights abuses expanded from the 1990s onwards in the US after the revival of the Alien Tort State (ATS)[933], focusing mainly on aiding and abetting as a determinant factor to establish a company's contribution to human right harms.[934] The expansion of case law on such basis was, then, curbed in 2013, when the US Supreme Court applied

[928] Bueno N., Bright, C. (2020) 'Implementing Human Rights Due Diligence Through Corporate Civil Liability' 69(4) International & Comparative Law Quarterly

[929] Turner,S (2019) 'Business Practices, Human Rights and the Environment' in JR May and E Daly (eds.) Human Rights and the Environment: Legality, Indivisibility, Dignity and Geography (Elgar Edward 2019) 377.

[930] Adam v Cape Industries Plc [1990] BCLC 479.

[931] See: McCorquodale, R. (2013) Pluralism, global law and human rights: Strengthening corporate accountability for human rights violations, Global Constitutionalism (2013), Cambridge University Press, pp. 287-315.
Van Dam C, Gregor F., Corporate responsibility to respect human rights vis-à-vis legal duty of care
Zuo Y. (2023) Research on Corporate Human Rights Due Diligence Duty of Care in the Global Supply Chains, Journal of Education, Humanities and Social Sciences, Vol. 24

[932] Cassel R. 2021, Outlining the Case for a Common Law Duty of Care of Business to Exercise Human Rights Due Diligence

[933] S Joseph, Corporations and Transnational Human Rights Litigation (Hart Publishing 2004).

[934] D Cassell, 'Corporate Aiding and Abetting of Human Rights Violation: Confusion in the Courts' (2008) 6 (2)
Nw. J. Int'l Hu. Rts 304-326..

the presumption against extraterritoriality in the *Kiobel* case.[935] The possibility of using the ATS was restricted to cases which 'touch and concern' the territory of the US 'with sufficient force to displace the presumption against extraterritorial application'.[936]Furthermore, in 2018 the US Supreme Court affirmed in the *Jesner* case[937] that 'foreign corporations may not be defendants in suits brought under the ATS', thus restricting even more the possible use of the ATS to cases filed against companies based in the US.[938]

Despite a progressively restricted approach in the US, civil litigation against parent and lead companies based on domestic tort law has flourished in other jurisdictions. As part of this trend, international standards on HRDD are increasingly relevant in determining the degree of supervision that a parent or lead company should exercise over its subsidiary or business partner, which is central to considerations of liability in negligence.

Different approaches have been used by courts[939], particularly looking at the UK case-law:

- A traditional approach: the liability of the parent company for the harm caused to a third party by a subsidiary depends on the degree of control exercised by the parent company over the decisions of the subsidiary.[940] As in the case *Okpabi v Royal Dutch Shell Plc*[941]and*,* where a parent company exercises in practice a high degree of control and supervision over the subsidiary's relevant conduct that caused the harm, then it might be liable for that harm.
- A new approach: it focuses on the degree of control that should have been exercised, either on the basis of the relationship of proximity between the parties, or on the basis of the legitimate expectations arising out of group-wide policies. For example, the *Chandler v Cape Plc*[942] *case* clarified the circumstances in which a "*special relationship"* between the parent company and its subsidiary exists, creating the expectation that control *should* be exercised by the former over the activities of the latter. Other cases, as the Canadian case *Choc v Hudbay Minerals Inc*[943] demonstrated that public representations and statements made by parent companies play a key role in both establishing the existence of a special relationship and creating certain expectations on the degree of supervision that the former should exercise over the activities of the latter.[944]
- A hybrid approach: the two mentioned approaches are not necessarily mutually exclusive. For example, in the case brought against Shell in the Netherlands, the Court of Appeal of The Hague reached a diametrically opposite conclusion to that of the English Court of Appeal in *Okpabi* despite being based on similar facts. The Dutch Court, indeed, adopted a hybrid approach, relying both on the high degree of supervision exercised *de facto* by the parent company over the operations of its subsidiary and the degree of supervision that should have been exercised on the basis of the relationship of proximity between the entities, as evidenced, inter alia, by groupwide policies adopted by the parent company. The tests set out by the court

[935] C Bright, 'The Implications of the Kiobel v. Royal Dutch Petroleum Case for the Exercise of Extraterritorial Jurisdiction', In A Di Stefano, C Salamone and A Coci (eds.), A Lackland Law? Territory, Effectiveness and Jurisdiction in International and EU Law (Giappichelli 2015) 165-181.
[936] Kiobel v. Royal Dutch Petroleum Co., 569 U.S. 108 (2013).
[937] Jesner v. Arab Bank, Plc, No 16-499, 584 U.S. (2018).
[938] W Dodge, 'Corporate Liability Under the US Alien Tort Statute: A Comment on Jesner v Arab Bank' (2019) 4 BHRJ 131.
[939] Bueno, Bright (2020) p. 16
[940] Leader, S. (2019) Parent Company Liability and Social Accountability: Innovation from the United Kingdom', in A Ghenim et al. (eds) *Groupes de Sociétés et Droit du Travail: Nouvelles Articulations, Nouveaux Défis* (Dalloz 2019) 113.
[941]*Okpabi v Royal Dutch Shell Plc* [2018] EWCA Civ 191 para 132. On this case, see K Aristova, 'Tort Litigation against Transnational Corporations in the English Courts: The Challenge of Jurisdiction' (2018) 14 *Ultrecht LR* 6. C Bright, 'The Civil Liability of the Parent Company for the Acts or Omissions of Its Subsidiary: The Example of the *Shell* Cases in the UK and in the Netherlands' in A Bonfanti (ed.) *Business and Human Rights in Europe: International Law Challenges* (Routledge 2018) 212.
[942] *Chandler v Cape* [2012] EWCA Civ 525.
[943] *Choc v Hudbay Minerals Inc*., 2013 ONSC 1414
[944] Eric Barizaa Dooh of Goi v. Royal Dutch Shell Plc, Court of Appeal of The Hague, 18 December 2015.
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suggest that there is a high level of supervision expected from a parent company in terms of monitoring compliance with the human rights and environmental standards within its group.

Also in the *Lungowe v Vedanta* case,[945] the UK Supreme Court adopted an hybrid approach, looking not only at the degree of supervision exercised *de facto* by the parent company but also at the degree of control that should have been exercised, not on the basis of a special relationship between the parties, but on the basis of the legitimate expectations arising out of its group-wide policies.[946] The UK Supreme Court identified three possibilities through which group-wide policies could give rise to a parent company duty of care: (1) devising defective or ineffective group-wide policies;[947] (2) "taking active steps, by training, supervision and enforcement, to see that they are implemented by relevant subsidiaries";[948] (3) holding itself out as exercising a certain degree of supervision and control of its subsidiaries, even if it does not in fact do so. As a result, a parent company may notably incur a duty of care to third parties, such as local communities affected by the operations of its subsidiary, if, as part of its group-wide policies, it exercises a certain degree of supervision and control over the activities of its subsidiary, but also if it holds itself out to exercising it in published materials, even if it does not actually do so in practice.

Many other cases could be mentioned on the matter, outlining a flourishing trend of courts in considering liability aspects related to HRDD processes and the supportive role of the UNGPs in legal decisions – as in the Hague District Court decision in *Milieudefensie et al. v. Royal Dutch Shell plc*[949] case. Nonetheless, some scholars have warned against the potentially perverse effect of approaches in which the adoption and implementation of group-wide corporate policies or commitments can generate parent company liability, as it might be a disincentive to companies to devise such policies or commitments, for fear of exposing themselves to legal liability.[950] However, this would be a risky strategy for companies,[951] particularly in public procurement situations if required expressly in the contract and thus leading to legal risks of suit. Furthermore, claims on the necessity to comply are reinforced by the growing business expectations to undertake HRDD and the flourishing regulatory frameworks on mandatory due diligence raising in different domestic and regional settings. Indeed, regulations with associated liability regimes would be the solution to shift from the *existence* of such a duty to the substantive question of the *breach* of a statutory duty.

4.3.3 Regulatory Efforts: Trend in Regulating Corporate Responsibility to Respect Human Rights

As outlined above, the UNGPs do not elaborate much on the legal liability for failure to meet the corporate responsibility to respect human rights, causing considerable legal uncertainty. Nonetheless, a progressive normative process of recognition of human rights due diligence as an obligation through domestic and regional regulatory frameworks is acknowledged.[952] Indeed, a growing trend towards mandatory HRDD initiatives with associated civil liability regimes suggests a

[945] *Lungowe v Vedanta Resources plc* [2019] UKSC 20.
[946] See Green L., Hamer,D. (2019) Corporate Responsibility for Human Rights Violations: UK Supreme Court Allows Zambian Communities to Pursue Civil Suit Against UK Domiciled Parent Company EJIL: Talk!, 24 April 2019; D. Palombo, 'The Duty of Care of the Parent Company: A Comparison between French Law, UK Precedents and the Swiss Proposals', BHRJ 1, 8.
[947] M Croser et al. (2020) Vedanta v Lungowe and Kiobel v Shell: The Implications for Parent Company Accountability' 5 BHRJ130, 133.
[948] Ibid para 53.
[949] In May 2021, the Court ruled that Shell must reduce its global net carbon emissions by 45% by 2030.
[950] McCorquodale R. (2019) 'Parent Company can Have a Duty of Care for Environmental and Human Rights Impacts: Vedanta v Lungowe' BHRJ Blog, 11 April 2019.
[951] Macchi C, Bright C.(2020)'Hardening Soft Law: The Implementation of Human Rights Due Diligence Requirements in Domestic Legislation', in M Buscemi et al. (eds), Legal Sources in Business and Human Rights: Evolving Dynamics in International and European Law (Brill Nijhoff) 218-247.
[952] Chiussi L. (2020) Corporate Human Rights Due Diligence: from the Process to the Principle, in M Buscemi et al. (eds), Legal Sources in Business and Human Rights: Evolving Dynamics in International and European Law (Brill Nijhoff 2020) 218-247.

shift in HRDD from a social expectation to a legal requirement.[953]

For example, an increasing number of countries in the last years have included HRDD in their National Action Plans[954] and have enacted regulatory action introducing mandatory reporting regulations and mandatory elements of human rights due diligence in other pieces of legislation. Thus, it seems that imposing HRDD on companies is progressively growing into an *acquis* of the States duty to take positive measures. As recommended by the Committee on Economic Social and Cultural Rights under General Comment 24:

> "The State duty to protect entails *a positive duty to adopt a legal framework requiring business entities to exercise human rights due diligence* in order to identify, prevent and mitigate the risks of violations of human rights, to avoid such rights being abused, and to account for the negative impacts caused or contributed to by their decisions and operations and those of entities they control on the enjoyment of Covenant rights."[955]

Among examples of regulatory initiatives flourished in recent years incorporating HRDD elements, three categories can be identified[956]:

- **Transparency disclosure laws:** as already mentioned in paragraph 4.1, a so-called "disclosure revolution"[957] has led to the adoption in many jurisdictions of laws requiring companies to disclose information on general human rights and environmental impacts or related to specific human rights issues. Some examples include the California Transparency in Supply Chains Act[958], the Australian Modern Slavery Act[959], the proposal of a Canadian Modern Slavery Act[960] and the already mentioned UK Modern Slavery Act and EU Non-Financial Reporting Directive and the recently adopted EU Corporate Sustainability Reporting Directive.
- **Sector-specific and thematic laws**: some laws entail due diligence provisions and a comprehensive exercise of substantive HRDD in relation to a specific sector or thematic, however without clarifying liability conditions in case harm occur. As a note, such examples rely on public authorities for the monitoring and enforcement of due diligence obligations defined in the laws.
  One example of thematic laws concern forced labour and conflict minerals: due diligence provisions featured in the US Dodd-Frank Act[961] (s1502), requiring companies to undertake due diligence to verify the presence of conflict minerals within their products, as well as publicly to disclose their due diligence reports. Similarly the EU has adopted in 2017 the EU Conflict Mineral Regulation[962]– more on this law will be addressed in Chapter 5. In 2015, the Chinese government launched draft *Chinese Due Diligence Guidelines for Responsible Mineral Supply Chains* setting out a five-step

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[953] International Corporate Accountability Roundtable, Danish Institute for Human Rights, and Global Business Initiative on Human Rights (2014), "Business dialogue on national action plans: report of key themes".
Business Europe (2022), "EU companies need workable rules on corporate due diligence"
[954] OHCHR (2016), "Guidance on National Action Plans on Business and Human Rights",
McVey M., Ferguson J., PuyouF.R. (2022) "Traduttore, Traditore?" Translating Human Rights into the Corporate Context", Journal of Business Ethics,
[955] CESCR (2017) 'General Comment No 24 on State obligations under the International Covenant on Economic, Social and Cultural Rights in the Context of Business Activities' (10 August 2017) UN Doc E/C.12/GC/24 para 16 (emphasis added). A similar requirement can be found in the crc, 'General Comment No 16: State Obligations regarding the Impact of the Business Sector on Children's Rights' (17 April 2013) UN Doc CRC/C/GC/16, para 62.
[956] See Bueno, Bright (2020) p. 10; Methven O'Brien, C. and Botta, G. (2022), p. 8
[957] Cooper, S. and Owen, D. (2007), "Corporate social reporting and stakeholder accountability: the missing link", Accounting, Organizations and Society, Vol. 32 No. 7-8, pp. 649-667.
Islam, M. and McPhail, K. (2011), "Regulating for corporate human rights abuses: the emergence of corporate reporting on the ILO's human rights standards within the global garment manufacturing and retail industry", Critical Perspectives on Accounting, v.22 No. 8, pp. 790-810.
Hohnen, P. (2012), "The future of sustainability reporting", EEDP Programme Paper 2012/02,
Chatham House, London
[958] US Government (2012) California Transparency in Supply Chains Act
[959] Australia Government (2018) Australian Modern Slavery Act
[960] Canada Government (2020) proposal of a Canadian Modern Slavery Act
[961] United States Congress (2010) Dodd-Frank Wall Street Reform and Consumer Protection Act (HR 4173, 5 January 2010) United States Securities and Exchange Commission (2012), Rule 13p-1
[962] European Commission (2017), "Guidelines on Non-financial Reporting (Methodology for Reporting Non-financial Information), Communication from the Commission, Official Journal of the European Union, C/2017/4234.

process whereby companies review their supply chains for specific risks and publish detailed information on actions taken.[963] Also in Switzerland, due diligence laws initiatives have emerged on child labour and conflict minerals[964].

More generally on forced labour thematic, the Uyghur Forced Labor Prevention Act[965] enacted in the US foresees a Strategy to Prevent the Importation of Goods Mined, Produced, or Manufactured with Forced Labor in the People's Republic of China. This law entails also due diligence obligations related to assessing, preventing and mitigating forced labour risk in the production of goods imported into the US as well as associated guidance.[966]A further example of sector-specific legislation regards the illegal logging and the timber industry: for instance, the EU Timber Regulation[967]; likewise, the Australian Illegal Logging Prohibition Act (2012) imposes similar obligations. Other thematic laws regard the EU Batteries Regulation introducing mandatory requirements for all batteries placed on the EU market to ensure that their production does not lead to human rights abuses or environmental damage.[968] A final example of thematic-based legislation is the Dutch Child Labour Due Diligence Act[969], whereby companies must exercise due diligence investigating whether supplied goods or services have been produced using child labour.[970]

The purpose of the enforcement mechanisms in this second category of laws is primarily to sanction failure to comply with the due diligence obligations set forth by the law but they leave the issue of access to effective remedy for affected individuals unaddressed.

- **Comprehensive due diligence requirements**: other legislations and legislative proposals include more comprehensive sets of due diligence requirements, mandating the exercise of HRDD with associated civil liability regimes in case of harm.

  Various initiatives and campaigns for the introduction of mandatory HRDD are currently taking place in a number of countries, particularly in EU[971] which will be addressed also in Chapter 5 and 6: in 2017, the above-mentioned French Loi relative au devoir de vigilance[972] marked a turning point, being a key example of overarching mandatory due diligence regulatory framework adopted so far. Such law requires large companies to publish an annual vigilance plan[973]. Similar vein is included in the recently adopted German Supply Chain Act[974]. Debates in Sweden, Austria, Finland, Denmark, Luxembourg are currently ongoing. In non-EU jurisdictions there are also relevant steps-

[963] China Chamber of Commerce of Metals, Minerals and Chemicals Importers and Exporters (2015), Chinese Due Diligence Guidelines for Responsible Mineral Supply Chains

[964] Schweizerische Eidgnenossenschaft (2021), Verordnung über Sorgfaltspflichten und Transparenz bezüglich Mineralien und Metallen aus Konfliktgebieten und Kinderarbeit.
Bueno, N., and Kaufmann, C. (2021) "The Swiss Human Rights Due Diligence Legislation: Between Law and Politics", Business and Human Rights Journal, 6(3), 542-549.
US Congress, (2022), "H.R.6256 - To ensure that goods made with forced labor in the Xinjiang Uyghur Autonomous Region of the People's Republic of China do not enter the United States market, and for other purposes", S.65

[966] Littenberg, Elliot, Witschi (2022) "Complying with the Uyghur Forced Labor Prevention Act – a Detailed Compliance Roadmap", Ropes & Grey,

[967] European Union (2010), "Regulation 995/2010 of the European Parliament and the Council of 20 October 2010 Laying down the Obligations of Operators who Place Timber and Timber Products on the Market", OJ L295/23, Official Journal of the European Union.
European Commission (2021), "Proposal for a Regulation of the European Parliament and of the Council on the making available on the Union market as well as export from the Union of certain commodities and products associated with deforestation and forest degradation and repealing Regulation (EU) No 995/2010"

[968] European Commission (2020), Proposal For a Regulation of The European Parliament and of the Council concerning batteries and waste batteries, repealing Directive 2006/66/EC and amending Regulation (EU) No 2019/1020"

[969] Wet zorgplicht kinderarbeid of 7 February 2017 as adopted by the Senate on 17 May 2019.

[970] In the event of a reasonable suspicion of child labour, the company must adopt and implement a plan of action observing the ILO-IOE Child Labour Guidance Tool for Business (art 5). The public supervisory authority may impose an administrative fine in case of failure to comply with these obligations. The Act also provides criminal sanctions in case of continuing non-compliance during five years after an administrative fine was imposed (art 9).

[971] BHRC, National Movements for Mandatory Human Rights Due Diligence in European Countries, https://www.business-humanrights.org/en/national-movements-for-mandatory-humanrights-due-diligence-in-european-countries

[972] République Française (2017), LOI n° 2017-399 du 27 mars 2017 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre,

[973] Cossart S. et al (2017) The French Law on Duty of Care: a Historic Step Towards Making Globalization Work for all, 2BHRJ 317.

[974] Bundestag (2021) German Lieferkettengesetz proposal.

ahead, showing an emergent trend towards binding legislations, nonetheless limited to some countries, addressing mainly large undertakings and focused on specific human rights. For example, the Swiss Responsible Business Initiative[975] has triggered intensive parliamentary debates on the question of corporate legal liability for business-related human rights and environmental violations. Similarly relevant is also the law passed in Norway in 2021.[976] Further proposals are emerging also in the Americas. [977]

Considering the patchwork of national legislations and initiatives in the direction of HRDD, at European Union level[978], the urgency to comprehensively regulate HRDD has been outlined in the European Parliament *Study on Due Diligence through the Supply Chain*, showing a high degree of convergence among businesses on their reasons for supporting a more comprehensive regulatory approach.[979] The Corporate Sustainability Due Diligence Directive has been adopted by the European Parliament in April 2024, being one of the most comprehensive example of regional framework providing for mandatory human rights and environmental due diligence, under current discussion.[980] Core features and impacts of this Directive and of the mentioned domestic legislations on HRDD in the EU context will be unpacked in details in the next Chapter (Chapter 5) with reference to public procurement contracts.

In conclusion, this chapter highlighted the ongoing process of consolidation of a corporate responsibility to respect human rights emerging upon business (non-State) actors, who are often suppliers also in public procurement transactions. The attention has been on the full package of instruments and actions that companies could enact to comply with their responsibility to respect human rights and operationalize HRDD, which public buyers could require within public procurement tenders and contracts. Despite doubts and unclarity on legal liability related to HRDD, the developments in the case-law and the multiple regulatory initiatives in the direction of its mandatory requirement – some more comprehensive than others- show an increasing interest in regulating the corporate responsibility to respect human rights and in clarifying legal liability, which is inevitably relevant for suppliers in public procurement.

In such context of unclarity, accountability and enforcement gaps, a focus on the private-public interplay and public procurement has potentials for hardening the soft. The objective of this chapter was first of all to provide an overview of the emerging corporate responsibility to respect human rights and related instruments to operationalize it and thus to incentivize both public buyers to require its respect and suppliers to achieve it through different instruments. A second objective was to reflect on actual liability, accountability and enforcement gaps, and showing the current patchwork of regulatory initiatives emerging on this matter. The potentials of public procurement to harden the soft in such context and incentivize more respect of human rights by suppliers in the global market are several.

The next chapter will focus on the B&HR *momentum* specifically in the European Union context and the possible interconnections with the public procurement regulatory framework, its opportunities and challenges.

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[975] In Switzerland, in November 2020 the Responsible Business Initiative975 referendum was launched

[976] Storvinget (2021), Norwegian Ethics Information Committee proposed a draft "act on business transparency and work with fundamental human rights and decent work".

[977] In Mexico, a draft General Law on Corporate Responsibility and Due Diligence was presented in 2020 following a recommendation by the country's National Human Rights Council the previous year. In Brazil, draft legislation has been published to succeed earlier formal guidelines. See: Presidência da República (2018) Decree No 9.571/2018; National Human Rights Council of Brazil, 2020 – Resolution No 5/2020. Serva C., Faria, L. (2022), "Mandatory human rights due diligence in Brazil", International Bar Association

[978] Smit et al. (2020), Study on Due Diligence Requirements through the Supply Chain: Final Report (European Commission), p.260

[979] European Commission (2020) Study on Due Diligence Through the Supply Chain (Brussels: European Commission)
The study showed that more than 2/3 surveyed companies agree that an EU-wide mandatory due diligence requirement would have positive impacts on human rights.

[980] European Commission, (2022), "Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937, Proposal for a Directive", COM(2022) 71 final.

Part III: Hardening the Soft through Public Procurement at Regional Level

5. A Human Rights Lens on Regional Public Procurement Frameworks: Hardening the Soft through EU Public Procurement Law

Introduction

In the previous chapters, key role and responsibility of both public and private stakeholders involved in the public procurement contractual relationship have been investigated from an international human rights perspective, outlining related legal dilemmas. This chapter continues the reflection on the *State-business nexus* applied to a peculiar regional regulatory framework: the European Union (EU) legal setting. The EU, indeed, constitutes a springboard with blossoming initiatives and development of hard and soft law sources suggesting a twofold trend implying related opportunities and legal challenges for public procurement and human rights: an *EU Sustainable Public Procurement (SPP) trend* and an *EU Business & Human Rights (B&HR) momentum*. Their potential correlations require further insight to reflect on possible synergies and mutual opportunities strengthening the State duty to protect and the corporate responsibility to respect human rights through public procurement. Indeed, the two trends are developing in silos, but would require interconnection to increase the potential for both B&HR and SPP in the EU setting.

An EU Sustainable Public Procurement trend is identified at EU policy and regulatory level. In details, the Public Procurement Regulatory Framework and the 2014 Procurement Directives Package enable multiple legal possibilities for the inclusion of sustainability considerations – both environmental and social- throughout the public procurement process which are under scrutiny in Section 5.1. More specifically, the attention will be on Socially Responsible Public Procurement (SRPP) development – borrowing the EU Commission label – and related social and human rights considerations relevant for this analysis, among others linked to human rights at work, ethical trade, inclusion of disadvantaged groups. Narrowing down the focus, the EU 2014/24/EU Public Sector Directive will be at stake, assessing multiple legal possibilities enabling the inclusion of B&HR considerations in procurement but also legal obstacles – as the *link to the subject-matter* of the contract. Such developments suggest some steps ahead towards a more responsible and *B&HR-based procurement* in EU which is, however, still at embryonal stage.

Furthermore, an on-going *EU Momentum on Business & Human Rights* and a trend towards regulating such matter, particularly in relation to due diligence, is evident at policy and legislative level in the EU regulatory setting- under scrutiny in Section 5.2. To contextualize such trend, B&HR will be explored, first, in the European human rights' regional architecture (considering the Council of Europe international legal sources) and then under EU law outlining the emergence of a patchwork of voluntary and mandatory initiatives, in a pathway started since early 2000s towards an EU Strategy on B&HR. Particularly, the attention is on indirect and sectorial efforts towards regulating *human rights due diligence* at EU level*,* a trend stimulated also by some EU MSs domestic normative experiences which will be at stake in Chapter 6. This regulatory process is particularly relevant at the moment, culminating with the EU Commission proposal for a mandatory HRDD EU regulatory framework since 2020, leading to the recently adopted EU Corporate Sustainability Due Diligence Directive (CSDDD). The proposal, adopted by the European Parliament in April 2024 after *trilogue's* negotiations, opens regulatory opportunities with inevitable impacts also on public procurement. Indeed, the explicit mention to public procurement - article 24 on *Public support, public procurement and public concessions*- is a powerful opportunity to bridge gaps between the EU SPP trend and the EU B&HR momentum, in a fragmentary EU patchwork of soft and hard law sources. Indeed, for now the SPP and B&HR spheres result still isolated from each other requiring more synergy to create effective impacts towards more *B&HR-based procurement*. Thus, the CSDDD legislative *iter,* proposed drafts and main opportunities and challenges also in relation to public procurement will be addressed.

5.1 The EU Trend on Sustainable Public Procurement: Insight into Socially Responsible Public Procurement and Legal Possibilities

5.1.1 The EU Public Procurement Regulatory Framework and the 2014 Procurement Directives Package

Public procurement is a core pillar of the EU internal market and its legal and political architecture.[981] It represents a substantial share of the EU common market, accounting for 14% EU GDP and 17% when including utilities procurement.[982] Indeed, the European Commission has recognized public procurement as crucial market-based instrument to enhance future economic growth, resource efficiency, strategic and innovation policy.[983] Contracting authorities in EU are, thus, important market players, influencing commercial behaviour through their purchasing decisions and expectations set for their suppliers and service providers, encouraging responsible supply chains and more sustainable consumption and production.[984] In this regard the EU normative framework set forth regulating public procurement plays a crucial role:

> "Given the amount of public money at stake, and the number of public purchasers and suppliers involved, the way in which public procurement is regulated and administered has an immediate and significant influence on the business environment."[985]

The EU public procurement regime has unique characteristics and is grounded on a multi-layered regulatory framework, structured around two regulatory set of norms: (1) the EU Treaties and (2) the Directives on Public Procurement,[986] firstly adopted in 2004 and then reformed in 2014.[987]
The first layer of norms consists of the provisions of the Treaty of the Functioning of the European Union (TFEU) guaranteeing key principles of integration, free movement and full realization of the EU common market. The TFEU does not include any explicit provision on public procurement, nonetheless it establishes general principles – *four freedoms* defining the internal market rules - applicable to all procurement contracts:

- The prohibition of non-discrimination (art. 28 TFEU)
- The free movement of goods and the elimination of barriers to trade (art. 34 TEFU)
- The freedom of services suppliers (art. 56 TEFU)
- The freedom of establishment (of business) (art. 49 TFEU)

As repeatedly confirmed by the Court of Justice of the EU (CJEU), public procurement is an important instrument for "opening-up the internal market to undistorted competition in all the Member States".[988] The objective of eliminating restrictive procurement practices, operating as barriers to trade and obstacles for open competition[989], and creating a common procurement market represent the main drivers behind the EU regulatory framework on public procurement.[990] Other EU law fundamental principles applicable to the procurement market are equal treatment, non-discrimination, transparency,

[981] Corvaglia M. (2017) The EU Public Procurement Framework: The Internal Market and Socially Responsible Procurement, in Corvaglia (ed) Public Procurement and Labour Rights, p. 153
[982] EU Commission Public Procurement Data
[983] European Commission (2010) Communication "Europe 2020 – a Strategy for Smart Sustainable and Inclusive Growth", COM (2010) 2020 final of 3 March 2010, p. 15
[984] Fisher E. (2013) "The Power of Purchase: Addressing Sustainability through Public Procurement", European Procurement & Public Private Partnership Law Review 2, p. 8
Institute for Human Rights and Business IHRB (2015), "Protecting Rights by Purchasing Right: The Human Rights Provisions, Opportunities and Limitations Under the 2014 EU Public Procurement Directives", p. 8
[985] European Commission, (2010) "EU public procurement policy: responding to new challenges", DG Internal Market and Services
[986] For historical overview see Weiss F. (1993) Public procurement in European Community Law, The Athlone Press
[987] European Commission (2014) Annual Public Procurement Implementation Review, Brussels, 1.8.2014 SWD
[988] CJEU (2005) Case C-26/03 Stadt Halle and RPL Lochau, EU:C:2005:5, para 44; CJEU (2016) Case C-553/15 Undis Servizi, EU:C:2016:935, para 28; CJEU (1974) Case C-144/17 Lloyd's of London, EU:C:2018:78, para 33
[989] Graells A.S. (2015) Public Procurement and the EU Competition Rules, Hart Publishing, p. 101
[990] Arrowsmith S (2020) The Law of Public and Utilities Procurement, Sweet and Maxwell, p. 10

value for money, mutual recognition and transparency. The case-law confirm that all procurement activities carried out in the European territory are bound by the principle of non-discrimination on the ground of nationality and by the free-movement rules[991] if they are of "certain cross border interest".[992] Thus, discriminatory measures – both direct and indirect- are prohibited as they could hinder the free movement of goods[993], the free movement of services [994] and the freedom of establishment.[995]

The second normative layer of the EU public procurement regime deals with the Directives. All procurement contracts above a certain monetary threshold are bound by the Public Procurement Directives package, integrating the EU Treaty provisions with *positive obligations* and detailed regulation of the entire procurement process and public contracts award.[996] The first Procurement Directives issued in 2004 were reformed in 2014 and transposed in the MSs national legal systems by 2016, including the following sources:

- The *Public Sector Directive* 2014/24/EU replacing Directive 2004/18/EC2, updating the rules for public supply, service and works contracts;
- The *Utilities Directive* 2014/25/EU replacing 2004/17/EC3, regulating procurement by entities operating in the water, energy, transport and postal services sector;
- The *Concessions Directive* 2014/23/EU, creating a new regulated regime for the award of works and services concession contracts over €5 million.
- Two "Remedies" Directives applicable to complaints and review processes: the *Public Sector Remedies Directive* 89/665/EC and the *Utilities Sector Remedies Directive* 92/13/EC5[997]

The Directives set as threshold minimum harmonised rules for tenders whose monetary value exceeds a certain amount and which are presumed to be of cross-border interest, ensuring that the award of contracts is fair, equitable, transparent and non-discriminatory.[998] Rather than seeking to regulate with precision all public contracts, the EU legislator regulates only those most clearly capable of affecting trade between MSs. Still, for tenders of lower value, national rules apply, which nevertheless must respect general principles of EU law. Regarding the subject matter, the Directives describe how public authorities should purchase: i) "works" including building and civil engineering contracts; ii) "supplies" namely contracts for the purchasing of goods; iii) "services" including contracts for advertising, property management, cleaning, management consultancy, financial, ICT related services.[999]
Concerning the legal effect, the legal basis for enacting the Directive in the first place is art. 114 TFEU which permits the EU to approximate the laws of the Member States by way of secondary EU legislation in order to pursue "the objective of establishing and functioning of the internal market".[1000] Defining the internal market of the EU further, art 26.2 TFEU states that the internal market is "an area without

[991] CJEU (2000) Case C-324/98 Teleaustria and Telefonadresse EU: C:2000:669, ECR I-10745
[992] Kunzlik P. (2013) Green Public Procurement- European Law, Environmental Standards and "What to Buy" Decisions, 25, Journal of Environmental Law, p. 173
[993] Art. 34 TFEU. Direct discrimination between suppliers are prohibited, as in the case of the use of local content requirements or provisions imposing a different set of regulations on foreign bidders
[994] Indirect discriminatory measures favouring domestic goods or services hindering trade are prohibited. Example: requiring specific product characteristics that are more difficult to meet for foreign suppliers and easily satisfied by domestic producers. See CJEU, Concordia Bus Case.
[995] Trepte P. (2007) Public Procurement in the EU: A Practitioner's Guide, Oxford University Press
[996] Andhov M. (2021) Contracting Authorities and Strategic Goals of Public Procurement – A Relationship Defined by Discretion? University of Copenhagen Faculty of Law Legal Studies Research Paper Series, paper no. 2021-105.
[997] The two Directives were significantly amended by Directive 2007/66/EC6. In addition, the "defence" Directive 2009/81/EC7 applies a more flexible and confidential regime to the procurement of military supplies and related works and services.
[998] The Directives consist of applying the core principles (non-discrimination, equal treatment,transparency) in the following areas: publicity of proposed procurement contracts; design of technical specifications; choice of procurement procedure; qualification and selection of candidates and tenderers; award of contracts. Hill, K. (2016) Public Procurement in the EU: Legislative Framework, Basic Principles and Institutions, SIGMA, OECD. European Commission (2015), Study on "Strategic use of public procurement in promoting green, social and innovation policies" Final Report DG GROW Framework Contract N°MARKT/2011/023/B2/ST/FC for Evaluation, Monitoring and Impact Assessment of Internal Market DG Activities
[999] Ortega O.M, O'Brien C. (2018), The Role of the State as Buyer Under UN Guiding Principle 6
[1000] Art. 114.1 TFEU

internal frontiers in which the free movement of goods, persons, services and capital is ensured".[1001]MSs are bound to take all appropriate measures to ensure the fulfilment of the obligations arising out of the Directives. By definition, Directives are not directly and automatically applicable, hence they are to be transposed into national law to produce effects within the MSs. States are, therefore, required to take measures necessary to give full effect to the provisions in national law and to ensure that no other national provisions undermine its applicability. The Directives are binding only in terms of result to be achieved, generally leaving to national authorities the discretionary choice of form and methods.[1002]
The Directive lays down a number of general principles of procurement, some of them inspired from the EU fundamental principles[1003] mentioned above, supplemented by more peculiar ones, which functions in a dual way. They serve both as interpretative guidance to help the CJEU interpreting the Directives' rules, and to complement the Directives rules supplementing the written provisions of the Directive with additional rights and obligations not explicitly included in the text.[1004] Indeed, in the revision of the Procurement Directive(s) the EU legislator left many gaps in the procurement rules, which are for the general procurement principles to fill-in.[1005] It can be argued that this has led to more flexible procurement procedures since more discretion has been given to the contracting authorities. However, creating gaps in the rules also increases legal uncertainty, as it can often be difficult to determine the state of law based on the principles alone.

The set of EU norms has been subject to a dynamic and radical process of legislative reform, following the Commission proposal in 2011.[1006] The rationale behind the Procurement Directives reform in 2014, replacing the previous 2004 Directives, was to modernise and streamlining public procurement processes by increasing the efficiency of public spending, facilitating the participation of SMEs, ensuring the best value for money transparency and competition. The new directives contributed to the Juncker Commission's priorities of "a deeper and fairer single market" and "a new boost for jobs, growth and investments", addressing the following four areas: (i) boosting higher efficiency, more eProcurement and easier participation for SMEs; (ii) modernising public services and slashing administrative burden; (iii) preventing corruption and creating a culture of integrity and fair play; (iv) addressing societal challenges through public procurement. A key objective was, also, to facilitate greater *"strategic"* use of public purchasing, particularly to pursue environmental, social and economic objectives, analysed in depth in the next paragraph.[1007] In this direction, greater attention has been on public procurement supporting broader social and environmental policies,[1008] more flexible award criteria, horizontal performance clauses, more detailed rules on subcontractors, fostering smart rules, digitalisation, transition to eProcurement. Thus, the new revised Directives expanded not only the scope of coverage[1009], but also the objectives of the EU public procurement regime understood as a strategic tool, as well as the promotion of efficiency in public spending. Indeed, the EU Public Procurement Directives have been expanded from having a solely economic, market-oriented focus to a multi-layered

[1001] Art 3.3 TEU
[1002] According to the CJEU's doctrine of "direct effect", individuals may enforce in national courts the rights conferred by the Directives wherever the appropriate conditions are satisfied.
[1003] Equal treatment, transparency and proportionality are (also) general principles of EU law, part of primary EU law, possessing equivalent status to the Treaties because they originate in the Treaties. Used to fill legislative gaps in the sense that they can be used as a means to interpret legislation.
[1004] Risvig Hamer, C., Andhov, M.(2022). Article 18-Public Procurement Principles. In Caranta R. & Sanchez-Graells, A. (Eds.) European Public Procurement: Commentary on Directive 2014/24/EU, Edward Elgar Publishing, 199-207
[1005] Sabockis D. (2022) Competition and Green Public Procurement in EU Law- A Study under Directive2014/24/EU, Stockholm School of Economics p. 49
[1006] European Commission (2011), Proposal for a Directive on Public Procurement, COM(2011) 896 final, 20 December 2011
[1007] Semple, A. (2016), The Link to the subject matter: a glass ceiling for sustainable public contracts? in Sjaffel, B., Wiesbrock A., 2016, Sustainable Public Procurement under EU Law: New Perspectives on the State as Stakeholder, Cambridge University Press, p. 53
[1008] Sjaffel, B., Wiesbrock A. (2016), Sustainable Public Procurement under EU Law: New Perspectives on the State as Stakeholder, Cambridge University Press
[1009] See Article 72 on contract modification Directive 2014/24/EU

rationale considering the health of the internal market, with environmental and social dimensions as well as with regard to innovation.[1010]

Finally, it must be considered that the EU procurement regime is not static, rather continuously shaped also by the jurisprudence of the CJEU. The interpretative work of the Court has considerably influenced the application to public procurement of primary and secondary EU rules, particularly concerning the use of procurement in strategic way for environmental and social objectives. Even though the potential of the environmental use of public procurement has been extensively interpreted by the Court, in recent years an emerging CJEU case law has focused particularly on social and labour rights protection, for instance on the guarantee of the protection of labour standards and minimum wages, outlining concern on fundamental labour rights and human rights also when awarding public contracts.[1011]

5.1.2 Sustainable Public Procurement: Policy and Legal Traction under EU Law

Despite the rationale of the Public Procurement Directives is mainly linked to the European Single Market integration, some scholars have noted that "a specific concern with sustainability is almost taking over the realm of public procurement".[1012] Indeed, over the last years, the importance to include environmental and social considerations in public contracts through *Sustainable Public Procurement* (SPP) has gained increasing *momentum* in the EU policy setting and at regulatory level.[1013] As such, the EU Commission emphasizes that "all policies at national and subnational level need to contribute coherently to achieve the SDGs"[1014], in line with the overarching EU objective of sustainable development enshrined in the EU Treaties.[1015]

To coherently and effectively face future institutional, political and economic challenges to reach a sustainable development, the Commission issued in 2010 a strategic initiative: the "Europe 2020".[1016] This strategic plan set the path for the reform of the 2004 Public Procurement Directives package, [1017] with a view to modernising EU public procurement law and to introducing specific mandatory requirements on non-economic, horizontal policy objectives, to "make public procurement work for innovation, green growth, social inclusion".[1018] The reform process was, then, consolidated by the *Green Paper on the modernization of EU public procurement policy. Toward a more efficient European Procurement Market (2011)*, which included a number of suggestions to "make better use of public procurement in support of common societal goals", such as increased equality through the inclusion of social considerations in the procurement process.[1019]

In details, the Commission defined public procurement as a *strategic instrument* to achieve sustainability and the overarching goals of a smart, sustainable and inclusive growth[1020], either directly in the performance of the contract or indirectly by encouraging companies to change corporate

[1010] Andrecka and K Peterkova Mitkidis (2017), 'Sustainability Requirements in EU Public and Private Procurement – a Right or an Obligation? Nordic Journal of Commercial Law 55, 64.
[1011] Corvaglia A. (2017), p.157
[1012] Dragos, D, Neamtu B. (2014) "Sustainable public procurement in the EU: experiences and prospects" in F. Lichère, R. Caranta, S. Treumer (eds), Modernising Public Procurement: The New Directive (Djøf 2014), at 304.
[1013] Andhov, M. Caranta, R. Janssen, W. Martin-Ortega O. (2022), Shaping Sustainable Public Procurement Laws in EU - An analysis of the legislative development from 'how to buy' to 'what to buy' in current and future EU legislative initiatives; Jannsen W., Caranta R. (2023) Mandatory Sustainability Requirements in EU Public Procurement Law: Reflections on a Paradigm Shift, Hart, p. 5
[1013] European Commission (2015) Commission Communication "A Global Partnership"
[1014] ibid
[1015] Reference to sustainable development can be found in Art 3 and 21 TEU, Arts 11, 191 TFEU, Art 37 Charter of Fundamental Rights
[1016] European Commission (2010) Communication "Europe 2020 – a Strategy for Smart Sustainable and Inclusive Growth", COM (2010) 2020 final of 3 March 2010
[1017] Arrowsmith, S., & Kunzlik, P. (2009), Social and environmental policies in EU procurement law: New directives and new directions. Cambridge: Cambridge University Press
[1018] European Commission, Proposal for a Directive on Public Procurement, COM 2011, p. 2
[1019] European Commission (2011) Green Paper on the modernization of EU public procurement policy. Toward a more efficient European Procurement Market, COM (2011) 15 final
[1020] Sjaffel, B., Wiesbrock A., 2016, Sustainable Public Procurement under EU Law: New Perspectives on the State as Stakeholder

practices.[1021] In details, "strategic public procurement" refers to procurement not just as an administrative process, but also as an opportunity to deliver sustainable growth and value for money[1022] supporting environmental and social policy objectives as well as innovation.[1023] Thus, the 2014 Directives provides new opportunities for MSs to prioritise respect for social, environmental considerations and human rights at the core of their purchasing activities. Concerning human rights related considerations, they are to be mentioned under the umbrella of *Socially Responsible Public Procurement* (SRPP), defined by the European Commission as

> "Procurement aiming to set an example and influence the market-place giving companies incentives to implement socially responsible supply chain and management systems, achieving positive social outcomes in public contracts."[1024]

Particularly, in the "*Buying Social-A Guide to Taking Account of Social Considerations in Public Procurement*" (2021)[1025] the European Commission gave prominent attention to decent work, social and labour rights, ethical trade and human rights in supply chains. A non-exhaustive list of examples of social objectives[1026] that contracting authorities can pursue through public procurement is provided, clearly outlining that compliance with mandatory social and labour rules in the performance of the contract is not a choice, but an obligation under the Public Procurement Directives.[1027] Particularly, respecting human rights throughout supply chains and addressing ethical trade issues is expressly mentioned as a social objective to be pursued through public procurement, stressing that:

> "The respect for basic human rights is an essential part of any business relationship entered into by a State, as set out in the UNGPs. In addition, the CJEU held in 2012 that fair trade considerations can form part of procurement decisions[1028], and the Public Procurement Directives reflect this".[1029]

It is recalled that the Public Procurement Directives require explicit exclusion of economic operators convicted by final judgment of child labour and other forms of trafficking in human beings, and compliance with the Fundamental ILO Conventions that should be verified by all public buyers. The Guide looks also at how human rights could be protected in public procurement recommending: (i) increasing transparency in supply chains including through monitoring of subcontractors and sub-subcontractors; (ii) analysing specific risks within supply chains; (iii) requiring contractors and subcontractors to take measures to improve workers' conditions in the supply chain and tackle potential or identified human rights violations in the production process; (iv) and encouraging strict supplier codes of conduct for social responsibility.

Furthermore, the EU *Communication on decent work worldwide for a global just transition and a sustainable recovery* outlined that SRPP is a powerful tool to combat forced labour and child labour,

[1021] Commission Communication, "Europe 2020: a strategy for smart, sustainable, inclusive growth", COM 2010
[1022] Andhov M (2021) p. 5
Recital 91 of Directive 2014/24/EU: "This Directive clarifies how the contracting authorities can contribute to the protection of the environment and the promotion of sustainable development, whilst ensuring that they can obtain the best value for money for their contracts".
[1023] Recital 2 and 47 Directive 2014/24/EU
[1024] EU Commission (2021), Buying Social – A guide to taking account of social considerations in public procurement, 2021/C 237/01, 2nd Edition, p.4
[1025] Ibid. The Guide is integrated by European Commission (2020) "Making Socially Responsible Public Procurement Work: 71 Good Practice Cases" and European Commission (2021) "15 Frequently Asked Questions on Socially Responsible Public Procurement". The EU Commission has adopted previously another soft law guidance on green public procurement in support to Member States purchasing: EU Commission 2016, Buying green! A handbook on green public procurement
[1026] European Commission (2021): Examples of objectives include promoting fair employment opportunities and social inclusion; providing opportunities for social economy and social enterprises; promoting decent work; ensuring compliance with social and labour rights; accessibility and design for all; respecting human rights and addressing ethical trade issues; (6) delivering high quality social, health, education and cultural services.
[1027] See Article 18.2 of Directive 2014/24/EU, Article 36.2 of Directive 2014/25/EU and Article 30.3 of Directive 2014/23/EU.
[1028] CJEU Case C-368/10 *Commission v Kingdom of the Netherlands*, para 91, 92.
[1029] Recital 97 and art 67(3)(a) Directive 2014/24/EU; Recital 102 and Article 82(3)(a) Directive 2014/25/EU, Recital 64, art. 41 of Directive 2014/23/EU.

requiring the public sector to *lead by example*[1030] also in public procurement activities, a crucial argument shared also in the literature on social procurement.[1031] Pursuing strategic objectives, including protection of human rights in public procurement, is legitimated also by legal arguments grounded in EU fundamental treaties.[1032] For example, reference to sustainable development (both social and environmental) is explicit in Article 3(3) of the Treaty on European Union (TEU), stating that the Union:

> "Shall work for the sustainable development of Europe based on balanced economic growth and price stability, a highly competitive social market economy, aiming at full employment and social progress, and a high level of protection and improvement of the quality of the environment".[1033]

Based on Article 4(2) TFEU, the Union and its Member States have shared competences in areas such as the internal market, the environment and social policy. Article 7 TEU states that the EU institutions shall consider all Treaty objectives when adopting measures falling within their competences. Article 9 TFEU provides that the institutions must also take into account requirements linked to the promotion of a high level of employment, and the guarantee of adequate social protection. Regarding environmental considerations in public procurement, this is explicit in Article 11 TFEU:

> "Environmental protection requirements *must* be integrated into the definition and implementation of the Union policies and activities, in particular with a view to promoting sustainable development."

Since the provision addresses EU institutions, it has been argued that the EU legislator is bound by the obligatory requirements of environmental integration when setting secondary legislation and policies (including public procurement), while the legal implications for the Member States are less obvious. Although it seems doubtful that the EU legislator should be obliged to introduce environmental standards as part of all public procurements, it is legitimate to allow environmental and social considerations in public procurement at the EU level. The next section will unpack different legal possibilities to include social considerations throughout the procurement process, with specific reference to the Directive 2014/24/EU.

5.1.3 The Legal Framework created by Directive 2014/24/EU: Legal Possibilities and Limitations for Social and Human Rights Considerations

The Peculiarities of Directive 2014/24/EU

To better understand the legal traction of SPP in the EU regulatory framework and the possible inclusion of human rights aspects within the procurement process, the focus is on the 2014/24/EU Directive, also known as Public Sector Directive or the Classic Directive, as most relevant for this analysis on public procurement of goods, works, services.[1034] Indeed, in terms of subject matter, the Directive applies to contracts with the following features: (i) established between an economic operator and a contracting authority, (ii) for a pecuniary interest, (iii) concluded in writing, (iv) with the

[1030] See: EU Commission (2019), COM/2019/640. The European Green Deal.; EU Commission (2022), COM/2022/66 final. Communication on Decent Work Worldwide for a Global Just Transition and a Sustainable Recovery.
[1031] See McCrudden, C. (2007). Corporate Social Responsibility and Public Procurement. The New Corporate Accountability: Corporate Social Responsibility and The Law, Cambridge University Press.
[1032]Caranta, R.(2015) 'The Changes to the Public Contract Directives and the Story They Tell About How EU Law Works' 52 Common Market Law Review p. 391; Comba M., Comba, 'Variations in the scope of the new EU public procurement Directives of 2014' in Lichère, Caranta and Treumer (eds) p. 41; Arrowsmith and Kunzlik (2009) p 31.
[1033] See also the Charter of Fundamental Rights of the European Union [2012] OJC 326/391, preamble ('[The Union] seeks to promote balanced and sustainable development …') and Art 37 ('A high level of environmental protection and the improvement of the quality of the environment must be integrated into the policies of the Union and ensured in accordance with the principle of sustainable development').
[1034] Sabockis D. (2022)

execution of works, the supply of products or the provision of the services as object[1035] and (v) with public contract value respecting the financial thresholds set by the European Commission.[1036]

The Directive defines rules that apply to both parties to a public contract, namely "contracting authorities" on the one hand and "economic operators" on the other. In details, it covers procurement by a broad variety of public bodies, since *contracting authorities* encompass multiple entities: State, regional, local authorities and *other bodies governed by public law.*[1037] The Directive defines the notion of economic operator in a broad manner as well. Any natural or legal person which offers the execution of works, the supply of products, the provision of services or a combination of these on the market is considered to be an economic operator under this Directive.[1038]

The main aims of the Directive are summarized under Recital 1, stating that public procurement by contracting authorities must comply with the principles of the TFEU already outlined above, "in particular the free movement of goods, the freedom of establishment and the freedom to provide services as the principles deriving therefrom, such as equal treatment, non-discrimination, mutual recognition, proportionality, transparency". Thus, the Directive aims at (i) giving effect to the principles arising from the principles of free movement enshrined in primary law and (ii) ensuring the opening up of public procurement to competition.

The key provision containing the General Principles of public procurement is Article 18, shaping the very essence of the public procurement rules. Compliance with this article must be ensured in all stages of a given procurement procedure, as well as in the performance of a public contract, including its modification.

In details, Article 18.1 mandates the principles of equality, non-discrimination, transparency, proportionality

> "Contracting authorities shall treat economic operators equally and without discrimination and shall act in a transparent and proportionate manner".

Also, open competition is provided as cornerstone principle of procurement in the Directive, stating that:

> "The design of the procurement shall not be made with the intention of excluding it from the scope of this Directive or of artificially narrowing competition. Competition shall be considered to be artificially narrowed where the design of the procurement is made with the intention of unduly favouring or disadvantaging certain economic operators."

Protocol 27 to the EU Treaties adds that the internal market also "includes system ensuring that competition is not distorted"[1039] Indeed, in line with these provisions, the CJEU has explained that a measure adopted on the basis of Art. 114 TFEU must have as its object to remedy obstacles to free movement or distortions of competition.

Moreover, Article 18.2 continues with a relevant provision related to sustainability aspects. The features and implications of such article will be unpacked more in details in the following paragraph, given its leverage for the inclusion of human rights aspects in public procurement.

[1035] Art. 2.1.5, Art 2.1.6, Recital 4

[1036] Starting from January 2022, the applicable thresholds under the Directive are: EUR 140 000 for supply and service contracts procured by central government authorities; EUR 215 000 for supply and service contracts procured by other contracting authorities than central government authorities and EUR 5 382 000 for all types of public works contracts. See European Commission (2021) Delegated Regulation 2021/1952 amending Directive 2014/14/EU in respect to the thresholds for public supply, service and works contracts and design contests.

[1037] Art. 2.1.4

[1038] Art. 2.1.10

[1039] Protocol 27, Internal Market and Competition annexed to the EU Treaties.

Article 18.2: Towards a Sustainability Procurement Principle?

Reflecting on social and human rights considerations, sustainable development and public procurement, Article 18.2[1040] on *Principles of Procurement* – also known as the "horizontal clause"[1041] – is a key provision included in the Public Sector Directive, stipulating that:

> "Member States *shall* take *appropriate measures* to ensure that in the *performance* of public contracts economic operators comply with *applicable obligations* in the fields of environmental, social and labour law established by Union law, national law, collective agreements or by the international environmental, social and labour law provisions listed in Annex X."

Annex X includes not only environmental law obligations in international environmental law Conventions[1042]- on protecting the ozone layer, hazardous waste and disposal, persistent organic pollutants, and hazardous chemicals and pesticides- but also the eight ILO Core Conventions[1043] giving effect to the Core Labour Standards reflected in the 1998 *ILO Declaration on Fundamental Principles of Rights at Work*.[1044]

Complementing the article, Recital 37 recalls that both MSs and contracting authorities must take relevant measures to ensure compliance with applicable environmental, social and labour law to ensure the appropriate integration of such requirements into public procurement procedures. Differently from Directive 2004/18, where reference to social requirements was scarce and confined to the contract performance stage, article 18.2 provides for compliance with minimum social standards at several stages of the procurement cycle, as emphasized in Recital 40. Furthermore, scholars have outlined that this article constitutes

> "A milestone in achieving a sustainable market for public contracts. The provision has the potential to ensure ethical sourcing, fight social dumping and force compliance with environmental laws in the context of public procurement, because it limits the Member States' margins to ignore environmental, social and labour law issues (public procurement's so-called strategic objectives)".[1045]

However, article 18.2 has raised multiple dilemmas on its legal status, questioning whether sustainability can or cannot be ascribed to a general principle of public procurement as the ones prescribed under art. 18.1. Adopting a literal interpretation of the article, some legal doubts emerge considering generic wording and vague meaning:

- Regarding the binding nature and coverage of the article, the use of *"shall"* suggests an obligatory character of the provision. Also, the fact that the article is titled *Principles of Procurement* would suggest that its second paragraph is a procurement principle too. In this regard, the European Trade Union Confederation supports this interpretation, stating that "Article 18.2 can be considered as a general principle, which is later substantiated in specific articles." However, the main controversial aspect is that despite the legally binding nature of the Directive, the provision creates a somewhat

[1040] ETUC (2014), 'New EU framework on public procurement – ETUC key points for the transposition of Directive 2014/24/EU'9 ; Semple, A.(2018) 'Living wages in public contracts: impact of the Regio-Post judgment and the proposed revisions to the Posted Workers Directive' in Sanchez-Graells (ed), Smart Public Procurement and Labour Standards, Hart. p. 83.
[1041] Arrowsmith S, Kunzlik P.(2009)
[1042] Vienna Convention for the protection of the Ozone Layer and its Montreal Protocol on substances that deplete the Ozone Layer; Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal (Basel Convention); Stockholm Convention on Persistent Organic Pollutants (Stockholm POPs Convention); Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade (UNEP/FAO) (The PIC Convention) Rotterdam.
[1043] ILO Convention 87 on Freedom of Association and the Protection of the Right to Organise; ILO Convention 98 on the Right to Organise and Collective Bargaining; ILO Convention 29 on Forced Labour; ILO Convention 105 on the Abolition of Forced Labour; ILO Convention 138 on Minimum Age; ILO Convention 111 on Discrimination (Employment and Occupation); ILO Convention 100 on Equal Remuneration; ILO Convention 182 on Worst Forms of Child Labour;
[1044] Conlon, E. (2019) Civil Liability for abuses of ILO core labour rights in European Union governments supply chains: Ireland as a case study, ch. 7 in Public Procurement and Human Rights: opportunities, risks, dilemmas for the State as Buyer, p. 116
[1045] Risvig-Hamer C., Andhov M. (2022), p. 199

generic duty, raising doubts on its binding nature and legal consequences as it does not impose any direct obligation upon contracting authorities, but rather a "legal possibility".[1046] Thus, the effective enforcement depends essentially on the willingness and discretion of the MSs to ensure its actual application and compliance, leaving some questions open to interpretation.[1047] Its obligatory character is *watered down* creating a challenge of potentially limited enforceability and leaving MSs discretion in the most appropriate methods to implement the provision. For a clearer interpretation, Article 18.2 can be read in conjunction with the abovementioned Recital 37 which refers to both MSs and contracting authorities. While the Recitals are not binding, the definition of the contracting authority in the 2014 Directive expressly points out that it includes the State,[1048] constituting a possible ground to justify the provision as mandatory upon all authorities of MSs, including decentralised authorities such as municipalities.[1049]

Furthermore, considering the CJEU case-law, willing contracting authorities (or MSs) can in principle use their discretion as a lever to boost compliance with human rights (Case C-368/10 Commission v Netherlands; C-513/99 Concordia Bus; Case C-448/01 AG and Wienstrom GmbH v Republik Österreich).[1050] However, their effective enforcement depends essentially on each MS and contracting authorities' discretionary decisions. All relevant decisions are, indeed, left to either the implementing legislation of MSs – particularly limited and fragmented when looking at the EU panorama.

- Article 18.2 does not prescribe precisely which specific action MS should take to ensure compliance with it. It refers solely to "*appropriate measures*" that should be applied to ensure compliance in *the performance* of public contracts, in conformity with EU law and principles. Recital 40 clarifies that the control of the observance of environmental, social and labour law provisions should be performed throughout all the relevant stages of the procurement cycle - the selection stage, the application of exclusion criteria, the award stage and the application of abnormally low tenders' provisions.
- Further doubts relate to the "*applicable obligations"* in the area of environmental, social and labour law sources listed under Annex X and whether the list should be interpreted in a broad way or not. Indeed, the provision includes national and EU law as well as international law applicable obligations referred to in Annex X providing for mandatory minimum standards. Some Member States argue that the inclusion of other international sources, such as other ILO Conventions than the ones provided in the list, should be included as cornerstone social and employment provisions.[1051] So, the question is whether other international law sources not listed under Annex X (which could expand also to soft-law instruments as the UNGPs) could share comparable advantage and status. According to some scholars this would be logical as Articles 42, 67, 68 and 70 allow contracting authorities to demand stricter environmental and social standards compared to those covered under Article 18.2 However, from the wording of Article 18.2 and Annex X, it seems that

[1046] Risvig Hamer, C., Andhov, M. (2022). Article 18-Public Procurement Principles. In Caranta, Sanchez-Graells (Eds.) European Public Procurement: Commentary on Directive 2014/24/EU, Edward Elgar Publishing, pp. 199-207

[1047] Wiesbrock, A. (2016). Socially responsible public procurement: European value or national choice? In Sjafjell & Wiesbrock (Eds.) Sustainable Public Procurement under EU Law: New Perspectives on the State as Stakeholder, Cambridge University Press, Cambridge.

[1048] Art. 2.1.1

[1049] The CJEU has considered the scope of the state for the purpose of directives in several of its judgments, and it uses the terms state, state authority and public authority interchangeably. In Jimenez Melgar, the CJEU stated that directives are "binding on all authorities of Member States, including decentralised authorities such as municipalities". Prechal points out: 'i"The answer to the question of which organ or authority of a Member State is actually bound by a directive will, depending on the subject matter of the directive at issue, vary from Member State to Member State, according to the internal distribution of tasks and competences"

[1050] Sanchez-Graells, A. (2020). Public Procurement and 'Core' Human Rights: A Sketch of the EU Legal Framework. In Martin-Ortega, O. & O'Brien, C. M. (Eds.), Public Procurement and Human Rights, Edward Elgar.

[1051] Belgium and France advocated that Annex X of the 2014 Directive should include other ILO Conventions which cover labour inspections, protection of wages, minimum standards of social security, employment policy and occupational health and safety.

a narrow interpretation applies, and that the enumerated Conventions are exhaustive.[1052] Nonetheless, a room for potential expansion is suggested by Recital 37 referring explicitly to Directive 96/71/EC – the Posted Workers Directive- concerning working conditions for workers posted in other MSs.[1053] Some CJEU rulings have considered the question of whether a contracting authority may require a minimum salary to be paid to all workers employed under a public contract. In earlier cases, such as *Ruffert*[1054] and *Bundesdruckerei*[1055] the CJEU ruled that it was impossible to require payment of the minimum wage under a public contract. [1056]. Nevertheless, the jurisprudence seems to have shifted with the most recent *RegioPost* case, where the CJEU allowed applying the minimum wage requirement.[1057] Such cases raise questions on the possibility of MS to comply with ILO Convention 94.[1058]

- Regarding Article 18.2 transposition, doubts have raised on the legal consequences given its generic wording. For example, some MSs - Denmark - and former MSs -UK- have not transposed the provision expressly, but linked its substantial requirement to provisions related to facultative exclusion.[1059] This is even more the case as other relevant provisions in the UK and Danish procurement acts, such as those concerning technical specification and contract performance conditions, do not refer to the wording of Article 18.2.

  The question is whether omitting implementation of Article 18.2 among procurement principles may constitute a non-compliant transposition. Further, the Commission has not indicated a clear strategy to open infringement procedures concerning Article 18.2 shortcomings, but has rather taken a persuasive approach in its 2017 Strategy.[1060]

Given all such considerations, several elements suggest that sustainability is not ascribable to a general procurement principle. For instance, Arrowsmith and Sanchez-Graells recognize that the provision can hardly be seen as creating any obligation of its own.[1061] As confirmed by the CJEU in some cases – such as *Telaustria and Telefonadress* – treaty principles are characterized by universal application even in the context of contracts falling outside the EU Directives and are interpretative tools for all provisions of the EU public procurement directives, not just for those to which the provision refers directly.[1062] In contrast, strategic policies have commonly been seen as a goal that public procurement should aim to achieve, rather than a principle regarding how the procurement process should be concluded.[1063]

[1052] Bogojević, S. Groussot X.and Hettne J. (2019), Discretion in EU Public Procurement Law, Hart

[1053] A "posted worker" is an employee who is sent by his employer to carry out a service in another EU Member State on a temporary basis, in the context of a contract of services, an intra-group posting or a hiring out through a temporary agency.

[1054] CJEU (2008) Case C-346/06 Ruffert ECLI:EU:C:2008:189

[1055] CJEU (2014) Case C-549 Bundesdruckerei

[1056] CJEU states: art. 56 TFEU precludes the application of a minimum wage requirement contained in the legislation of the MS to which the contracting authority belongs to subcontractors established in another EU MS. The Court did not per se rule out the imposition of minimum wage requirements in a public procurement context. Rather it dealt specifically with the application of minimum wage legislation on an extra-territorial basis to tenderers relying exclusively on workers in another MS. The court confirmed that also in relation to subcontractors established in another MS, the imposition of a minimum wage requirement could in principle be justified on the basis of the objectives of protecting employees and preventing social dumping, but that the measure was disproportionately in the case at hand.

[1057] C-115/14, Regio Post, ECLI: EU: C: 2015: 760.

[1058] Bruun, N., Jacobs, A., Schmidt, M 2010, "ILO Convention 94 in the aftermath of the Ruffert case"

[1059] Denmark and the UK (before Brexit) had not transposed the provision. However, these States implemented the substance of Article 18.2 in the other provisions referring to it, such as facultative exclusions of bidders for non-compliance, and general power to not award a contract in case of non-compliance. The mentioned exclusions and the power not to award a contract are discretionary; consequently, contracting authorities have a choice whether to exercise them or not. The above-mentioned Member States also implemented the wording of Article 18.2 in regards to a duty on the competent authorities to ensure observance of the obligations referred to in Article 18.2 by subcontractors, and in the mandatory provision obligating rejection of an abnormally low tender in case of non-compliance with Article 18.2
The opposite example is Scotland: A proactive approach to transposition of Article 18.2 can be seen in the Scottish Regulation on Public Procurement, which was potentially inspired by Recital 39.

[1060] European Commission (2017) Making Public Procurement Work in and for Europe, COM (2017) 572 final.

[1061] Sanchez-Graells, A. (2018) 'Regulatory substitution between labour and public procurement law: the EU's shifting approach to enforcing labour standards in public contracts' 24 EPL 240–1.

[1062] Sune Troels Poulsen, Peter Stig Jakobsen and Simon Evers Kalsmose-Hjelmborg (2012) EU Public Procurement Law: The Public Sector Directive, The Utilities Directive (2nd edn, DJØF), 51.

[1063] Risvig-Hamer, Andhov (2022) p.205

Particularly, the permissive language concerning strategic considerations in the provision and the lack of stronger mandatory wording suggest that sustainability is not a general principle .[1064] As such, the contracting authority *may* be allowed to consider social and environmental issues.[1065] The procurement law *does not preclude* the contracting authority from applying strategic considerations as long as procurement principles are respected.[1066]

Nevertheless, the *Case 395/18 Tim SpA* has opened the floor to more arguments in the opposite direction. Indeed, when the CJEU had a chance, for the first time, to comment on the nature of Article 18.2, it recognized that it should be considered as a principle of procurement law:

> "EU legislature sought to establish [Article 18(2)] as a principle, like the other principles referred to in paragraph 1 of that article, namely the principles of equal treatment, non-discrimination, transparency, proportionality and prohibiting the exclusion of a contract from the scope of Directive 2014/24 or artificially narrowing competition. It follows that such a requirement constitutes, in the general scheme of that Directive, a cardinal value with which the Member States must ensure compliance pursuant to the wording of Article 18.2 of that Directive."[1067]

Thus, CJEU clarified that Art. 18.2 constitutes a *cardinal value of EU procurement*, together with the ones prescribed by Art 18.1, thus creating the basis for a *sustainability* principle. Reference to the fact that Article 18.2 is *a cardinal value* and that Member States *must ensure compliance* introduces stronger language suggesting a "more principle-like" application, opening the door to such interpretation, despite the unclarity.

As it will be unpacked in the next paragraph, the Directive provides multiple legal possibilities to include social criteria and human rights considerations along the procurement cycle. Furthermore, the scope of its regulation and compliance extends not only to the main suppliers but also their subcontractors, as prescribed by article 71. In the next paragraph, the different *legal possibilities* provided by the law will be addressed, with attention also to related limitations.

Unpacking Legal Possibilities throughout the Procurement Cycle

The reformed Directive 2014/24/EU stands out as a refined instrument of public procurement regulation entailing different opportunities to achieve social and labour policies in public procurement, which could be potentially used to foster the protection of human rights throughout supply chains.[1068] Despite the limits linked to the discretionary application of such provisions, it is undeniable that the Directive pays considerable attention to the protection of social, labour and human rights under different angles.[1069] At the very beginning of the Preamble, Recital 2 defines public procurement as a strategic instrument to achieve overarching goals of smart, sustainable and inclusive growth, either directly in the performance of the contract or indirectly by encouraging companies to change corporate practices.[1070] Differently from the 2004 regulatory framework,[1071] this Directive embraces a more holistic approach to the concept of sustainable development and horizontal policies, addressing more in depth the social dimension of sustainability. Direct links to sustainable development – intended as

[1064] Traditionally recognised EU Treaty principles in art.18, such as equal treatment, non-discrimination and proportionality and transparency, have been developed by the CJEU using strong, mandatory language. For example, concerning the interpretation of the equal treatment principle, the CJEU stated: "Comparable situations must not be treated differently, and different situations must not be treated in the same way, unless such treatment is objectively justified." in Embassy Limousines & Services case.
[1065] Concordia Bus Finland, paragraph 64.
[1066] See CJEU cases: EVN and Wienstrom, paragraph 34. See also Beentjes v State of the Netherlands; Commission v France; T-331/06, Evropaïki Dynamiki v EEA, ECLI: EU: T: 2010: 292; Commission v Netherlands; RegioPost .
[1067] Art 69.4.
[1068] De Shutter O. (2015) Trade in the Service of Sustainable Development: Linking Trade to Labour Rights and Environmental Standards, Hart Publishing, p. 163
[1069] Wiesbrock (2016)
[1070] Sjafjell & Wiesbrock (2016)
[1071] Caranta R., Trybus M. (2010) The Law of Green and Social Procurement in Europe European Procurement Law Series vol. 2, DJØF Publishing Copenhagen

"environmental, social and labour" policies and requirements- can be found in different recitals and provisions.[1072] Regarding the specific mention of "human rights", as outlined under the Buying Social Guide, human rights aspects – particularly human rights at work - fall within the Socially Responsible Public Procurement category. Although the term "human rights" is not explicitly mentioned within the Directive, however "social considerations" linked to human rights are included within different recitals and provisions, as captured in the table below, including: international labour standards and human rights at work; the right not to discriminate and the integration of disadvantaged person or minority groups; fair-trade considerations; gender equality.

Table 5.1 Social considerations related to human rights in the Directive 2014/24/EU

Type of Social Consideration	**Provision in Directive 2014/24/EU**	**Specific Rights directly or indirectly guaranteed**
ILO Labour Standards	Recital 37 Recital 98 Article 18.2	ILO Conventions listed under Annex X: - ILO Convention n.97 on Freedom of Association and the protection of the right to Organize - ILO Convention n. 98 on the right to organize and collective bargaining - ILO Convention n. 29 on forced labour - ILO Convention n. 105 on the abolition of forced labour - ILO Convention n. 138 on Minimum age - ILO Convention n. 111 on Discrimination - ILO Convention n. 100 on Equal Remuneration - ILO Convention n. 182 on worst form of Child labour
Integration of disadvantaged person or minority groups	Recital 36 Recital 99 Article 20	- Protection of health and safety in the production process - Promotion of employment of long-term job-seekers - Training measures for unemployment and job seekers
Fair trade considerations	Recital 97	- Explanatory mention of minimum wages and price premium
Gender Equality	Recital 98	- Promotion of equality between men and women in the workplace - Incentive for the participation of women in the work environment

Other than the "horizontal clause" already analysed in the previous chapter, there are different *legal possibilities* to include social and human rights considerations throughout the procurement process. The Directive recognizes the importance of the effective enforcement of social and labour considerations along the entire production and supply chain. As explicitly prescribed by Recital 40, environmental, social and labour law observance should be performed at all the relevant stages of the procurement cycle and not being restricted to one specific stage of the procurement process or a preferred means of proof:

> "Control of the observance of the environmental, social and labour law provisions should be performed at the relevant stages of the procurement procedure, when applying the general principles governing the choice of participants and the award of contracts[1073], when applying the exclusion criteria[1074] and when applying the provisions concerning abnormally low tender".[1075]

Thus, non-economic considerations, such as human rights, social and labour rights advancement, are explicitly allowed at every stage of the procurement process, in contrast with the previous 2004

[1072] Recitals 2, 41, 47, 91, 93, 95, 96, 123 and Arts. 2(22), 18(2), 42(3)(a), 43, 62, 68, 70
[1073] Article 56.1 on General Principles (Choice of participants and award of contracts)
[1074] Article 57.4 on exclusion grounds
[1075] Article 69.2.d on abnormally low tender

Directives confining such possibilities to the contracting stage alone.[1076] The EU procurement cycle will be unpacked to enquire how social considerations and human rights criteria can shape nearly every step of the procurement process, addressing:

- Planning (needs assessment, market consultation and engagement)
- Subject Matter of the Contract definition
- Setting-up Technical Specifications
- Setting-up Exclusion Grounds and Selection Criteria
- Evaluation and Award
- Means of Proof
- Contract Performance Conditions
- Contract Monitoring

1. The Planning Phase

The first stage of the public procurement process, also known as pre-procurement or planning, entails need assessment and dialogue with the market, prior to the publication of a call for competition and launching of the tender. The Public Procurement Directives (2014) do not regulate this phase in detailed way, nonetheless the needs assessment and the market consultation represent the earliest possible engagement opportunities for public procurers to make social, labour and other human rights related-priorities clearly known to the widest array of potential bidders.

Needs Assessment

Needs assessment aims at ensuring that a real demand for specific goods, works or services exists. Assessing real needs in terms of outcomes sets out the scope and nature of requirements, allowing a more flexible and potentially cost-effective response from the market. As outlined by the European Commission in the Buying Social Guide, the needs assessment phase has the potential to save money, as well as generating social returns, being an essential part of the procurement planning phase.[1077] In line with a SRPP logic, it purports to identify ways of meeting the identified need in the most socially responsible manner, ensuring that what is purchased meets social requirements and that it advances social impacts and ethical outcomes. In details, it means designing procurement procedures and contracts allowing flexibility over time and ensuring that a wide range of organisations, including social economy organisations and social enterprises, non-profit or voluntary bodies can participate. For example, a contracting authority could ask its provider for transparency in its supply chain to monitor and verify the labour conditions and human rights of workers in conjunction with civil society organisations. Another example could be a government department including a contract clause for employment and training opportunities for unemployed and disadvantaged people.[1078]

Market Consultation and Engagement

Prior to the publication of a tender, it is crucial to consult the market and engage with the potential suppliers. The contracting authority determines the rules applicable to a specific contract and whether it should be reserved for peculiar types of enterprise, carrying out preliminary market consultation. Indeed, market consultation is, typically, used to identify potential suppliers and to clearly understand the products and services available on the market. Suppliers, on their side, are given some time and notice to prepare for the tender.

[1076] IHRB (2015)
[1077] European Commission (2021) Buying Social – A guide to taking account of social considerations in public procurement – Second edition (2021/C 237/01), p. 25
[1078] Ibid, pp. 36-45

The European Commission recognizes that market dialogue for SRPP means identifying potential bidders and solutions with positive social impacts and building capacity in the market to meet social needs and requirements.[1079] In details, it entails informing the design of procurement procedures and contracts including social criteria that are relevant, linked to the subject-matter, achievable and non-discriminatory. SRPP could require helping suppliers to submit bids that have strong social elements and providing feedback to suppliers after the process, for instance by offering a debrief on the results and advice for improving their social offering in future tenders.

Benefits of market dialogue include improved planning and management of SRPP, especially when undertaken as part of a need assessment process, as they improve also the public buyers' understanding of the capacity of potential bidders to meet social aims and ambitions. Dialogue can increase trust and credibility with suppliers, and many welcome the chance to react to social requirements ahead of the procurement launch. In short, market dialogue can help creating the conditions needed to deliver SRPP both internally within the public buyer and in the market. Finally, among strategies and methods for market engagement – which depend on the resources and time availability and the level of social innovation required- supplier and market sounding questionnaires, Prior Information Notice (PIN)[1080], forward procurement plan[1081] can be mentioned.

2. Subject-Matter of the Contract

When dealing with procurement activities subject to the EU Public Procurement Directives, determining the subject-matter of the contract is a fundamental step. The subject-matter normally takes the form of a brief description of the goods, works, services the contracting authority intend to purchase. For procedures above the EU thresholds, this appears in the contract notice along with the relevant common procurement vocabulary (CPV) codes, allowing the market to identify what it is the contracting authority wishing to buy and ensuring that interested operators can find out about the tender. CPV codes determine also which legal regime[1082] set forth by the Directives applies to the contract.
Deciding on the subject-matter of the contract is crucial also to identify relevant opportunities to apply social criteria within the tender process. Indeed, in multiple provisions, the Public Sector Directive clarifies that public buyers can apply social criteria throughout the procurement process, as long as they are linked to the subject-matter of the contract. [1083] For instance, social requirements could be on how suppliers carry out the contract or contract clauses that reinforce commitments and allow monitoring of supply chains. However, generic requirements on bidders, such as having a general CSR policy in place would not apply. As recommended by the European Commission, rather than requiring a company-wide policy, the focus should be on the specific aspects of social responsibility to be addressed in the contract.[1084] Nevertheless, in some cases, a CSR policy may serve as (partial) evidence in relation to a specific requirement.[1085]

3. **Technical Specifications**

Once the subject-matter of a contract has been settled, more detailed requirements need to be shaped. Technical specifications can be defined as indicators for the market about what exactly the

[1079] European Commission (2021) p. 27
[1080] Method for providing the market with early notification of intent to award a contract/framework and can be used to initiate a market consultation exercise. A PIN is published on the Tenders Electronic Daily (TED) website, reaching operators outside of home region, who may have different approaches to social aspects.
[1081] A forward procurement plan gives suppliers advance notice of upcoming contract opportunities and allows them time to plan and prepare to submit good quality responses. The plans can include a needs statement to provide more specific information for suppliers on social needs and requirements.
[1082] For social and other specific services public procurement contract, the Directives provides a 'light regime', allowing greater flexibility in the contract award process.
[1083] European Commission (2021) p. 36
[1084] See Recital 97
[1085] Ibid, pp. 51,52

contracting authority wish to purchase. As regulated under Article 42 and Annex VII, they are "technical prescriptions defining the characteristics required of a material, product or supply so that it fulfils the use for which it is intended by the contracting authority".[1086] Tenders that do not comply with technical specifications must be rejected[1087], so they should include only essential requirements.[1088] The rationale behind regulating technical specifications under the Directive regards ensuring efficiency through the use of functional or performance-based requirements and avoiding "unjustified obstacles to opening up of public procurement to competition".[1089] Anyway, the Directive enables MSs to include sustainability and social criteria, thus also human rights aspects, when this is an essential part of what is to be delivered. A key human right explicitly addressed through technical specifications is the right not to discriminate. As provided by Article 42, the Directive allows not only to include environmental characteristics and climate-performance criteria, as functional or performance criteria.[1090] But also, to include social criteria for end-use to ensure accessibility to people with disabilities.[1091] In this regard, Article 42.1 prescribes that:

> "Where mandatory accessibility requirements are adopted by a legal act of the Union, technical specifications shall as accessibility criteria for persons with disabilities or design for all users are concerned, be defined by reference thereto."

This strict link between technical specifications and the achievement of policies in support of disabilities is reaffirmed in Recital 99. Addressing broadly "measures aiming at the protection of health of the staff involved in the production process", Recital 99 points out that:

> "In technical specifications contracting authorities can provide such social requirements which directly characterize the product or service in question, such as accessibility for persons with disabilities or design for all users".[1092]

Mandatory accessibility requirements defined under EU law, should be referred to in technical specifications, such as Directive 2019/882/EU *on the accessibility requirements for products and services.*[1093] Further, the obligation under the *UN Convention on Rights of Persons with Disabilities* (UNCRPD) that State Parties provide accessible products, services and infrastructures, is another key reference.[1094]

Thus, technical specifications can play a significant role in enforcing minimum standards and human rights, particularly in regard to social inclusion, as contracting authorities are required to reject tenders that do not comply with them[1095]. To be effective and lawful, technical specifications including human rights and social aspects should be carefully drafted including any essential social aspects without introducing any unnecessary restrictions on competition.

Technical specifications may relate to the production process, which will not necessarily be obvious in the final product. However, they must be linked to the subject-matter of the contract and proportionate to its value and objectives.

4. Exclusion and Selection Criteria

[1086] Art. 42 and Annex VII Public Sector Directive; Annex VIII Utilities Directive
[1087] The obligation to reject tenders which do not meet specifications was highlighted by the CJEU in Case C-243/89 *Commission v Kingdom of Denmark (Storebaelt)* and Case C-561/12 *Nordecon AS and Ramboll Eesti AS v Rahandusministeerium (Nordecon).*
[1088] Variants can be used for greater flexibility in specifications where in Art. 45 of Directive 2014/24/EU and Art. 64 of Directive 2014/25/EU.
[1089] Art 42.2
[1090] Art. 42.3.a
[1091] Annex VII Public Sector Directive; Annex VIII Utilities Directive; there is no equivalent Annex in the Concessions Directive
[1092] Corvaglia (2017), p.187
[1093] It sets out common accessibility requirements to ensure that persons with disabilities and older people can access products and services on an equal basis with others.
[1094] It is mandatory to include accessibility requirements in technical specifications for all procurement which will be used by people. The European Accessibility Act defines some of these requirements for a number of commonly purchased products and services.
[1095] Art.56(1)(a). CaseC243/89 Commission v Kingdom of Denmark1993 shows the obligation to reject tenders that not meet techspec

Exclusion Grounds

Exclusion criteria aim at determining the economic operators' suitability and capacity to carry out a contract, based on their past and present track records. Article 57 of the Public Sector Directive regulates exclusion criteria providing a not exhaustive list,[1096] identifying two categories of exclusion grounds:

- Mandatory (to be applied in all tenders)
- Discretionary (public buyers can choose to apply them or not; anyway, they may be mandatory under national law).

Table 5.2 mandatory and discretionary exclusion grounds linked to SRPP in the Directive 2014/24/EU

Mandatory Exclusion Grounds	**Discretionary Exclusion Grounds**
• Conviction by final judgement for child labour or other forms of trafficking of human beings • Breach of obligations related to the payment of taxes or social security contributions- established by judicial or administrative decision having final and binding effect	• Breach of obligations related to the payment of taxes or social security contributions – demonstrated by any appropriate means • Violation of applicable obligations under the social and environmental clause – i.e. environmental, social and labour law obligations set out in the EU, national law, collective agreements or ILO Conventions • Grave professional misconduct which renders integrity questionable • Significant or persistent deficiencies in the performance of a substantive requirement under a prior contract • Serious misrepresentation or inability to submit supporting documents

Article 57.1 lays down mandatory exclusion grounds useful for including social and human rights considerations. In details, Article 57.1.f provides for exclusion of economic operators from relevant tenders following convictions for criminal offences including child labour or human trafficking, which are key human rights risks that may arise throughout supply chains. Also, criminal organization, corruption, breach of obligations relating to tax payments or social security obligations are included.[1097] The obligation to exclude is reinforced by the obligation to terminate any contracts awarded to companies subsequently convicted for those offences (article 73.b).

In terms of B&HR application, exclusion for child and forced labour confirmed by final judgements represents only a small proportion of the types of adverse human rights impacts associated with businesses activities, as companies can potentially impact all human rights.[1098] Further, convictions are rare due to extraterritorial jurisdiction over parent companies for the acts of their subsidiaries and the difficulties of piercing the corporate veil. In practice the scope of this explicit human rights related exclusion criteria under Article 57 may be limited. To expand further to human rights, discretionary exclusion grounds could be taken into account

Discretionary grounds for exclusion are regulated by Article 57.4, providing the possibility to exclude suppliers when the contracting authority can demonstrate by any appropriate means a violation of applicable obligations referred to in Article 18.2. The article, reinforced by Recital 39,[1099] allows procurers to exclude economic operators that do not comply with obligations of environmental, social, labour law established by EU law, national law, collective agreements or by certain international environmental, social and labour law provisions. This casts a rather wide net in principle, however the provision lays down *optional* exclusion grounds, therefore, the practical application is limited by

[1096] The non-exhaustive nature was highlighted in Case C-213/07 Mikhaniki v Ethniko Simvoulio Radiotileorasis [2008] ECR I-9999.
[1097] Article 57(2) Public Sector Directive; Recital 105 and 106 Utilities Directive; Art. 38(5) Concessions Directive.
[1098] European Commission (2021) p. 48
[1099] Recital 39: "Contracting authorities should be given the possibility to exclude economic operators which have proven unreliable, for instance because of violations of environmental or social obligations…or other forms of grave professional misconduct"

constraints of executive discretion[1100] and the sufficient link to the subject matter of the contract provision. The provision creates also significant uncertainty as to the scope of "applicable obligations", where[1101] tenderers are based in jurisdictions other than the contracting authority's one.[1102]

Grave professional misconduct represents another discretionary exclusion ground that can be connected to human rights risks.[1103] Recitals 100 and 101 establish a link between the violation of social obligations (for example the violation of rules of accessibility for people with disabilities) and grave professional misconduct leading to the exclusion of suppliers from the award procedure. As required in recital 100, the evaluation of these exclusions has to be balanced "in exceptional situations where overriding requirements in the general interest make a contract award indispensable" and according to the principle of proportionality.

Despite such possibilities, however when linking article 57 to article 18.2 – particularly after its interpretation in the CJEU Tim case – some contradictions emerge: if sustainability represents a *cardinal procurement value*, why violations of obligations in the fields of environmental, social and labour law (article 57.4.a) or professional misconduct (article 57.4.c) would not constitute mandatory grounds of exclusion?[1104]

Finally, another relevant provision is article 69: as confirmed in recital 103, contracting authorities must exclude economic operators when their bids result "abnormally low" due to non-compliance with environmental, social or labour law obligations under the *horizontal clause*.[1105] If tenders appear to be abnormally low, procuring authorities must require an explanation from the economic operators of the prices and costs particularly regarding compliance with the obligations referred to in art 18.2 as explicitly allowed under article 69.2.d. Thus, "abnormally low" tenders could be excluded for example due to poor human rights standards, in case the supplier is unable satisfactorily to account for the low level of the price.[1106] However, it is only where the contracting authority decides to investigate the reason for the low bid (or is compelled to do so under national law) that the requirement to reject arises. Despite the limitations, setting up exclusion grounds based on B&HR could be an important driver to exclude ex-ante suppliers that do not respect human rights throughout their supply chains or do not have HRDD measures in place.

Selection Criteria

Selection criteria concern rules to determine the suitability and capacity of economic operators to carry out a contract based on their past and present performance in order to short-listing the most capable operators to be awarded.[1107] While exclusion criteria focus on negative factors which may prevent the contracting authority from awarding the contract to a bidder, selection criteria can help identifying the best suppliers to deliver social aspects of the contract. As provided by Article 58, selection criteria may relate to: (i) the suitability of the economic operator to pursue the activity; (ii) their economic and

[1100] Sanchez Graells A. (2020)

[1101] Semple, A. (2015), The Link to the Subject Matter: A Glass Ceiling for Sustainable Public Contracts? In Sjåfjell & Wiesbrock (Eds.), (2015). Sustainable Public Procurement under EU Law. Cambridge University Press, 50-74.
Outhwaite, O. & Martin-Ortega, O. (2016). Human rights in global supply chains: corporate social responsibility and public procurement in the European Union. Human Rights and International Legal Discourse.

[1102] Ølykke, G. S. (2016). The provision on abnormally low tenders: a safeguard for fair competition? In Ølykke G. S., & Sanchez-Graells, A. (Eds) Reformation or Deformation of the EU Public Procurement Rules, Edward Elgar.

[1103] Sanchez Graells A. (2019) Public procurement and core human rights. A sketch from the EU legal framework, in Ortega O'Brien (2019), Public Procurement and Human Rights: Opportunities, Risks and Dilemmas for the State as Buyer, Edward Elgar

[1104] Botta, G. (2022) The interplay between EU public procurement and human rights in global supply chains: Lessons from the Italian legal context, European Journal of Public Procurement Markets – 4th Issue

[1105] Art. 69 Public Sector Directive; Art. 84 Utilities Directive; the Concessions Directive does not contain an equivalent provision.

[1106] O'Brien, C. M., Martin-Ortega O. (2020). Missing a Golden Opportunity: Human Rights and Public Procurement, in Deva, S. & Birchall, D. (Eds) Research Handbook on Human Rights and Business. Cambridge

[1107] IHRB (2015).

financial standing or (iii) their technical and professional ability.[1108] The means of proof to determine them are defined further by Annex XII.

An example of selection criteria which may contribute to SRPP, including human rights considerations and HRDD, regard technical capacity to monitor labour practices along the supply chain[1109], including management systems and partnerships with other organisations. In such case, contracting authorities could ask, among the technical capabilities, for an indication of responsible supply chain management and tracking systems – namely HRDD- set up to prevent and remedy impacts on workers and to deliver the goods, works or services under the contract[1110].

Other examples of selection criteria relevant for SRPP, could be financial standing requirements (such as turnover and profitability) or specific criteria requiring to demonstrate experience and expertise of organisations and/or their teams in dealing with social issues relevant to the contract, for example in terms of accessibility, gender equality and non-discrimination. Another example is the evidence of successful completion of previous contracts involving similar social requirements, such as the recruitment and opportunities for up-skilling of apprentices or disadvantaged workers.[1111]

All such requirements may represent a leverage for prompting operators to address human rights and manage adverse impacts affecting workers.[1112]Anyway, they all need to be related and proportionate to the subject-matter of the contract. So, contracting authorities should not take a generic approach to setting selection criteria, but check that they are appropriate to achieve the SRPP objectives without going beyond what is needed. Thus, when requiring evidence of supply chain management measures, for example, such criteria cannot go beyond the scope of what is purchased and include all company's operations.[1113]

5. Evaluation and Contract Award

Another possibility is to include human rights requirements is the evaluation and award phase.[1114] Evaluation and award criteria must be set up for the comparative assessment of future performance of the contract. The Directive allows the selection of suppliers based on the evaluation of a combination of qualitative criteria, opening up the possibility to include social and labour considerations in the selection of the contract to be awarded.[1115] Differently from the 2004 Directives, where contracts could be awarded on the basis of either "lowest price only" principle or the "most economically advantageous tender" (MEAT),[1116] the 2014 Directives provides that contracting authorities must award public contracts only on the basis of MEAT[1117]. MEAT must be based on "price or cost" and may include the best price-quality ratio,[1118] incorporating both:

(a) quality, including environmental, social characteristics, trading and its conditions

(b) organisation, qualification, experience of staff assigned to perform the contract.

Article 67.2 establishes the framework for the assessment and discretional evaluation of the best price-quality ratio by the contracting parties, providing a non-exhaustive list of possible criteria which are not necessarily of an economic nature, including social aspects.[1119] Together with the possibility to take into

[1108] Art. 58(1) Public Sector Directive; Art 80 Utilities Directive; Art. 38 Concessions Directive.
[1109] As set out in Annex XII, Part II, point (d) of Directive 2014/24/EU.
[1110] Annex XII Public Sector Directive
[1111] European Commission (2021) p. 69
[1112] IHRB (2015)
[1113] Examples of practices: Application of ILO Conventions in Czech Ministry Procurement of Textile; Addressing human rights through procurement in the Municipality of Stavanger (Norway). See European Commission (2021) p. 51
[1114] Ashraf N. & Van Seters, J. (2019). Sewing the pieces together: towards an eu strategy for fair and sustainable textiles. ECDPM.
[1115] Telles P., Butler L. (2014) Public Procurement Award Procedures in Directive 2014/24/EU, in Lichere F., Caranta R. and Treumer S. (eds) Modernising Public Procurement: the New Directive, Djof Publishing, p. 131
[1116] Art. 53(1) Public Sector Directive 2004; Art. 55(1) Utilities Directive 2004.
[1117] Art. 67(1) Public Sector Directive; Art. 82(1) Utilities Directive;
[1118] Dragnos (2022) pp. 243-245
[1119] Faustino P. (2014) Award Criteria in the new EU Directive on Public Procurement, Public Procurement Law Review 124

consideration the qualification and the experience of the staff performing the public contract at art. 67.2.b, other non-economic criteria explicitly mentioned in art 67.2.a are:

> "The qualification quality, including technical merit, aesthetic and functional characteristics, accessibility, design for all users, social, environmental and innovative characteristics and trading and its conditions"

Thus, compared to Directive 2004/18- which only referred to environmental characteristics- social criteria are expressly mentioned as award criteria in art 67.2, strengthened by the specific references to fair trade conditions in recital 97, social aspects of the production process in recital 98 and the social integration of disadvantaged people or minority groups in recital 99.

An example of award criteria fostering human rights protection is requiring a *third-party certification for ethical sourcing of products delivered under the contract*. In such case, marks would be awarded based on the percentage of products with Fair Trade or equivalent certification and in case of lack of third-party certification, the supplier should indicate the reason and describe any internal measures taken to ensure ethical sourcing of products.[1120] Other examples of social award criteria could be having a methodology for ensuring social inclusion in the delivery of the service, or specific measures to ensure gender equality and additional accessibility requirements beyond the requirements included in the technical specifications.[1121]

After having set up award criteria, it is crucial to think carefully about how to evaluate tenders presented by the bidders. The Public Procurement Directives do not prescribe a unique mandatory evaluation methods, nonetheless the Directive promotes the use of an innovative evaluation approach in the direction of SPP: the life-cycle costs (LCC)[1122] in the evaluation of MEAT.[1123] This cost-effectiveness approach - addressed under art. 68[1124]- allows to take into consideration all the costs associated to the life-cycle of the production and distribution of the products[1125], including long-terms costs and externalities, in the evaluation of price-quality ratio of award criteria[1126], thus considering environmental externalities of a product from its inception to its completion, delivery and disposal. To avoid distortion on competition, life-cycle concerns should be grounded on non-discriminatory and verifiable criteria. In terms of social and human rights considerations, recital 96 does not limit the concept of LCC to environmental externalities but applies it to the broad category of "internal costs, such as research to be carried out, development, production, transport, use, maintenance and end-of-life disposal costs". Thus, even if an explicit reference is only made to environmental externalities, the social aspect of LCC analysis is not *a priori* excluded from this definition. Social considerations like the protection of human rights, labour rights, the respect of equal opportunities could be included in the concept of long-term costs associated to the production of the distribution of the procured goods and services. [1127]

The "best price-quality ratio can also be considered according to qualitative, environmental and/or social aspects", provided that such aspects are linked to the subject matter of the contract. The link to the subject matter of the contract criterion enables public authorities to give preference to bids from tenderers who maximize social outputs, such as economic operators who employ a higher number of

[1120] European Commission (2021), p. 72

[1121] For example, where technical specifications require Web content to comply with Web Content Accessibility Guidelines (WCAG) 2.1 AA conformance level, additional points could be scored to any bid offering AAA conformance level.

[1122] LCC based upon evaluation of certain costs over the life cycle of a product, service,work related to acquisition, use, maintenance and end of life and taking into account environmental externalities (eg GHG emissions or other pollutants)

[1123] Sabockis D. (2023) pp.262-265

[1124] Neamtu B., Dragos D. (2016) Life-cycle costing for sustainable public procurement in the European Union" in Sjafjell and Wiesbrock (2016), p. 114

[1125] Recital 96: "The notion of LCC includes all costs over the life cycle of works, supplies or services"

[1126] Dragos D., Neamtu B. (2013), Sustainable Public Procurement: LCC in the new EU Directive Proposal, European Procurement & Public Private Partnership Law Review, p. 19

[1127] Perera O. Mortin B., Perfrement T. (2009) Life Cycle Costing in Sustainable Public Procurement: A Question of Value,

disadvantaged workers or measures for the promotion of equality of women in the labour market, implementation of training measures for unemployed youth, accessibility for disabled persons, etc.[1128] As clarified by the CJEU in *Concordia, EVN*[1129] and *Max Havelaar*[1130] cases, tenders may be compared and chosen on the basis of previously defined and weighted economic and quality award criteria, rather than by reference to price alone. In the *Concordia case* it was clarified that non-purely-economic criteria -such as human rights -may be used to assess the MEAT, provided that they must: 1) be linked to the subject matter of the contract; 2) not give contracting authorities an unrestricted freedom of choice; 3) be expressly mentioned in the contract documents or the tender notice; 4) comply with the fundamental principles of EU law, including non-discrimination. As outlined in the Preamble, focusing on qualitative aspects allow to obtain high quality works, supplies and services that are optimally suited to the purchasers needs, achieving value for money. A limitation is that the application of qualitative award criteria remains completely discretionary, also the option of abandoning the lowest price criterion is entirely up to the MS' discretion, showing different approach by each country.[1131]

Therefore, the contracting authority has discretion to assess the MEAT on the basis of criteria, including qualitative, environmental and/or social aspects, linked to the subject-matter of the contract in question (art 67.2). Nonetheless, the implementation of a general policy based on human rights guarantees as award criteria raises again difficult functional questions, related to the discretion and the link to the subject matter of the contract. It must be stressed that a specific situation where contracting authorities have no discretion to deviate from MEAT on the basis of the violation of labour or social obligations concerns abnormally low tenders (art.69.3).[1132] Thus, under Recital 103 contracting authorities have a specific positive duty to reject the tender where they have established that it is abnormally low because it does not comply with applicable obligation.

Finally, in terms of weighting, there is no maximum or minimum percentage of marks to be assigned to social award criteria. For contracts where either the social risks- as of human rights violations- or the potential social benefits – as measurable improvements in wellbeing for a vulnerable group or participation of persons with disabilities- are high, it may make sense to have social award criteria with a high weighting. This also depends on whether social aspects are addressed in the technical specifications or elsewhere in the tender. In the practice, there are examples of contracting authorities developing interesting evaluation approaches which will be addressed in the next chapter related to national and contracting authorities' practices.[1133]

6. Means of Proof: Labels and Certifications of Compliance

Third-party certification of compliance and labels constitute key means of proof for suppliers to demonstrate their compliance to sustainability and social criteria outlined above.[1134] Specific attention in the Directive has been devoted to labels which are increasingly used as proofs of compliance of sustainable criteria in the procurement process and along the supply chain.[1135] According to Recital 75:

> "Contracting authorities that wish to purchase works, supplies or services with specific… social or other characteristics should be able to refer to particular labels".

[1128] Russo, D., (2018)
[1129] Case C- 448/01 EVN and Wienstrom 2003
[1130] Case C-368/10 Commission v. Kingdom of the Netherlands (Max Haavelar)
[1131] Austria and the Netherlands apply legislation that makes the application of the best price quality ratio mandatory.
[1132] Ølykke (2016)
[1133] E.g. social award criteria for the procurement of IT hardware and services in Germany. See European Commission (2021) p. 54
[1134] D'Hollander D., Marx A. (2014). Strengthening private certification systems through public regulation: The case of sustainable public procurement. Sustainability Accounting, Management and Policy Journal, 5(1).
[1135] Corvaglia A. (2016) Public Procurement and Private Standards: Ensuring Sustainability under the WTO GPA, Journal of International Economic Law 607

According to article 43- main provision entirely dedicated to the inclusion of labels- the use of labels is not only limited to technical specifications, as in the 2004 Directives, but extend to all the other stages of the procurement process[1136] that require and allow a proof of compliance, as selection criteria, evaluation and award criteria and performance conditions.[1137] Article 43 allows to use "specific labels" as means of proof that the procured works, services and supplies correspond to the required specific environmental, social and other characteristics".[1138]

In terms of addressed social considerations, a vast number of third-party labels could be mentioned[1139] which should fulfil the following conditions.[1140] The labels must: (i) only concern criteria which are linked to the subject matter of the contract; (2) be based on objectively verifiable and non-discriminatory criteria; (3) be established using an open and transparent procedure in which all relevant stakeholders, including government bodies, consumers, social partners, manufacturers, distributors and non-governmental organisations, may participate; (4) be accessible to all interested parties; and (5) be set by a third party over which the economic operator applying for the label cannot exercise a decisive influence.[1141]

The specific provisions regulating labels, together with those focused on environmental management standards (recital 88 and article 62) significantly increase the clarity in the regulatory framework regarding the inclusion of social and labour considerations. They, also, considerably expand the possibility of enforcing social and labour policies along the production chain associated to procurement contracts. However, a considerable margin of uncertainty remains regarding the possibility to refer specifically to social labels along the procurement process in comparison to environmental considerations, and how social and ethical labelling programs could be systematically interpreted as linked to the subject matter of the public contract.[1142]

7. Contract Performance Conditions

Together with award criteria, contract performance conditions have been recognized as a crucial and traditional stage suitable for the enforcement of social and labour considerations.[1143]

> "Contract performance clauses are generally the most appropriate stage of the procurement process to include social considerations relating to employment and labour conditions of the workers involved in the performance of the contract"[1144]

Indeed, the 2004 Directive allowed contracting authorities to incorporate human rights related considerations only at the contract performance stage. As already outlined, the 2014 Procurement Directive extends such possibility to the entire procurement cycle. Although contracts are an important lever to ensure successful bidders comply with their human rights responsibilities, focusing solely on contractual conditions could be limiting for procurers to widely communicate baseline expectations for responsible business models.[1145]

[1136] The Directive incorporates the conclusions reached in the Max Havelar Case C-368/10 on the possibility of using labels and certifications in the procurement process. CJEU interpreted art. 23.6 of Directive 2004/18/EC allowing the possibility of referring to labels in technical specifications, on the condition that "equivalent" labels would be accepted in the award phase.

[1137] Neamtu B, Dragos D. (2015) Sustainable Public Procurement: Use of Eco-labels" European Procurement & Public Private Partnership Law Review, p. 92

[1138] Corvaglia (2017) pp. 179-180

[1139] Examples include: the Fairtrade International certifications; TCO Certified; SA 8000; Fair for Life; World Fair Trade Organization; WAI WCAG 2.1 AAA label, and/or other disability organisations labels; DALCO accessibility requirements for standard UNE 170001-1:2007 on built environment

[1140] See Recital 75 and art. 43.2 outlining that the requirements specified in the labels must be linked to the subject matter, which could constitute a key limit as it will be shown in the last paragraph

[1141] Article 43(1) of Directive 2014/24/EU; Article 61(1) of Directive 2014/25/EU.

[1142] Marx A. (2019) Public procurement and human rights: current role and potential of voluntary sustainability standards in Ortega, O'Brien

[1143] Corvaglia M. A. & Li, K. (2018). Extraterritoriality and public procurement regulation in the context of global supply chains' governance. Eur. World. 2(1).

[1144] European Commission (2021) p. 83; Corvaglia (2017) p. 185

[1145] IHRB (2015)

Contract performance conditions describe how a contract is to be executed. Article 70, expanding beyond the core ILO Conventions, states that contractual conditions may also include "economic, innovation-related, environmental, social or employment related considerations", though limiting contractual conditions regarding basic working conditions to levels set by national legislation or collective agreements.

Similarly, to the selection and award criteria, such conditions must be linked to the subject-matter of the contract and included in the notice or procurement documents. To be effective they should be: clearly drafted; adequately specific, with defined timelines and deliverables; assigned to a particular party or individual; accompanied by suitable remedies in the event of non-performance, such as financial penalties or remedial actions.

In terms of social rights, Recitals 97, 98[1146] and 99 indicate clearly that contracting authorities should be able to impose contract performance requirements of a labour and social nature for the following reasons:

> "To favour the implementation of measures for the promotion of equality of women and men at work, the increased participation of women in the labour market and the reconciliation of work and private life… and, to comply in substance with fundamental ILO Conventions, and to recruit more disadvantaged persons than are required under national legislation" or to implement "measures aiming at the protection of health of the staff involved in the production process, the favouring of social integration of disadvantaged persons or members of vulnerable groups amongst the persons assigned to performing the contract or training in the skills needed for the contract in question".

Thus, contract performance clauses are indicated as potential tools suitable for the social inclusion of disadvantaged groups or minority groups, to enforce ILO Conventions or promote disadvantaged social categories, and to foster gender equality. Indeed, they are suitable to ensure "the implementation of measures for the promotion of equality of women and men at work, the increased participation of women in the labour market and the reconciliation of work and private life"

Recital 98 gains particular importance in the interpretation of article 70, requiring that the application of social considerations in award criteria and contract performance clauses is conducted "in accordance with Directive 96/71/EC as interpreted by the CJEU".[1147] Balancing economic freedoms to provide services and social rights in the internal market, the already mentioned Directive on Posted Workers requires MSs to guarantee some minimum employment rights to posted workers active in their territory, as provided under national law. The overlap between the regulation of public procurement and the Directive on Posted Workers, regarding the inclusion of minimum wages in public contract as performance conditions has been at the centre of the CJEU Ruffert case, Bundesdrukerei case and Regio-Post case. Building on the judgements, Directive 2014/24 in recital 38 specifically addresses the issue of the respect of minimum social and labour obligations in the delocalised performance of public contracts, clarifying that the services should be considered to be provided at the place where the services are executed, irrespective of the places and Member States to which the services are directed.

Also, the provision on subcontractors strengthens the use of social criteria in the performance stage. As such, according to article 71.6, with the scope of monitoring the production and supply chain, the contracting authorities are asked to take appropriate action "with the aim of avoiding breaches of the obligations referred to in Article 18.2."

[1146] Contract performance conditions might also be intended to favour the implementation of measures for the promotion of equality of women and men at work, the increased participation of women in the labour market and the reconciliation of work and private life, the protection of the environment or animal welfare and, to comply in substance with fundamental International Labour Organisation (ILO) Conventions, and to recruit more disadvantaged persons than are required under national legislation.

[1147] Caranta R. (2015) "The Changes to the Public Contracts Directive and the Story they tell about how EU Law works", Common Market Law Review

Anyway, core difficulties are related to ensuring effective monitoring and enforcement systems and identifying clear audit strategies.[1148] The effectiveness of mechanisms would rest on both the ability to specify the relevant applicable obligations, the investment of significant resources in monitoring and the practical possibility for the contracting authority to react to potential breaches of human rights guarantees in a manner that does not damage the more immediate public interest in the execution of the public contract—which can be particularly challenging where human rights infringements take place in a different jurisdiction or in a manner that only indirectly affects the core object of the contract.[1149]

Some examples of contract performance conditions relevant for the achievement of human rights in specific situations are shown in the table below, inspired from the European Commission Buying Social Guide.

Table 5.3 Contract performance conditions relevant for the achievement of human rights (European Commission (2021) Buying Social Guide)

Human and Labour Rights	The contractor will ensure that no violation of Human Rights and the eight core conventions of the International Labour Organisation occurs in the performance of a contract on procurement of uniforms. The names and places of business of all subcontractors and sub-subcontractors under this contract are set out in an Annex to the contract, and the contractor confirms that it has put in place an appropriate system, audited by an independent third party, to ensure that accurate information about the working conditions of all people involved in the delivery of the contract is available throughout the duration of the contract.
Ethical Trade	In a catering contract, food and drink items with a value equal to at least 5% of the annual Contract Price will be provided with Fair Trade certification or equivalent. As part of the quarterly menu planning cycle, the contractor will specify which fair-trade products it proposes to include in the menu and their estimated value. At the end of each Contract Year, the value of fairly traded products will be reviewed, and additional certified products included for the following Contract Year.
Social Inclusion	In a contract for advertising state services, the contractor is responsible for reaching each of the target groups set out in the specifications and for implementing the special measures included in its tender to reach older users, those suffering from social isolation and those without access to the internet. A review of the effectiveness of these measures will be carried out after three months, with the contractor required to implement any remedial measures specified by the public buyer.
Employment	In a contract for public works, the contractor is responsible for recruiting, training and providing employment in the course of this contract for at least X [number specified in the bid] people who fall into one or more of the defined categories of Disadvantaged Worker. The terms of this employment are specified in an Annex to the contract. Monthly reports must be submitted specifying the number of disadvantaged workers employed, training provided, hours worked and wage receipts.
Gender Equality	The contractor will ensure that all line managers for the staff performing the contract complete training on gender equality aspects of recruitment and employment, including pregnancy and maternity; menopause; sexual harassment; family related leaves, such as parental leave and work/life balance, etc.

8. Contract Monitoring

Contract performance monitoring is a crucial step in the implementation of the contract and its management. Particularly, social clauses and human rights-based considerations –for instance in terms of HRDD - may be challenging for the contractor to implement, requiring a continuous monitoring to evaluate their effectiveness. Time and resources could be needed on both sides to manage the contract, and maintaining open communication between the parties to help identifying risks and mitigating potential adverse impacts. A contract could include different types of formal mechanisms for monitoring compliance, depending on the following factors: the nature of the social clauses (for instance if they relate to the supply chain or end-users); the experience of both parties in applying these clauses;

[1148] Gothberg, P. (2019). Public procurement and human rights in the healthcare sector: the Swedish county councils collaborative model. In O'Brien, M. & Martin-Ortega, O. (Eds.), (2019). Public Procurement and Human Rights, Edward Elgar.
[1149] Sanchez-Graells (2020)

the level of trust and communication between the parties; the resources and capacity to effectively monitor performance; and the availability of suitable third parties to assist with monitoring.
It is crucial to assign responsibility for monitoring in the contract, defining clear activities (including questionnaires, meetings, inspections, reports, audits) to be carried out and their frequency, and specify the escalation and mediation measures that will apply if problems arise. When setting monitoring mechanisms, it is essential to take into account the nature, level of detail and type of evidence necessary to monitor the execution of the contract appropriately. Furthermore, information that are truly relevant and proportionate to the nature and risks of the contract should be processed, as well as the organisation's ability to assess and verify that information. Identification of the profiles of those undertaking the monitoring through requesting relevant certificates proving their expertise would be useful for monitoring accessibility of a service, for example. Different remedies could be set up where social clauses are breached. As a matter of fact, keeping accurate records of all monitoring activities is particularly important to support the use of remedies.[1150]

The Link to the Subject Matter of the Contract and Other Limits

Despite the multiple *legal possibilities* provided by the Directive to include social and human rights considerations along the various stages of the procurement process, the strategic use of public procurement for the achievement of social and employment objectives has some stringent limits under the EU public procurement regime.[1151]

The already mentioned *link to the subject-matter of the contract* (LtSM) is an essential requirement elaborated throughout the entire body of the Directive and recalled in several stages of the procurement cycle, playing a key balancing function to ensure proportionality. Indeed, the principle of proportionality, stipulates that the requirements (technical specifications, award criteria, contract performance clauses, etc.) must be proportional and linked to the contract subject-matter and to the specific process of production, provision or trading provided under the contract.[1152] The LtSM is, also, essential to evaluate the lawfulness and balance of the inclusion of any non-economic criteria along the entire procurement process.[1153] Indeed, it aims at balancing the legitimate use of public procurement for the enforcement of social and labour policies, excluding considerations falling outside the scope of the contract that may diverge from the needs of the governmental authorities.

The CJEU case-law has played an important role in consolidating a link between LtSM and sustainability. The LtSM was firstly identified by the CJEU case law in the *Concordia case*[1154] concerning the procurement of bus transport services by the City of Helsinki. In the tender process, the contracting authority of the city of Helsinki had included *emissions of nitrogen oxide and noise* among the criteria used to identify the most economically advantageous tender, and the Court held that such award criteria was legitimate provided that such criterion was linked to the subject matter of the contract. Nonetheless, LtSM may represent a potential obstacle for social sustainability advancement. The requirement, indeed, excludes general corporate policy which cannot be considered as a factor characterizing the specific process of production or provision of the purchased works, supplies, services. For instance, a contracting authority can only require that all supplies purchased are produced in accordance with fair trade labelling, but not that all the supplies produced by the tenderer, including the ones not produced for the authority, shall be made according to this standard.[1155] The CJEU has, further,

[1150] European Commission (2021) p. 64-66
[1151] Corvaglia (2017) p.188
[1152] Semple, A. (2016)
[1153] Arrowsmith S. (2009) Application of the EC Treaty and Directives to Horizontal Policies: a Critical Review" in Arrowsmitth, Kunzlik (2009) p. 236
[1154] Case C-513/99 Concordia Bus Finland v. Helsingin kaupunki and HKL Bussiiliikenne (2002)
[1155] Semple, A (2016)

clarified in *EVN case*[1156] that inclusion of social and environmental criteria must not give public authorities an unrestricted freedom of choice, but they must be clearly specified together with the weighting of their importance for the purpose of evaluating the tender. In such case, a criterion giving preference to electricity produced by renewable energy sources should have referred to a specific supply period 'in order to be linked to the subject matter of the contract'. This mandatory link was then consolidated in the text of directive 2004/18/EC in the context of the evaluation of the most economically advantageous tender at the award stage

Also, in the *Max Havelaar case*[1157], the Court judged that a clause requiring that tenderers comply with the criteria of sustainable purchasing and socially responsible business was contrary to the obligation of transparency and insufficiently connected to the subject matter of the contract. In his Opinion, the Advocate General clarified the limits of the requirement of the subject matter of the contract in relation to fair trade criteria[1158].However, in the *Regio Post* case, the CJEU affirmed that a public authority may require tenderers and their subcontractors to undertake to pay staff a minimum wage provided for under the legislation of the State in which the contract will be executed. In order to be lawful, this requirement must be established through legislation or universally applicable collective agreements and relate to the subject matter of the contract only.[1159]

In the 2011 Green Paper of the EU Commission, the LtSM has been reaffirmed as a

> "Fundamental condition that has to be taken into account when introducing into the public procurement process any considerations that relate to other policies".

However, increasing concerns have been voiced regarding the necessity of this link with the subject matter. Regardless of developments reached by the CJEU, the formulation of this requirement under the 2004 directives left major areas of uncertainty, raising considerable doubts on the margins of application of this requirement.[1160] For this reason, the regulatory clarification of the LtSM has been described as one of the main achievements reached in Directive 2014/24[1161], shedding lights on its definition and application along the procurement process.

Recital 97, clarifies that "the condition of a link with the subject matter of the contract excludes criteria and conditions relating to general corporate policy, which cannot be considered as a factor characterizing the specific process of production or provision of the purchased works, supplies or services". Moreover article 67.3 even if focused on award criteria provides an attempt to define this requirement. This article specifies that conditions linked to the subject matter and in conformity to the new regulatory framework of the Directive are:

> "Where they relate to the works, supplies or services to be provided under that contract in any respect and at any stage of their life cycle, including factors involved in: a) the specific process of production, provision or trading of those works, supplies or services; b) a specific process for another stage of their life-cycle, even where such factors do not form part of their material substance."

Th regulation of award criteria allows interpretation of the LtSM if the contract with a great flexibility, allowing the inclusion of criteria based on process and production methods, as clearly stating that these characteristics should not necessarily "form part of their material substance".

Moreover, one of the most considerable regulatory improvements reached by the 2014 Directive is the extension of the requirements to the LtSM to all specifications and criteria along the entire procurement

[1156] CJEU (2003) Case C- 448/01 EVN and Wienstrom
[1157] CJEU Case C-368/10 Commission v. Kingdom of the Netherlands
[1158] Ibid, Opinion of the Advocate General Kokott, para 111: "It would certainly be going too far for a contracting authority in determining the economically most advantageous tender to want to assess the general purchasing policy of potential tenderers and to take into consideration whether all the goods in its product range were fair trade, irrespective whether or not they are the subject matter of the contract"
[1159] Russo, D. (2018)
[1160] Semple A (2015), pp. 66-70
[1161] Caranta R. (2015) pp. 417, 418

process, and it is not imposed exclusively in the award stage as in the 2004 Directives. Indeed, it is not only required in the development of award criteria (art. 67.2), but also in relation to technical specifications (art42.1), selection criteria (art 58.1), contract performance clauses (art 70), imposed on variants (art 45.1) and labels (art 43.1).[1162]

However regardless of the extension in the scope of application, the most controversial aspect of this requirement is represented by the limitations that imposes on the achievement of broader social and employment policies through public procurement.[1163] It is highly debatable whether production characteristics concerning the respect of human rights or labour conditions in the workforce could be considered as criteria able to be linked to the subject matter of the contract. Requirements related to the general ethical sourcing policies followed by the bidders or the overall management of the suppliers cannot be included in the procurement process, as well as broad ethical considerations and the possible corporate responsibility policies pursued by the different suppliers remain outside of the evaluation process in the procurement cycle.[1164] As clearly specified in Recital 97[1165], further limits of the LtSM regard the fact that that contracting authorities would be forbidden to require to economic operators to commit to corporate social responsibility (CSR) or other sustainability measures not directly linked to the object of the contract[1166].

Furthermore, requirements must only concern criteria which are linked to the subject-matter of the contract and appropriate to define characteristics of the procured subject-matter (art 43.1.a) hindering the possibility to use labels linked to general corporate policies or aspects of the supply chain that are too far detached from the direct provision of services or supply of products to the contracting authority. Another limitation is the contracting authorities' capacity and resources, as they should have specific expertise to make judgements of equivalence between different labels and between the prescribed elements of the applicable label and the documentation provided by economic operators.

Even if it has often been argued that there should be a relaxation of this requirement,[1167] LtSM remains the pillar of the regulation of the sustainable use of public procurement under the EU regime. Moreover Directive 2014 provides even more guidance and specifies the different conditions of transparency at several stages of procurement process for the inclusion of social and labour considerations, and how the requirement of a link to the subject matter of the contract is defined at the different stages of the procurement process.

The LtSM has been recognized as one of the most controversial issue in the trade-off between proportionality principle, sustainability and human rights. However, other example of limits in the Directive regards the general and vague wording of other provisions. As already outlined, the Directive extends the scope of its regulation and its compliance not only to the main suppliers but also their subcontractors, as prescribed by article 71. The EU legislation requires transparency in the subcontracting chain: companies have to specify what part of the contract they intend to assign to a third party and identify the subcontractors for which a chain of responsibility may be drawn up. For this reason, article 18.2 should be interpreted as covering not only the conduct of contractors, but also the

[1162] Semple A (2015), p. 61

[1163] Client Earth (2011) Briefing n.4: Clarifying the link to the subject matter of the contract for Sustainable Procurement Criteria, Legal Briefing

[1164] Caranta R. (2015) pp. 418

[1165] "The condition of a link with the subject-matter of the contract excludes criteria and conditions relating to general corporate policy, which cannot be considered as a factor characterising the specific process of production or provision of the purchased works, supplies or services. Contracting authorities should hence not be allowed to require tenderers to have a certain corporate social or environmental responsibility policy in place"

[1166] Ankersmit, L. The contribution of EU public procurement law to corporate social responsibility. Eur Law J. 2020; 26: 9– 26
Outhwaite, Opi & Martin-Ortega, Olga. (2016). Human rights in global supply chains: corporate social responsibility and public procurement in the European Union. Human Rights and International Legal Discourse.

[1167] Semple A (2015), p. 70-73

subcontractors and suppliers involved in the performance of a contract[1168]. In details, Art. 71.1 clarifies that the mandatory social and labour law provisions (art 18.2) are to be observed by subcontractors and that national authorities are responsible to guarantee compliance with them. Nonetheless, art.71 does not stipulate what kind of measures national authorities must take, referring in general terms to "appropriate action" by the competent authority acting "within the scope of their responsibility and remit". It depends again on national measures to specify what kind of actions contracting authorities have to take to ensure subcontractors compliance.[1169] Art 17.6 contains two examples of not mandatory "appropriate" measures: (1) a system of joint and several liability throughout the subcontracting chain and (2) the application of exclusion grounds provided for in art. 57 to subcontractors.[1170] Both measures are key mechanisms to ensure compliance with applicable social and employment conditions. However, the discretionary wording of art 71.6 is likely to result in considerable divergence across MS, failing to guarantee an effective compliance by subcontractors.

A further limitation is contained in art. 57, since contractors and subcontractors can rely upon self-declarations, in practice leading to possible non-compliant contractors/subcontractors obtaining public contracts.

The Extraterritorial Reach of the EU Public Sector Directive and Human Rights

When reflecting on the impacts of EU public procurement on human rights respect throughout global supply chains, it is essential to shed lights on the potential extraterritorial[1171] application of the Public Procurement Directives, particularly the EU Public Sector Directive. This means understanding the extent to which the regulatory framework applies to public procurement activities conducted outside the jurisdiction of the EU. Although the Directive primarily regulates public procurement processes within the EU, it may indirectly affect procurement processes in third countries. Indeed, it extends its regulatory influence outside the EU territorial jurisdiction, with impacts on the behaviour of firms, suppliers and subcontractors linked by supply chains across different jurisdictions.[1172]

Extraterritoriality is becoming an essential dimension of modern procurement regulation efforts, being a controversial matter.[1173] As a matter of fact, the EU's regulatory framework is increasingly opening up MS government procurement markets to competition from outside the EU. Article 25 of the Public Procurement Directive requires contracting authorities to not discriminate between EU undertakings and undertakings of third countries with which the EU has concluded international agreements that open up the EU's public procurement market.[1174] So extraterritorial impact

[1168] UNCESR General Comment no. 24: States should require all contractors and subcontractors to report their policies and procedures in the field of HR protection and to provide effective means of accountability and redress for abuses.
See Russo, D. (2018) The Duty to Protect in Public Procurement: Toward a Mandatory Human Rights Clause?

[1169] Austria has introduced relatively strict rules in relation to the involvement and nomination of subcontractors, requiring full disclosure of all proposed subcontractors during the tender procedure.

[1170] Tim case: "A contracting authority should exclude an economic operator from participating in a tendering procedure if the rules on access to work for people with disabilities had not been complied with. An economic operator challenged its exclusion due to a subcontractor's failure to comply with the rules". The CJEU concluded that the Directive does not preclude national legislation which allows the exclusion of a tenderer when a subcontractor is subject to the ground for exclusion. However, the exclusion must not take place automatically". Furthermore, the use of the words 'appropriate' and 'reasonably necessary' in art 18.2 seems to limit the extent of the due diligence required from a contracting authority. A level of due diligence is also expected from tenderers. According to the AG's opinion in Tim, an example of insufficient level of due diligence is shown by a "failure by the tenderer to carry out checks when it includes in its tender a subcontractor that has breached the obligations in art 18.2 is, at the very least, a case of negligent omission".

[1171] Extraterritoriality describes a concept connected to the jurisdiction of States under general international law, which is a different concept to that of jurisdiction in human rights treaties, although the two are often confused, see Marko Milanovic (2008) From Compromise to Principle: Clarifying the Concept of State Jurisdiction in Human Rights Treaties, 8(3) Human Rights Law Review 411

[1172] Corvaglia M.A., Li K. (2018), Extraterritoriality and public procurement regulation in the context of global supply chains' governance, 2(1): 6. Europe and the World: A law review.

[1173] Zerk,J. Extraterritorial Jurisdiction: Lessons for the Business and Human Rights Sphere from Six Regulatory Areas: A Report for the Harvard Corporate Social Responsibility Initiative to Help Inform the Mandate of the UNSG's. Special Representative on Business and Human Rights, Corporate Social Responsibility Initiative Working Paper No. 59, Harvard University, John F Kennedy School of Government; De Schutter O. (2006) Extraterritorial Jurisdiction as a Tool for Improving the Human Rights Accountability of Transnational Corporations' 8

[1174] Ankersmith L. (2020) The contribution of EU public procurement law to corporate social responsibility, European Law Journal, Eur Law J. 2020;26:9–26, John Wiley & Sons Ltd.

may arise when EU-based contracting authorities open their bidding procedures to the international market and extra-EU suppliers, if they participate in cross-border procurement activities or if contracts have cross-border implications.

Furthermore, EU suppliers could have non-EU sub-suppliers or contractors in their supply chains, with inevitable extraterritoriality impacts to consider. Indeed, the Directive fosters the enforcement of social and labour considerations along the entire production and supply chain,[1175] as provided by Article 71.[1176] 75 The Directive extends the scope of its regulation and compliance not only to the main suppliers, but also to their subcontractors, regardless where they are situated, even if they are located outside the jurisdiction of the procuring country.

Given such impacts at extraterritorial level, the Directive could be seen as a powerful leverage for the extension of European social and environmental standards internationally, highlighting a potential role of the EU as a global regulatory power.[1177]

> "Public procurement is thus becoming a hybrid, complex but efficient instrument to ensure socially responsible practices along the lengthening and increasingly fragmented production and supply chain".[1178]

The regulation of public procurement may extend its jurisdictional reach to better protect human and labour rights abroad in fragmented global supply chains, for instance through the use of private mechanisms of labels and certifications. Certifications and labels can directly influence the behaviour and the operation of firms outside the EU jurisdiction via territorial extension, conditioning the access to public contracts on human rights and labour standards.[1179] Labels and certifications ensure that the production of the procured products and services complies with social and ethical criteria, often offering the additional guarantee of third-party certifications.[1180] These standards, labels and certifications[1181] are also often applied throughout a corporate network in the sense that the individual affiliates of a corporate group are also obliged to follow them. This way, the standards also necessarily entail extraterritorial effects as the individual affiliates may be well spread out globally. Particularly, the use of labels, which facilitate the exchange of information in relation to the behaviour of contractors and subcontractors wherever they are located, enriches the scope of procurement regulations and makes it possible to monitor and protect human rights and labour standards outside the jurisdiction of the procuring country.

Another aspect to consider on the extraterritorial expansion of the scope of application of its rules and standards regards the EU external policies and assistance to non-EU countries in developing their procurement frameworks. Indeed, the idea that the EU has been engaging in regulatory transfer or 'export' of its public procurement rules is not new.[1182] This has been a prominent goal of EU trade

[1175] Directive 24/2014/EU, Recital 105: "It is important that observance by subcontractors of applicable obligations in the fields of environmental, social and labour law provided that such rules, and their application, comply with Union law, be ensured through appropriate actions."

[1176]Directive 2014/24/EU, art 71: "1. Observance of the obligations referred to in Article 18(2) by subcontractors is ensured through appropriate action by the competent national authorities acting within the scope of their responsibility and remit.

2. In the procurement documents, the contracting authority may ask or may be required by a Member State to ask the tenderer to indicate in its tender any share of the contract it may intend to subcontract to third parties and any proposed subcontractors"

[1177] Scott, J. (2014) Extraterritoriality and Territorial Extension in EU Law, American Journal of Comparative Law, The Global Reach of EU Law, Routledge.

[1178] Fox,T., Ward H, Howard,B. (2002) Public Sector Roles in Strengthening Corporate Social Responsibility: A Baseline Study, World Bank

[1179] Corvaglia M.A., Li K. (2018)

[1180] Semple, A (2012) The Role of Environmental and Social Labels in Procurement', Public Procurement Analysis

[1181] ibid

[1182] With reference to State aid as well, see Michael Blauberger and Rike U. Krämer (2013) European Competition vs. Global Competitiveness Transferring EU Rules on State Aid and Public Procurement Beyond Europe', 13(1) Journal of Industry, Competition and Trade 171-186.

policy,[1183] in particular in the context of EU enlargement and the establishment of close trade relationships with neighbouring countries.[1184] Additionally, the EU has played a key role in the revision of the multilateral WTO GPA, which shows clear convergence towards EU regulatory standards.[1185] Also recently, the approach to the extraterritorial application of EU procurement standards has significantly influenced the negotiations of free trade agreements (FTAs).[1186]
Beyond these bilateral relationships, the EU has also been crafting a more general trade policy aimed at ensuring reciprocal access to procurement markets where no free trade agreements are applicable, which has some elements of extraterritorial reach of the EU's approach to public procurement regulation.[1187]
Finally, also the CJEU has contributed to the further extraterritorial expansion of the EU rules by extending its competence to review procurement decisions that are ancillary to areas of the EU's external action, such as common foreign and security policy. [1188]
In conclusion, although the Directive regulates primarily the EU jurisdiction, its coverage would inevitably extend in different ways, including to the suppliers' supply chains, especially when reflecting on the impacts of public procurement on human rights throughout global supply chains internationally. Through the extraterritorial reach EU could play a role as driver to make EU standards respected at international level, at the same time tackling discriminations between national and international suppliers. Anyway, limits related to the extension of extraterritoriality remain, particularly linked to the normative problem that extraterritoriality stems from a strict interpretation of the principle of sovereign equality.
Although the protection of human rights could be driver to extend extraterritoriality reach of public procurement, it must be considered that also in human rights law multiple limits are present. For example, the UNGPs only included a rather weak compromise, stating that:

> "States are not generally required under international human rights law to regulate…extraterritorial activities…Nor are they generally prohibited from doing so, provided there is a recognized jurisdictional basis."[1189]

In conclusion, the public procurement regulatory framework provides several opportunities to Member States and their contracting authorities to use procurement as a "strategic tool" to foster social considerations and human rights protection. However, multiple legal limitations and discretionary application highlights the existence of frictions and gaps for the full development of SRPP and human rights considerations, requiring further efforts. The next section will address the *EU momentum on Business & Human Rights* in Europe to understand the synergies with public procurement and will focus on regulatory initiatives and key opportunities for public procurement in the EU legal context.

[1183] the EU has exclusive competence for the promotion of international procurement policy, as established by the Court of Justice in its Opinion of 16 May 2017 on the Free Trade Agreement between the European Union and the Republic of Singapore, 2/15, EU:C:2017:376, para. 77.
[1184] For example: EU-Ukraine Deep and Comprehensive Free Trade Agreement (DCFTA),or the technical cooperation established between the European Commission and countries in the Euro-Mediterranean Partnership (EUROMED)
[1185] See Dawar K., Skalova,M. The Evolution of EU Public Procurement Rules and Its Interface with WTO: SME Promotion and Policy Space', in Reformation or Deformation.
Also, Tsarouhas D., Ladi S. (2015) 'The EU in the World: Public Procurement Policy and the EU-WTO Relationship; Casavola,H. (2011) 'The WTO and the EU: Exploring the Relationship Between Public Procurement Regulatory Systems', in Edoardo Chiti and Bernardo Giorgio Mattarella (eds), Global Administrative Law and EU Administrative Law. Relationships, Legal Issues and Comparison, Springer, 293-320.
[1186] the EU-Canada Comprehensive Economic and Trade Agreement (CETA), as well as other free trade agreements (FTAs), such as the EU-Singapore deal,16 or the EU-Indonesia free trade agreement, currently under negotiation.17
[1187] EU Parliament, EU external relations- factsheet, chapter 213. Available at https://www.europarl.europa.eu/factsheets/en/chapter/213/the-eu-s-external-relations
[1188] Sanchez-Graells, A. (2017) An ever-changing scope? The expansive boundaries of EU public procurement rules, extraterritoriality and the Court of Justice, Extraterritoriality of EU Law & Human Rights after Lisbon: Scope and Boundaries Sussex European Institute
[1189] UNGP 2 Commentary

5.2 The EU Momentum on Business & Human Rights: What Opportunities for Public Procurement?

After having analysed the SPP trend under the EU public procurement regulatory regime, with attention to different legal opportunities and related limitations, the focus shifts to the B&HR regime to understand synergies and potentials to bridge gaps. An on-going *EU Momentum on Business & Human Rights* is analysed in the following section highlighting a current trend towards regulating such matter and HRDD at policy and legislative level in the EU regulatory setting. Different B&HR sources will be at stake, starting from B&HR in the Council of Europe human rights' regional architecture and in EU law. The emergence of a patchwork of voluntary and mandatory initiatives, in a pathway started since early 2000s towards an *EU Strategy on B&HR* will be at stake, with attention to both indirect and direct efforts towards regulating *HRDD* at EU level. Furthermore, focus will be also on some EU Member States (EU MSs) domestic normative experiences further stimulating such regulatory process at EU level which has culminated with the EU Commission proposal for a mandatory HRDD EU regulatory framework since 2020. Such process has led to the recent adoption of a proposed EU Corporate Sustainability Due Diligence Directive, opening regulatory opportunities for EU with inevitable impacts also on public procurement. As a matter of fact, it is observed that public procurement has not been addressed much in such fragmentary patchwork of soft and hard law sources, being a missed opportunity to speeding up progress towards more responsible public procurement. In conclusion, the potential role of this legislation in bridging the gap between the *EU SPP trend* and the *EU B&HR momentum* will be addressed. Indeed, for now the SPP and B&HR spheres result still isolated from each other requiring more synergy to create effective impacts towards more *B&HR-based procurement*.

5.2.1 Business & Human Rights in the European Human Rights Architecture

When considering B&HR developments in the Europe and key legal sources, reflections must start from the human rights legal architecture under the aegis of the Council of Europe (CoE)[1190] - at the heart of the regional human rights culture in Europe- then cascading to the peculiarities of the EU legal system.[1191] The European Convention on Human Rights and Fundamental Freedoms (ECHR)[1192] adopted in 1947 is the cornerstone bill of human rights of the European regional human rights regime.[1193] It mandates all State parties to secure such rights within their jurisdictions (art.1), entailing both negative and positive obligations and requiring States to provide an effective remedy in case of breach of any of the Convention rights (art.13). Its enforcement is ensured by the European Court of Human Rights (ECtHR), the judicial body monitoring human rights violations. In addition, the European Social Charter[1194] - adopted in 1961 - constitutes another fundamental source protecting

[1190] CoE was established in 1949 in response to the World War II by France, Italy, UK, Ireland and the Benelux and Scandinavian countries. It constitutes the main European intergovernmental political human rigths body with the Committee of Ministers (CoM) and the Parliamnetary Assembly as its main organs. Its aim is to "achieve a greater unity between its members for the purpose of safeguarding and realising the ideals and principles which are their common heritage and facilitating their economic and social progress is to be pursued by agreements and common action in the maintenance and further realization of human rights and fundamental freedoms" (Art.1, Statute of the CoE, 1949)
See: Beates E., (2010) The Evolution of the European Convention on Human Rights: from its Inception to the Creation of a Permanent Court of Human Rights, Oxford University Press; Petaux J. (2009) Democracy and Human Rights for Europe: The Council of Europe's Contribution, CoE

[1191] Gatta F. (2020) From Soft International Law on Business and Human Rights to Hard EU Legislation? In Buscemi et al (2020) Legal Sources in Business and Human Rights: Evolving Dynamics in International and European Law, Brill Nijhoff

[1192] The ECHR recognizes key political and civil rights: (1) rights of an absolute nature, as the prohibition of torture, slavery and forced labour and the prohibition of retroactive punishment which cannot be derogated from in times of emergency (art. 15); (2) non-derogable rights that are subject to limited exceptions, as the right to life (art. 2 and 15.2); (3) rights that may be derogated from within the limits, such as the right to liberty and security (art. 5) and the right to a fair trial (art. 6); (4) qualified rights, that is the right to respect for private and family life, freedom to manifest one's religion or beliefs , freedom of expression and freedom of peaceful assembly and association (articles 8-11).

[1193] Bantekas I., Oette L. (2020) International Human Rights Law and Practice, 3rd edition, Cambridge, pp. 243-254

[1194] Collective rights under the European Social Charter: the right to work, to organise and collective bargaining; to social security; social assistance; the right of the family to social, legal and economic protection; and certain rights of migrant workers. Such rights are subject to remediation by the European Committee of Social Rights which monitors its compliance under two complementary mechanisms: collective

specifically social and economic rights, relevant for this analysis.[1195] In terms of legal sources, the relationship between the EU and the ECtHR constitutes a critical and complex question for human rights protection in Europe.[1196] The ECHR has become progressively influential for the EU, for instance the respect for human rights is one fundamental accession criteria for EU membership, and the EU Charter for Fundamental Rights, incorporated in the Lisbon Treaty, draws on the ECHR.[1197]

Regarding B&HR developments, over the years, the CoE has expressed increasing concern about the effectiveness of the protection of human rights against abuses committed by business actors.[1198] The CoE has, thus, acted as a catalyst for the development of a European *consensus* on the importance of B&HR promoting different initiatives to facilitate a strengthened implementation of the UNGPs across Europe.[1199] Furthermore the Court has progressively addressed the existence of a State duty to protect human rights in the business context even before the start of the B&HR era.[1200] Indeed, since 2005, the ECtHR has identified a specific State "duty to regulate" private businesses[1201] and corporate compliance with human rights[1202] - even though only indirectly- particularly in situations of environmental pollution[1203], expanding also to other contexts. Examples include human trafficking[1204], interference with freedom of expression and privacy by media companies;[1205] abuses where public services such as healthcare[1206] and schools[1207] are delivered by private actors;[1208] interference by employers with the right to form and join trade unions; [1209] restrictions imposed by employers on employees' workplace dress;[1210] and the state's approach to regulating activities of a high-risk nature in terms of occupational health and safety[1211]. Also State-owned enterprises – connected to the *State-business nexus*- are the

complaints lodged by the social partners and other non-governmental organisations (*collective complaints procedure*), and national reports drawn up by Contracting Parties (*reporting system*).

[1195] Tornos J., De Losada, F., Calvete, A.O, (2017) Guide for the protection and promotion of human rights in public procurement

[1196] The role of the EU vis-à-vis its member states, particularly its ability to mandate action that may result in a breach of States' obligations under the ECHR, inevitably raises the question whether the EU itself should be bound by European human rights law. National courts as well as the ECtHR have shown considerable reluctance to find that the EU may provide lesser protection than that granted in national constitutions or the ECtHR respectively. This unresolved situation was considered unsatisfactory and contributed to the drafting of the Charter of Fundamental Rights. The Charter, which, among other rights also essentially contains ECHR rights is binding on the EU and on Member States "only when they are implementing EU law"

[1197] Bantekas I., Oette L. (2020) International Human Rights Law and Practice, 3rd edition, Cambridge, p. 254

[1198] O'Brien C. (2022) Business and human rights and regional systems of human rights protection in Marx A., Otteburn,K., Lica D., Geert van Calster and Jan Wouters (Eds). Research handbook on global governance, business and human rights, Edward Elgar

[1199] O'Brien C. (2021) Business and human rights in Europe 2011-2021: A decade in review, in: P. Czech et al, (eds.), European Yearbook on Human Rights 2021 (Intersentia)

[1200] Although claims cannot be brought before the ECtHR against businesses directly, the court's jurisprudence affords protections in the market sphere. Via "positive obligations", States may be obliged to adopt protective or preventive measures to avoid human rights abuses by third parties. This doctrine has been applied, for example, to require effective deterrence of third-party abuses through criminalisation of private actors' conduct or adoption of legislation or policies. On this basis the ECtHR has identified a specific state 'duty to regulate' private businesses, however attempts to engage the Court in adjudicating business-related applications extraterritorially have not yet succeeded.

[1201] ECtHR (2005) Fadeyeva v. Russia case

[1202] CoE Parliamentary Assembly (2016), *Human Rights and business – Recommendation CM/Rec*

[1203] ECtHR (2021) Environment and the European Convention on Human Rights

[1204] In ECtHR (2005) Siliadin v. France case, the ECtHR found a specific positive obligation on Member States to penalise and prosecute effectively any act aimed at maintaining a person in a situation of slavery, servitude or forced or compulsory labour. In Rantsev v. Cyprus and Russia (2010), the ECtHR held that to comply with these positive obligations under Art. 4 ECHR, States must put in place a legislative and administrative framework to prohibit and punish trafficking (para 89, 112). Further, 'the spectrum of safeguards set out in national legislation must be adequate to ensure the practical and effective protection of the rights of victims or potential victims of trafficking. Accordingly, in addition to criminal law measures to punish traffickers, Art. 4 requires member States to put in place adequate measures regulating businesses often used as a cover for human trafficking' (Judgment, para. 284). See further: ECtHR (2018), Factsheet – Slavery, Servitude and Forced Labour

[1205] ECtHR (2012) Axel Springer AG v. Germany [GC]

[1206] ECtHR (2005) Storck v. Germany, where the ECtHR considered compatibility of detention in a private psychiatric hospital with Arts 5 and 8 ECHR.

[1207] ECtHR (1993) Costello-Roberts v. the United Kingdom, where the ECtHR held that a State cannot 'absolve itself from responsibility by delegating its obligations to private bodies or individuals'.

[1208] O'Brien, C. (2015) Essential Services, Public Procurement and Human Rights in Europe, University of Groningen Faculty of Law Research Paper Series No.22/2015.

[1209] ECtHR (2002) Wilson, the National Union of Journalists and Others v. the United Kingdom.

[1210] ECtHR (2013) Eweida and Others v. the United Kingdom.

[1211] ECtHR (2014) Vilnes and Others v. Norway.

subject of a relatively elaborated jurisprudence.[1212] However, attempts to engage the Court in adjudicating business-related applications relating to matters in other states' territorial jurisdiction have not succeeded.[1213]

CoE institutions have relied mainly on B&HR soft law instruments, developing a set of recommendations to fulfil international human rights obligations through more effective implementation of the UNGPs. In 2010, even before the UNGPs endorsement, a first policy framework on the impact of corporations' activities on human rights was adopted. The Parliamentary Assembly of the Council of Europe (PACE) issued Recommendation No 1858[1214], Res. 1757 and Recommendation 1936 on Human Rights and Business. The Resolution outlined the existence of a "legal vacuum" in the B&HRs area leaving human rights without an effective protection, requiring greater efforts to develop effective standards of protection of human rights in the business area. Thus, the Committee of Ministers (CoM) explored the possibility to create either a binding "complementary legal instrument" – an *ad hoc* convention or an additional Protocol to the ECHR– or a non-binding measure, such as a specific recommendation addressed to the Member States.[1215] The subsequent adoption of the UNGPs induced the CoM to focus on promoting their implementation at the European level. Thus, the CoE committed itself to taking on the role of promoter rather than that of legislator, to enhance the visibility of UNGPs and to provide guidance to European governments and business actors.

In 2014 a Declaration on the UNGPs was issued, through which the CoM endorsed the UNGPs as "the current globally agreed baseline (…) in the field of business and human rights".[1216] Such position was, then, reiterated and elaborated in CoM's 2016 Recommendation on Human Rights and Business,[1217] specifically dedicated to the strategies and actions for the implementation of the UNGPs at the CoE level,[1218]providing indications on the application of the ECHR on the subject.[1219] In details, the CoM recommended the respect of the standards of protection set out in the UNGPs, calling on the 47 CoE Member States to review their national legislation and practice in the light of the UNGPs and to develop specific National Actions Plans (NAPs) on B&HRs, as well as sharing information and best practices.[1220] It, also, called on governments to implement the UNGPs and to review and evaluate national legislation and practice to ensure compliance to human rights across different areas, *among others* public procurement, State-owned enterprises regulation[1221] and access to remedy.[1222]

[1212] See O'Brien, C. (2015) Business and Human Rights. A Handbook for Legal Practitioners, pp. 33-39; Wee C. (2008), "Regulating the Human Rights Impact of State-owned Enterprises: Tendencies of Corporate Accountability and State Responsibility", ICJ Denmark; UNHRC (2016), 'Report of the Working Group on the issue of human rights and transnational corporations and other business enterprises' UN Doc A/HRC/32/45, 04.05.2016.
Human Rights Council(2016) 'Regulating the Human Rights Impact of State-owned Enterprises: Tendencies of Corporate Accountability and State Responsibility' UN Doc A/HRC/32/45.

[1213] O'Brien, C. (2018) 'The Home State Duty to Regulate the Human Rights Impacts of TNCs Abroad: A Rebuttal', 31(1) Business and Human Rights Journal, pp. 47-73; Fasciglione M. (2018), 'Enforcing the State Duty to Protect under the UN Guiding Principles on Business and Human Rights: Strasbourg Views', in Bonfanti (ed.), Business and Human Rights in Europe: International Law Challenges, Routledge, Oxford 2018

[1214] Recommendation No 1858 (2009) on Private military and security firms and the erosion of the state monopoly on the use of force

[1215] PACE (2010) 'Human rights and business', Recommendation 1936(2010), adopted on 6 October 2010, para 2.2, 2.3

[1216] CoM (2014) Declaration of the Committee of Ministers on the UN Guiding Principles on Business and Human Rights, Decl. (16/04/2014), para 7.

[1217] CoM (2016) Recommendation CM/Rec(2016)3 of the Committee of Ministers to Member States on Human Rights and Business.

[1218] CoE (2016) *Committee of Ministers to Member States on human rights and business*, CM/Rec(2016)3, March 2016.

[1219] Bonfanti, A. (2018) Business and Human Rights in Europe: International Law Challenges (Transnational Law and Governance)

[1220] The Recommendation established an embryonic regional arrangement for State monitoring and reporting on B&HR via a public 'shared information system that incorporate COE MSs National Action Plans and good practices. CoE, 'Online Platform for Human Rights and Business'

[1221] CoM (2016) Recommendation CM/Rec(2016)3 Appendix, para. 1.

[1222] Council requested the European Union Agency for Fundamental Rights (FRA) to issue an expert opinion on access to remedy, the third pillar of the UNGPs. In 2017, FRA published its Opinion on Improving Access to Remedy in the Area of Business and Human Rights at the EU Level. According to the Agency, indeed, the negative impact of business on human rights, whether at national or transnational level, and whether directly or indirectly coming from public or private actors, involves civil, criminal and administrative justiciability, demanding a greater access to justice, which must be ensured in accordance with the right to an effective remedy enshrined in Article 47 of the Charter of Fundamental Rights of the EU.

On the nexus between human rights and public procurement, the Appendix to the Recommendation provides specific guidance to States to exercise adequate oversight and to meet international human rights obligations when they contract with business enterprises. Thus, in the area of public procurement, the CoE provides for respect for human rights by business enterprises with which States conduct commercial transactions. It recommends the use of "clauses for consequences in their procurement contracts, including their termination, if such respect for human rights is not honoured".[1223] The CoE, linking public procurement and B&HR, highlights that the 2014 EU Public Procurement Directives provide ample opportunities for EU MSs to implement a range of preventative, monitoring and capacity building actions necessary to respond to the expectations of the UNGPs within their purchasing activities.

Finally, the COE Parliamentary Assembly (PACE) has urged follow-up to the Recommendation[1224] while also sporadically passing resolutions on related topics, for instance decent work,[1225] trade in torture equipment,[1226] promoting other instruments addressing human rights in the private sector.[1227]

5.2.2 Business & Human Rights in EU: the emergence of a patchwork of voluntary and mandatory initiatives

B&HR into EU Law: EU Treaties and Fundamentals

Under EU law and its founding treaties, the protection and respect of human rights is considered among the EU's overarching pillars and objectives.[1228] The attention on social rights and fundamental freedoms can be traced back to the very first establishment of the EU system. According to Article 2 of the Treaty establishing the European Economic Community (EEC Treaty), "a high level of employment and social protection" were key goals of the European Community.[1229] However, in the initial phase, the social dimension was recognised essentially in order to guarantee the effective exercise of the economic freedoms in the common market.[1230] Then, the CJEU progressively developed its own judicial bill of rights, laying down the basis for an EU system of fundamental rights protection, including the respect of human rights. The subsequent Treaties of Amsterdam and the Charter of Nice - mentioning human rights inspired by the principles and values of the Union- paved the way for the Treaty of Lisbon (2009)[1231] which marked fundamental constitutional developments in the field of fundamental and human rights. As provided by Article 2 of the revised Treaty of the European Union (TEU):

> "The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights".

[1223] CoE(2014), Draft Recommendation of the Committee of Ministers to member States on human rights and business, para 11

[1224] Resolution 2311 (2019) inviting COE member States to take all necessary measures to implement the UNGPs and the Recommendation CM/Rec (2016)3, including elaboration and sharing of National Action Plans, and to review their national legislation, practices and policies to ensure their compliance with the requirements deriving from the Guiding Principles and the Recommendation CM/Rec (2016)3.

[1225] Resolution 1993 (2014) 'Decent work for all'.

[1226] Recommendation 2123 (2018) 'Strengthening international regulations prohibiting trade in goods used for torture and the death penalty'.

[1227] See O'Brien (2021), p.15
Examples: the Convention on Cybercrime addressing private and public 'service providers'; and a 2014 Recommendation on the human rights of internet users. Instruments on women's and children's rights encompass the private sector, which is also strongly in focus in the Convention on Action against Trafficking in Human Beings and the Criminal Law Convention on Corruption. Newer mandates on environment and climate change, and cloning of human beings, human organs and tissue transplants and genetic testing further foresee business-related abuses.

[1228] Bantekas I., Oette L. (2020) pp. 264-266

[1229] Parodi M. (2020) The EU Charter of Fundamental Rights as the Source of Judicially Enforceable Obligations to the Activity of Private Companies, in In Buscemi et al (2020) Legal Sources in Business and Human Rights: Evolving Dynamics in International and European Law, Brill Nijhoff, p. 109

[1230] As CJEU pointed out '(Article 199 eec Treaty) forms part of the social objectives of the Community, which is not merely an economic union, but is at the same time intended, by common action, to ensure social progress and seek the constant improvement of the living and working conditions of their peoples, as is emphasized by the Preamble'. Case 43/75 Gabrielle Defrenne contro Société anonyme belge de navigation aérienne Sabena [1976] EU:C:1976:56.

[1231] Craig,P. De Burca G. (2002), The evolution of EU Law, Oxford University Press; Tizzano,A.(2013) Verso i 60 anni dai Trattati di Roma, Giappichelli.

Under Article 3 TEU, the promotion of such values, together with peace and wellbeing of people of the EU is fostered, outlining the need for the Union to

> "Combat social exclusion and discrimination, and promote social justice and protection, equality between women and men, solidarity between generations and protection of the rights of the child. It shall promote economic, social and territorial cohesion, and solidarity among Member States".

Thus, the EU has a duty to promote the respect of human rights within its powers and competences, not only when adopting and implementing EU legislation, but also on a broader extent as provided by articles 2, 3.5, 21 TEU. Furthermore, also the Treaty on the Functioning of the European Union (TFEU)[1232] mentions human rights as key goal and has a dedicated Title to Social Policy (Title X).[1233]
An essential novelty introduced by the Lisbon Treaty was the recognition that the Charter of Fundamental Rights and Freedoms of the European Union has the same legal value as the founding Treaties:[1234]

> "Fundamental rights, as guaranteed by the European Convention of Human Rights and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law".[1235]

Thus, when the 2009 Lisbon Treaty entered into force, the freedoms enshrined in the Charter became legally binding, acquiring the same legal status of the Treaties.[1236] Furthermore, the CJEU started ensuring compliance with EU law through its preliminary rulings (Article 267 TFEU) creating a broad case-law[1237] also in the protection of human rights.

Given such preliminary aspects, the EU legal order constitutes also a fertile ground for the development of human rights protection in the field of business activities.[1238] The entry into force of the EU Charter and its recognised capacity of having *horizontal* direct effect constitutes an important step in this direction.[1239] The Charter recognises the freedom to conduct business as a fundamental right (article 16), anchoring it to the primary law of the EU. However, as confirmed by the CJEU, the freedom to conduct a business has never been considered an absolute right.[1240] For example, in the *Nold* judgment, the CJEU affirmed that this freedom *"far from constituting unfettered prerogatives, must be viewed in the light of the social function of the property and activities protected thereunder".*[1241] Title IV of the Charter, headed *Solidarity*, lays down a set of economic and social fundamental rights that are relevant to the conduct of business activities, notably as limits thereof. Also, other rights included in other Titles of the Charter may be considered as limits to the conduct of business: human dignity[1242], the prohibition of slavery and forced labour, the respect for privacy, prohibition of discrimination and equality between men and woman are other principles restricting the right to engage in business. Article

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[1232] According to Art 1 TFEU, this Treaty and the Treaty on the EU constitute the Treaties on which the Union is founded and have the same legal value. The TFEU organises the functioning of the Union and determines the areas of, delimitation of, and arrangements for exercising its competences.
[1233] Biondi,A. Eeckhout,P.Ripley S (2012), EU law after Lisbon, Oxford University Press; Craig,P (2010) The Lisbon Treaty: law, politics, and Treaty reform, Oxford University Press.
[1234] Article 6.1 TEU
On the Charter, see: De Burca, G. (2001) 'The drafting of the European Union Charter of Fundamental Rights' European Law Review 126; De Witte,B. (2001) 'The Legal Status of the Charter: Vital Question or Non-Issue?' Maastricht Journal of European & Comparative Law 8; Douglas-Scott, S. (2004) 'The Charter of Fundamental Rights as a Constitutional Document', European Human Rights Law Review 37; Lenaerts, K, De Smijter,E. (2001)'A "Bill of Rights" for the European Union' Common Market Law Review 273.
[1235] Article 6.3 TEU
See Gaja,G.(1994) 'The protection of human rights after the Maastricht Treaty' in Deirdre Curtin, Ton Heukels (eds), Institutional Dynamics of European Integration: Essays in Honour of Henry G. Schermers (Martinus Nijhoff Publisher 1994).
[1236] art. 6 TEU
[1237] Bantekas I., Oette L. (2020) p. 266
[1238]Bonfanti (2018), Business and Human Rights in Europe: International Law Challenges, Routledge, Oxford.
[1239] O'Brien C. (2021), p. 4
[1240] Parodi (2020), p. 103
[1241] Case 4/73 J. Nold, Kohlen und Baustoffgroßhandlung v Commission of the European Communities [1974] EU:C:1974:51. Para 14
[1242] Article 1 of the Chartert

51.1 of the Charter establishes that EU institutions, bodies and agencies, as well as the Member States, when they are implementing Union law, are bound by the Charter.

Furthermore, according to the interpretation given by the CJEU in the *Cresco* case[1243], the already recognised horizontal direct effect of some fundamental rights protected by the Charter implies an obligation of companies to fully respect them, also in the event that national legislation does not seem consistent with observance of such rights. In other words, a company may not justify a conduct that is in conflict with the Charter on the grounds that a national rule permits it to engage in such conduct, if the fundamental rights in question have horizontal direct effect. Therefore, from a substantive point of view, the interpretative role of the CJEU will be even more important for the purpose of determining which rights have horizontal direct effect.

Considering the procedural dimension, the direct effect of Article 47 of the Charter improves access to effective judicial remedies in the case of business-related human rights violations, making the protection established by the Charter effective. This assumption applies both for individuals and for the undertakings themselves.[1244]

Moreover, regarding the duty to protect human rights in the case of corporate activities, the reference is to the MS and EU's respective competences[1245] in company law. The regulation of companies' duty of care falls under EU shared competences in company law: art.50.2.g TFEU gives to EU the competence to harmonise national company law in order to attain freedom of establishment of companies. On the basis of art.50.1, EU has, indeed, adopted several directives harmonising company law.[1246] In conjunction with art. 50, art.114 TFEU allows the EU to approximate legislation to ensure the establishment and proper functioning of the internal market, giving to the EU broad competence to harmonize legal and economic conditions for doing business across the EU. Thus, it is evident an increasing interest for B&HR concerns within the EU law framework, which will be analysed in depth in the next paragraph.

A Pathway towards an EU Strategy on Business & Human Rights

Over the past years, the EU has advanced a growing commitment to make B&HR part of its political agenda, including a *smart mix* of policy and legislative actions, forming the EU Strategy on B&HR. The result of such flexible and multiform EU approach to the elaboration of a B&HR Strategy is a constantly evolving framework built on different legal sources, including policy initiatives, guidance, direct legislative proposals and indirect regulatory frameworks, which will be addressed in a nutshell.[1247]

Key initiatives started blossoming in the early 2000s, when the European Commission made its first efforts towards the development of a coherent EU policy on Corporate Social Responsibility (CSR), issuing the *EU Commission Communication on Corporate Social Responsibility* in 2001. The very first EU approach on the matter started focusing on the notion of CSR, defined by the EU Commission in 2001 as:

> "A concept whereby companies decide voluntarily to contribute to a better society and a cleaner environment"[1248] and thus "integrate social and environmental concerns in their business operations and in their interaction with their stakeholders on a voluntary basis".[1249]

[1243] Case C-193/17, Cresco Investigation GmbH v Markus Achatzi
[1244] Parodi (2020), p. 105
[1245] As pointed out by the European Commission in its Staff working document on implementing the UNGPs, in the EU context, Member States and EU institutions share the duties embedded in the UNGPs on the basis of their respective competences
[1246] For example: the "Shareholder Rights Directive" and its 2017 amended version; the "EU Accounting Directive" with a detailed legal definition of parent company for the purpose of consolidated accounts and reports.
[1247] Gatta F. (2020), pp. 248-249
[1248] EU Commission (2001) Green Paper, Promoting a European Framework for Corporate Social Responsibility, 18 July 2001, 6 com(2001)366 final
[1249] EU Commission (2001), Promoting a European Framework for Corporate Social Responsibility, COM

Thus, the initiatives carried out in the first decade of the 2000s[1250] were limited to a general call on business enterprises to voluntarily integrate social and environmental concerns in their business operations. Nonetheless, in 2011 the European Commission inaugurated a new approach issuing *Communication A Renewed EU Strategy 2011–14 for Corporate Social Responsibility.*[1251] The Commission revised the CSR definition integrating a B&HR perspective in line with the UNGPs, referring to:

> "The responsibility of enterprises for their impacts on society's going beyond the mere voluntary commitment to contribute to a better society or the compliance with applicable legislation, exhorting European enterprises to encompass the adoption of processes to integrate social, environmental, ethical, human rights, consumer concerns into their business operations and core strategy, in close collaboration with their stakeholders. The main aim is to maximize the creation of shared value for their owners/shareholders, for other stakeholders and the society at large, and, at the same time, to identify, prevent and mitigate their possible adverse impacts."

In comparison to the previous definition, the element of voluntarism is replaced by a UNGPs-based approach, where accountability plays a central role, promoting a smart-mix of voluntary and regulatory measures.[1252] The Communication highlighted the "need to give greater attention to human rights, which have become a significantly more prominent aspect of CSR"[1253] and that the implementation of the UNGPs "will contribute to EU objectives regarding specific human rights issues".[1254] Commitment is shown by EU to integrate internationally recognized principles and guidelines into its own CSR policies, especially the UNGPs, entailing "respect for applicable legislation and for collective agreements between social partners". It, further, clarified that "European policy should be made fully consistent with the UNGPs framework" and all European enterprises are expected "to meet the corporate responsibility to respect human rights, as defined in the UNGPs". [1255] Implementing the UNGPs is, indeed, critical for contributing to "EU objectives regarding specific human rights and core labour standards, as child labour, forced prison labour, human trafficking, gender equality, non-discrimination, freedom of association and the right to collective bargaining".

Furthermore, on the link between B&HR and public procurement, the Communication refers to public procurement as potential mechanism "to strengthen market incentives for CSR". [1256] While "the positive impacts of CSR on competitiveness are increasingly recognized", enterprises "still face dilemmas when the most socially responsible course of action may not be the most financially beneficial, at least in the short term". Therefore, "MS and public authorities at all levels are invited to make full use of all possibilities offered by the current legal framework for public procurement" integrating environmental and social criteria into public procurement, outlining the need to non-discriminate SMEs, fostering equality of treatment and transparency". The Communication, therefore, could be read as an effort to reconcile respective requirements of public procurement and human rights law.[1257]

[1250] EU Commission (2002) 'Corporate Social Responsibility: A Business Contribution to Sustainable Development', com(2002) 347 final; EU Commission (2006) 'Implementing the Partnership for Growth and Jobs: Making Europe a Pole of Excellence on Corporate Social Responsibility', com(2006)136 final.

[1251] EU Commission (2011) Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions "A renewed EU strategy 2011–14 for Corporate Social Responsibility", COM/2011/0681 final, 6

[1252] Bonfanti, A, (2018)

[1253] EU Commission (2011) COM/2011/0681, P. 5

[1254] Ibid, para 4.8.2

[1255] For an overview of the progress of the various actions undertaken by the European Commission in the B&HRs domain since 2011 CSR Strategy, see EU Commission (2019) 'Corporate Social Responsibility, Responsible Business Conduct, and Business & Human Rights: Overview of Progress', Commission Staff Working Document, swd(2019) 143 final.

[1256] EU Commission (2011) COM/2011/0681, Section 4.4.2.

[1257] O' Brien, C. (2015), Essential services, public procurement and human rights in Europe

In addition, to promote effective enforcement, in the Communication it is expected that "all European enterprises meet the corporate responsibility to respect human rights" and all "EU MS are invited to develop by the end of 2012 National Action Plans". In 2011, indeed, EU became the first region to call on its governments to develop specific National Action Plans (NAPs)[1258] to implement the UNGPs, as recommended by the *UN Working Group on Human Rights and Transnational Corporations and Other Business Entities*.[1259]

Also, the European Parliament promoted efforts in the direction of more coherence in the field of B&HR, endorsing the UNGPs as the most authoritative B&HR international source and emphasizing the need to develop an EU strategy based on them. In the *Resolution on Corporate Social Responsibility: Accountable, Transparent and Responsible Business Behaviour and Sustainable Growth*, it outlined the need for a robust legal framework in line with other international standards.[1260] In the *Resolution on Corporate Social Responsibility: Promoting Society's Interests and a Route to Sustainable and Inclusive Recovery*, it called for a strengthened implementation of international sources on CSR and B&HR, recommending their uniform implementation by Member States "so as to avoid disparate national interpretations".[1261]

In the pathway towards a EU B&HR Strategy, other relevant initiatives are: the EU Commission Communication *Trade for All (2015)*; the EU Council *Action Plan on Human Rights Democracy* 2015-2019;[1262] the *EU Action Plan on Human Rights and Democracy 2020-2024.*[1263] The *Action Plans on Human Rights and Democracy*, pushed Member States to adopt NAPs on B&HR, attracting high levels of participation, both inside and outside the EU.[1264] The uptake of NAPs on B&HR in Europe advanced since 2013 will be assessed in details in Chapter 6, with reference to key measures in the direction of human rights protection in public procurement activities, both at legislative and policy level.[1265]

At regulatory level, a number of legislative initiatives directly and indirectly impacting HRDD have emerged at EU level since 2000s, classified in the table below and unpacked in depth in the next paragraphs. First of all, some regulatory initiatives at corporate and financial level have impacted due diligence in partial and indirect way, including non-financial reporting and sustainable investment rules as the EU Non-financial Reporting Directive,[1266] and the Corporate Sustainability Reporting Directive,[1267] and the EU Taxonomy Regulation for sustainable activities.

[1258] See European Commission (2014) Corporate Social Responsibility: National Public Policies in the European Union – Compendium; European Commission (2015) Commission Staff Working Document on Implementing the UN Guiding Principles on Business and Human Rights – State of Play, swd(2015)144 final.
[1259] Following the end of the SRSG's mandate in 2011, established to promote the "effective and comprehensive dissemination and implementation" of the UNGPs. UN Working Group on B&HR published its official NAP guidance in December 2014
[1260] European Parliament (2012) Resolution on Corporate Social Responsibility: Accountable, Trans-parent and Responsible Business Behaviour and Sustainable Growth, (2012/2098(ini)), para 54.
[1261] European Parliament (2012) Resolution on Corporate Social Responsibility: Promoting Society's Interests and a Route to Sustainable and Inclusive Recovery, (2012/2097(ini)), para 31.
[1262] Council of the EU (2012) EU Strategic framework and Action Plan on Human Rights and Democracy', 11855/12. Action n.18, letter b
[1263] Sets as a priority to reinforce the EU's global leadership on B&HR, by enhancing the coordination and coherence of EU actions in this area. The Action Plan includes a commitment for the Union and Member States to strengthen their engagement to actively promote the implementation of international standards on responsible business conduct such as UNGPs and the OECD Guidelines on Multinational Enterprises and Due Diligence.
[1264] Bordignon, M (2016) 'State commitment in implementing the UNGPs and the emerging regime of national action plans: a comparative analysis'. Human Rights & International Legal Discourse
[1265] See OHCHR Repository Working Group on Business and Human Rights on B&HR NAPs. 22 other States are in the process of developing a NAP
[1266] EU (2014) Non-Financial Reporting Directive (Directive 2014/95/EU) that requires large companies to disclose certain information on the way they operate and manage social and environmental challenges
[1267] EU Commission (2021) Corporate Sustainability Reporting Directive 2021/0104(COD) – Commission proposal (March 2021)

Secondly, other sectorial regulatory frameworks have laid down some specific supply chain due diligence obligations, as the EU Timber Regulation (2010)[1268] repealed by the new Regulation (EU) 2023/1115 on deforestation-free products, and the EU Conflict Minerals Regulation (2017).[1269]
Thirdly, concerning more comprehensive EU horizontal due diligence regimes, the blossoming of such partial and sectorial initiatives culminated with the announcement in April 2020 by the EU Commissioner for Justice Didier Reynders, of the European Commission's intention to introduce a mandatory human rights due diligence legislation in 2021. The urgency of such regulation has been outlined by the *EU Parliament Study on Due Diligence Through the Supply Chain*, commissioned by the European Commission's Directorate General for Justice and Consumers, deriving from the Commission *2018 Action Plan on Financing Sustainable Growth* and the EU Parliament 2018 *Report on Sustainable Finance*. More on the proposed Directive and related legislative *iter* will be unpacked in the next paragraphs.

Table 5.4 The EU B&HR Momentum – Relevant legislative and policy initiatives linked to HRDD

EU Transparency Disclosure Regulatory Frameworks	**EU Sectorial Due Diligence Regulations**	**EU Comprehensive due diligence frameworks**
• Non-Financial Reporting Directive (2014) • Sustainable Finance Disclosure Regulation (2019) • EU Taxonomy Regulation (2020) • Corporate Sustainability Reporting Directive (2021)	• EU Timber Regulation (2010) • EU Conflict Minerals Regulation (2017) • EU Regulation 2023/1115 on deforestation-free products (2023)	EU Commission Sustainable Corporate Governance Initiative (2020): • European Commission, Study on due diligence requirements through the supply chain • European Parliament, Briefing on Towards a mandatory EU system of due diligence for supply chains • European Parliament, Study on Corporate due diligence and corporate accountability European added value assessment • European Parliament, Study on Corporate Social Responsibility (CSR) and its implementation into EU Company law 2021: • European Commission, Summary report – public consultation on Sustainable Corporate Governance Initiative • European Parliament, Report with recommendations to the Commission on corporate due diligence and corporate accountability 2022: • European Commission, Proposal for a Directive on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937 • Council of the European Union, negotiation position in the General Approach 2023: • European Parliament position, June 2023. • Provisional Agreement between the Council of European Union and the European Parliament, December 2023 2024:

[1268] EU (2010) EU Timber Regulation (Regulation (EU) No 995/2010) that requires companies or persons placing timber or timber products on the EU market to conduct due diligence in order to determine the source of the timber and its legality.
[1269] EU (2017) Conflict Minerals Regulation (Regulation 2017/821/EU), lays down supply chain due diligence obligations for EU importers of tin, tantalum and tungsten, their ores, and gold originating from conflict-affected and high-risk areas

		• Council of the European Union, Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937 - Letter to the Chair of the JURI Committee of the European Parliament

5.2.3 Legislative developments on *human rights due diligence:* public procurement opportunities?

EU Transparency Disclosure Regulatory Frameworks

A number of EU regulatory measures in the field of responsible and sustainable business conduct have addressed only partially due diligence components encouraging the adoption of due diligence processes among undertakings, although the focus of such regulatory frameworks was not merely and comprehensively on due diligence. For example, this is the case of the Non-Financial Reporting Directive 2014/95/EU repealed by the Corporate Sustainability Reporting Directive (CSRD) entered in force in 2023, the Sustainable Finance Disclosure Regulation (SFDR) and the EU Taxonomy Regulation for sustainable activities (2020). They are all examples of binding frameworks highlighting a growing *momentum* for human rights and due diligence in business.

a) Corporate Sustainability Reporting Directive

Sustainable corporate governance has been mainly fostered indirectly by imposing reporting requirements in the Non-Financial Reporting Directive (NFRD)[1270] - already mentioned in Chapter 4 – mandating public disclosure of non-financial information, including human rights adverse impacts. The Directive addressed approximately 12000 companies[1271] concerning environmental, social and human rights related risks, impacts, measures (including due diligence) and policies. The NFRD had some positive impact improving responsible business operations, however different studies demonstrated that the majority of companies did not take sufficient account of their adverse impacts in their supply chains,[1272] showing inadequacy.[1273] Meanwhile studies on the uptake and performance of HRDD by large European companies displayed poor results.[1274]

By 2020, the EU had committed to a European New Green Deal,[1275] and the goal of a systemic redirection of capital towards sustainably-operating companies. Thus, a new Corporate Sustainability Reporting Directive (CSRD) was proposed in 2021 which entered into force in January 2023, superseding the 2014 NFRD,[1276] modernising and reinforcing the rules concerning sustainability reporting. It provides that reporting required by companies should extend to "the full range of environmental, social and governance issues relevant to a company's business', including information

[1270] EU (2014) Directive 2014/95/EU amending Directive 2013/34/EU as regards disclosure of non-financial and diversity information by certain large undertakings and groups (OJ L 330, 15.11.2014, p. 1–9). The NFRD is therefore an amendment of the Accounting Directive, i.e. of Directive 2013/34/EU on the annual financial statements, consolidated financial statements and related reports of certain types of undertakings, amending Directive 2006/43/EC and repealing Council Directives 78/660/EEC and 83/349/EEC (OJ L 182, 29.6.2013).

[1271] Large public-interest entities with more than 500 employees (and the balance sheet total or net turnover of which exceeds the Accounting Directive's threshold for large enterprises), including listed companies, banks and insurance companies.
See CEPS (2020) Study on the Non-Financial Reporting Directive, prepared for the European Commission to support the review of the NFRD

[1272] The Impact Assessment accompanying the Commission's proposal for the Corporate Sustainability Reporting Directive (SWD/2021/150 final) and the CEPS' Study on the Non-Financial Reporting Directive found a limited change in corporate policies as a result of the NFRD. Main stakeholders who could not identify a clear pattern of change in corporate behaviour driven by these reporting rules.

[1273] Alliance for Corporate Transparency (2019) An Analysis of the Sustainability Reports of 1000 Companies Pursuant to the EU Non-financial Reporting Directive', Report, 2019,

[1274] O'Brien C., Martin-Ortega O. (2020), 'EU Human Rights Due Diligence Legislation', supra note 61, p. 2; NYU Stern Center For Business And Human Right (2019) Assessing Legislation on Human Rights in Supply Chains: Varied Designs but Limited Compliance', Corporate Human Rights Benchmark (2020) 'Total Ranking – Europe and Central Asia'

[1275] European Commission (2019), The European Green Deal, COM (2019) 640 final 11.12.2019

[1276] European Commission (2021), Proposal for a directive amending Directive 2013/34/EU, Directive 2004/109/EC, Directive 2006/43/EC and Regulation (EU) No 537/2014, as regards sustainable corporate, COM (2021) 189 final 21.04.2021.

on companies global supply chains regarding issues such as forced and child labour". The new rules, indeed, ensure that investors and other stakeholders have access to the information they need to assess the impact of companies on people and the environment and for investors to assess financial risks and opportunities arising from climate change and other sustainability issues.[1277] The scope of application has been extended largely, covering all large and all listed companies[1278], as well as listed SMEs.[1279] Some non-EU companies will also have to report if they generate over EUR 150 million on the EU market. Further, reporting costs will be reduced for companies over the medium to long term by harmonising the information to be provided.

Regarding the key obligations, companies subject to the CSRD will have to report according to *European Sustainability Reporting Standards* (ESRS), developed by the EFRAG - the *European Financial Reporting Advisory Group*- which published the first set of standards in December 2023 under the form of a delegated regulation, published in the Official Journal of the EU as legally binding.[1280]

Such standards apply to companies under the scope of the CSRD regardless of which sector they operate it and they are tailored to EU policies, while building on and contributing to international standardisation initiatives.

In details, the ESRS outline the metrics companies must report and how to report them to comply with CSRD disclosure requirements. There are 12 ESRS in all, which detail disclosures and metrics across sustainability matters in four categories:

- Cross-cutting: General principles and general disclosures.[1281]
- Environmental: Climate change, pollution, water and marine resources, biodiversity and ecosystems, resource use and circular economy.
- Social: Own workforce, workers in the value chain, affected communities, consumers and users.
- Governance: Business conduct.

Another peculiarity of CSRD is that the reporting must meet the standard of double materiality. This means organizations must report on both (i) impact materiality – namely the impact businesses have or are likely to have on sustainability matters (for example, carbon emissions, workforce diversity, respect for human rights); (ii) financial materiality – namely the impact that sustainability matters have or are likely to have on the organization's finances (for example, cash flows, risk, access to funding).

Regarding due diligence, links with the UNGPs are evident in the Directive[1282] regulating expressly the last step of the HRDD process, namely the reporting stage. In details, article 19a.1 and article 29a.1 require undertakings to disclose information about five reporting areas,[1283] including due diligence

[1277] European Commission, Corporate Sustainability Reporting, available at https://finance.ec.europa.eu/capital-markets-union-and-financial-markets/company-reporting-and-auditing/company-reporting/corporate-sustainability-reporting_en

[1278] The sustainability reporting obligation would apply to all large companies as defined by the Accounting Directive (which the CSRD would amend), so approximately 49,000, compared to around 11 000 covered by the earlier NFR Directive.

[1279] By 2028, all of the following organizations, or undertakings, need to comply with the CSRD:

- Listed undertakings: These include any companies listed on an EU-regulated market exchange—except for listed 'micro undertakings' that fail to meet two of the following three criteria on consecutive balance sheet dates: (i) at least EUR 450,000 in total assets; (ii) at least EUR 900,000 in net turnover (revenue); (iii) at least 10 employees (average) throughout the year.
- EU-based large undertakings, listed or not: These include any listed or non-listed companies that meet two of the following three criteria on any two consecutive balance sheet dates: (i) at least EUR 25 million in total assets; (ii) at least EUR 50 million in net turnover; (iii) at least 250 employees (average) during the year.
- "Third-country" undertakings: These include non-EU parent companies, with annual EU revenues of at least EUR 150 million in the most recent two years, and also own: (i) a large EU-based undertaking, or (ii) an EU-based subsidiary with securities listed on an EU-regulated market exchange, or (iii) an EU branch office with at least EUR 40 million in net turnover.

[1280] In February 2024, the UE institutions agreed to postpone by two years the deadline for adopting sector-specific European Sustainability Reporting Standards (ESRS). Sector specific ESRS are expected to be released by June 2026, what does not impact the CSRD effective dates.

[1281] Cross-cutting reporting is required of all organizations governed by the CSRD, while ESG reporting is mandatory for those organizations that consider them material.

[1282] Recitals 32 and 45 CSRD

[1283] Business model; policies, including due diligence processes implemented; the outcome of those policies; risks and risk management; and key performance indicators relevant to the business

processes with regard to sustainability matters[1284] – which include human rights. Companies need to outline specific policies pertaining to sustainability matters and describe due diligence for tracking and enforcing these policies. Thus, they must disclose their due diligence process for identifying and mitigating the social and environmental impacts in their value chains and supply chains. Finally, target metrics and transition plans are crucial as companies must share their sustainability targets, progress toward achieving them, and how those targets support a transition to a sustainable economy and achieving net-zero emissions by 2050, as EU laws require.[1285]

b) Sustainable Finance Disclosure Regulation

Another relevant regulatory framework on sustainability financing is the Sustainable Finance Disclosure Regulation (SFDR) [1286], a fundamental pillar of the EU Sustainable Finance agenda, introduced by the European Commission as a core part of its 2018 Sustainable Finance Action Plan. The Regulation applies to financial market participants and financial advisers and imposes comprehensive sustainability disclosure requirements covering a broad range of *environmental, social & governance* (ESG) metrics at both entity- and product-level. The main provisions of the SFDR have been applicable as of 10 March 2021, with a Delegated Act containing more precise disclosure standards adopted by the European Commission. Under the SFDR, undertakings are required to publish, among others, a statement on their due diligence policies with respect to principal adverse impacts of their investment decisions on sustainability factors on a comply or explain basis. 'Sustainability factors' mean environmental but also social and employee matters, respect for human rights, anti-corruption and anti-bribery matters. At the same time, for companies with more than 500 employees the publication of such a statement is mandatory, and the Commission is empowered to adopt regulatory technical standards on the sustainability indicators in relation to the various types of adverse impacts.

Finally, in the context of the market for ESG investment products and investments in companies and business activities promoting and not harming human rights, the Taxonomy Regulation[1287] is worth to be mentioned outlining the emergence of human rights risks in business and finance. It constitutes a transparency tool that facilitates decisions on investment and helps tackle greenwashing by providing a categorisation of environmentally sustainable investments in economic activities that also meet a minimum social safeguard. The reporting covers also minimum safeguards established in Article 18 which refers to procedures' companies should implement to ensure the alignment with the OECD Guidelines for Multinational Enterprises and the UNGPs, including the principles and rights set out in the eight ILO fundamental conventions and the International Bill of Human Rights when carrying out an economic activity categorized as "sustainable".

All the aforementioned regulatory frameworks do not impose direct substantive duties on companies other than public reporting requirements, thus investors can use such information when allocating capital to companies. Indeed, by requiring companies to identify their adverse risks related to human rights in all their operations and supply chains, such regulatory systems may help in providing more detailed information to the investors to allocate capital to responsible and sustainable companies. However, they do not impose comprehensive HRDD obligations and they do not include any mention to public procurement and public investments. Anyway, sustainability reporting obligations have inevitable impacts also suppliers of public entities and contracting authorities, that fall under the

[1284] The sustainability matters might include: Environmental protection; Treatment of employees; Management and corporate board diversity; Social responsibility; Human rights; Anti-corruption; Anti-bribery

[1285] IBM (2023) What is the Corporate Sustainability Reporting Directive (CSRD)?, available at https://www.ibm.com/topics/csrd

[1286] EU (2019) Regulation (EU) 2019/2088 of the European Parliament and of the Council of 27 November 2019 on sustainability-related disclosures in the financial services sector, OJ L 317, 09.12.2019, p. 1.

[1287] EU (2020) Regulation 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 (OJ L 198, 22.6.2020, p. 13–43).

Directives and Regulations' scope, thus they are to be considered in the interlink between public procurement and B&HR.

EU Sectorial Due Diligence Regulations

Further regulations are examined as examples of sectorial incorporation of supply chains due diligence obligations into legally binding EU legal frameworks related to specific products and sectors.

a) The EU Timber Regulation and the Regulation on Deforestation-Free Products

The EU Timber Regulation 995/2010[1288] is one of the first examples including international principles on due diligence and responsible business conduct in an EU legal act, although it was adopted before the UNGPs. This regulation, part of the EU action to promote legal timber trade and achieve sustainable forest management[1289] and applicable to both imported and domestically produced timber and timber products, was adopted for different reasons: (i) to prohibit the placement of illegally harvested timber and products derived from such timber on the EU market; (ii) to require EU operators who place timber products on the EU market to exercise due diligence to minimise the risk of placing illegally harvested timber, or timber products containing illegally harvested timber; (iii) to require EU traders to keep records of their suppliers and customers.

In terms of HRDD, it lays down specific due diligence obligations for operators and traders who place timber and timber products on the market, to undertake a risk management exercise to minimise the risk of placing illegally harvested timber, or timber products containing illegally harvested timber, on the EU market. Article 6 establishes a peculiar "due diligence system" based on procedures and measures concerning three key elements: (i) access to information[1290]; (ii) risk assessment[1291]and (iii) risk mitigation[1292].

The Regulation includes also peculiar monitoring mechanisms: MSs are subject to monitoring obligations being responsible for checking whether operators comply with the due diligence requirements and, in case of non-compliance, for applying sanctions.

In 2023, a new Regulation on Deforestation-Free Supply Chains[1293] has entered into force, repealing the EU Timber Regulation, with specific focus on certain commodities and product supply chains[1294], aiming at reducing the impact of EU consumption and production on deforestation and forest degradation worldwide. It includes a prohibition of placing on the market such commodities and derived products if the requirement of "legal" and "deforestation free" cannot be ascertained through due diligence. In terms of coverage, this prohibition applies to all operators placing the relevant products on the Union market, including EU and non-EU companies, irrespective of their legal form and size. In terms of impacts on public procurement, the new Regulation bridges gaps in *the State-business nexus* specifically through Article 25.2.d which provides as penalty for non-compliance "the temporary exclusion for a maximum period of 12 months from public procurement processes and from access to

[1288] EU (2010) European Parliament and Council Regulation (EU) 995/2010 of 20 October 2010 laying down the obligations of operators who place timber products on the market [2010] OJ L295/23.

[1289] For an overview of the actions under the EU forest management policy, see European Commission, Forest Law Enforcement, Governance and Trade– Proposal for an EU Action Plan, COM (2003)251 final.

[1290] The operator must have access to information describing the timber and timber products, country of harvest, species, quantity, details of the supplier and information on compliance with the applicable national legislation

[1291] The operator should assess the risk of having illegal timber in his supply chain, based on the information identified above and taking into account criteria set out in the regulation

[1292] When the assessment shows that there is a risk of illegal timber entering the supply chain, that risk can be mitigated by requiring additional information and verification from the supplier.

[1293] EU (2023) Regulation (EU) 2023/1115 of the European Parliament and of the Council of 31 May 2023 on the making available on the Union market and the export from the Union of certain commodities and products associated with deforestation and forest degradation and repealing Regulation (EU) No 995/2010

[1294] The main driver of these processes is the expansion of agricultural land that is linked to the production of commodities like cattle, wood, cocoa, soy, palm oil, coffee, rubber, and some of their derived products, such as leather, chocolate, tyres, or furniture, whose consumption in EU is massive.

public funding, including tendering procedures, grants and concessions". Such provision will have inevitable direct impacts on the public procurement legal framework.

b) **The EU Conflict Minerals Regulation**

Another example of direct incorporation of HRDD can be found in the EU framework on trade in conflict minerals: the so-called Conflict Minerals Regulation, adopted in 2017.[1295] The expression "conflict minerals" refers to high-value metal ores and minerals that armed groups obtain and trade in conflict-affected areas – often using forced labour to mine them – and then sell to fund their activities or to buy weapons, perpetuating hostilities and corruption.[1296]

In 2010, the US was the first jurisdiction enacting a specific legislation on trade in conflict minerals: Section 1502 of the Dodd Frank Act.[1297] The EU followed in 2017 adopting the Conflict Minerals Regulation establishing a "Union system for supply chain due diligence"[1298] and laying down a regime centred on due diligence, traceability and disclosure,[1299] with reference to the OECD 'Due Diligence Guidance for Responsible Supply Chains from Conflict-Affected and High-Risk Areas'[1300] and to the UNGPs.[1301]

Effective from 2021, this Regulation establishes requirements on approximately 600-1,000 EU importers of tin, tantalum, tungsten and gold from conflict-affected and high-risk areas. It requires EU companies to ensure throughout their supply chains to import the four specific minerals only from responsible and conflict-free sources and put in place specific due diligence mechanisms. Importers need to establish a management system that comprises a "chain of custody or supply chain traceability system", following a five-step framework: (i) establishing strong company management systems; (ii) identifying and assessing risks in the supply chain; (iii) designing and implementing a strategy to respond to identified risks; (iv) carrying out an independent third-party audit of supply chain due diligence; (v) reporting annually on supply chain due diligence.

Furthermore, they must also apply overall risk management measures intended to "weed out" gradually non-compliant smelters and refiners from EU supply chains. Such measures should include grievance mechanisms.[1302] Other elements of the overall regime include duties on Member States to appoint competent national oversight authorities[1303]; to publish lists of companies subject to due diligence requirements; and undertake checks on company compliance;[1304] as well as publication by the Commission of a list of global "responsible smelters and refiners".[1305] Finally, the Regulation addresses the entire supply chain phases, setting out specific different rules for upstream and downstream[1306] suppliers. Despite no specific mention is provided on public procurement, the Regulation is relevant in providing a comprehensive approach on due diligence related to the extractive sector, which may have

[1295] EU (2017) European Parliament and Council Regulation (EU) 2017/821 of 17 May 2017 laying down supply chain due diligence obligations for Union importers of tin, tantalum and tungsten, their ores, and gold originating from conflict-affected and high-risk areas [2017] OJ L130/1.
[1296] O'Brien (2021) p. 10
[1297] Section 1502 of the Dodd Frank Act required US-listed companies to carry out due diligence on minerals sourced from the Democratic Republic of Congo and neighbouring countries.
[1298] Conflict Minerals Regulation, Art 1, para 1.
[1299] Regulation (EU) 2017/821 of the European Parliament and of the Council of 17 May 2017 laying down supply chain due diligence obligations for Union importers of tin, tantalum and tungsten, their ores, and gold originating from conflict-affected and high-risk areas.
[1300] OECD (2016) Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas, Paris
[1301] EU (2017) Conflict Minerals Regulation, Recital 5
[1302] Regulation (EU) 2017/821 on supply chain due diligence obligations, Art.5.
[1303] Ibid, art. 10
[1304] Ibid, art 11
[1305] Ibid, art 9
[1306] (i) those importing metal-stage products also have to meet mandatory due diligence rules; (ii) those operating beyond the metal stage do not have obligations under the regulation, but they are expected to use reporting and other tools to make their due diligence more transparent, including, for many large companies, those in the non-financial reporting directive.

implications particularly in suppliers' selection for public procurement of public works and infrastructures.[1307]

In the EU landscape on B&HR, the EU regulatory frameworks indirectly addressing due diligence were outlined together with multiple sectorial Regulations including obligations on due diligence related to specific sectors. It is crucial to outline also the relevance in this landscape of EU initiatives promoting comprehensive due diligence regulatory frameworks. The most emblematic case is the proposed Directive on Corporate Sustainability Due Diligence, which will be unpacked in the next section in depth.

5.2.4 Unpacking the EU Corporate Sustainability Due Diligence Directive: Opportunities, Gaps and Link with Public Procurement

An EU *momentum* helping to level the playing field and to enhance the protection of the environment and human rights in the EU and globally has been crystalized under the aegis of the European Commission, culminating with a proposal for a Directive on mandatory sustainability due diligence-

As a matter of fact, the urgency to regulate HRDD in more comprehensive way is linked to reasons of ineffective implementation of B&HR standards, since only a limited number of undertakings are voluntarily implementing HRDD. Under the *EU Study on Due Diligence through the Supply Chain*, a survey was conducted on more than 300 EU-based firms investigating whether they adopt human rights and environmental due diligence in their supply chains.[1308] The results showed that only 1/3 did so, mainly limited to first-tier suppliers, showing lack of effectiveness in the incorporation of soft-law standards. Lack of effectiveness is also demonstrated by results of the *2019 Alliance for Corporate Transparency* survey of 1000 EU-based firms: 80% companies reported on their human rights policies, but only 22% described the specifics of HRDD processes[1309] with risk to reduce HRDD to a mere "box-ticking" exercise.

Thus, a proposal for a Corporate Sustainability Due Diligence Directive (CSDDD)[1310] has been issued introducing a substantive corporate duty for the companies to perform due diligence to identify, prevent, mitigate and account for external harm resulting from adverse human rights and environmental impacts in the company's own operations, its subsidiaries and in the supply chain.[1311] The long-awaited proposal has been officially adopted by the European Parliament and the Council on 24th April 2024.

Legislative Iter

The *EU B&HR momentum* culminated with a proposal to adopt a mandatory HRDD Directive launched in April 2020 by the EU DG-JUST, under the Sustainable Corporate Governance Initiative.[1312] In March 2021, the European Parliament *Resolution with recommendations to the Commission on corporate due diligence and corporate accountability*[1313] has been issued. Then, the negotiation process of a draft Directive began in 2022, followed by the release in February 2022 of the Commission's

[1307] Trevino-Lozano L., Ortega O. (2023) Sustainable public procurement of infrastructure and human rights: linkages and gaps, in Trevino-Lozano, Ortega (eds) Sustainable Public Procurement of Infrastructure and Human Rights: Beyond Buying Green

[1308] European Parliament (2020) Study on Due Diligence Through the Supply Chains, Responsible Business Conduct Working Group

[1309] Alliance for Corporate Transparency (2019) Research Report: An Analysis of the Sustainability Reports of 1000 Companies Pursuant to the EU Non-Financial Reporting Directive' (2020)

[1310] Council of the European Union (2024) Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937 - Letter to the Chair of the JURI Committee of the European Parliament

[1311] Treviño-Lozano, L., & Uysal, E. (2023)

[1312] European Commission (2020) Sustainable corporate governance: Inception Impact Assessment, Ref. Ares(2020)4034032

[1313] Resolution 2020/2129(INL): Recommendations as to the content of the proposal requested recommendations for drawing up a Directive of the EU Parliament and Council on corporate due diligence and corporate accountability

Proposal for a Directive on Corporate Sustainability Due Diligence (CSDDD).[1314] The Council of the European Union officially presented its negotiation position on the proposal in a "General Approach"[1315] in December 2022, and the European Parliament settled its position in June 2023.[1316] Then, the *trilogue* legislative process has followed: the three EU institutions – European Commission, European Parliament, Council of European Union - have begun joint negotiations on the final law. After inter-institutional technical negotiations, the Council and the European Parliament have reached a provisional agreement in December 2023, framing the scope of the Directive, clarifying the liabilities for non-compliant companies, better defining the different penalties, and completing the list of rights and prohibitions that companies should respect.[1317] The text provisionally agreed under the Spanish presidency, anyway, failed to secure a majority in the Council, because of the blockage by some member states. After a stalemate, the Belgian presidency proposed a number of changes to get enough support, and get the text voted by the Council on 15th March 2024.[1318]

On 19 March 2024, the European Parliament's Legal Affairs Committee (JURI Committee) gave a green light to the long-awaited CSDDD adopting the text with 20 votes for, 4 against and no abstentions. The text has been formally approved by the European Parliament and agreed with the Council on 24th April 2024 with 374 votes against 235 and 19 abstentions.[1319] In terms of next steps, the Directive will enter into force on the twentieth day following its publication in the EU Official Journal and will need to be transposed by MSs into national legislation[1320] - each MS will have two years for its transposition. The Directive will, then, start to apply to companies in a phase-in way from 2027 and onwards, starting with the largest companies.[1321]

Scope and Obligations

In terms of subject matter, the Directive lays down (1) due diligence obligations for large companies regarding actual and potential human rights and environmental adverse impacts, with respect not only to their own operations, but also those of their subsidiaries, and the operations carried out by business partners in the company's chain of activities. The definition of "chain of activities" has both an upstream[1322] and downstream[1323] components. Thus, the Directive covers the upstream business partners of the company - working in design, manufacture, transport and supply- and partially the downstream

[1314] On 4 April 2022, in the Parliament plenary, the file has been referred to the Committee on Legal Affairs (JURI). The JURI Committee has appointed Lara Wolters as rapporteur. The European Economic and Social Committee (EESC) has adopted a mandatory opinion on 14 July 2022. On 7 November 2022, the rapporteur has published the draft report, while eight Parliament committees provided opinions. On 25 April 2023 JURI Committee adopted its report on the proposal, and demanded key amendments.

[1315] European Council (2022) General Approach

The Council adopted its negotiating position ('general approach') on 1 December 2022. The Council's text introduced a phase-in approach regarding the application of the rules laid down in the directive.

[1316] On 1 June 2023, the Parliament voted in plenary the JURI report, and adopted amendments to the Commission proposals by 366 votes to 225, with 38 abstentions. The amendments voted by the Parliament plenary relate to: 1) scope of application; 2) integration of due diligence into their corporate policies; 3) prevention of potential negative impacts; 4) mitigating actual negative impacts; 5) exchanges with stakeholders; 6) guidelines; 7) combating climate change; 8) sanctions.

[1317] The provisional agreement clarifies obligations for companies described in Annex I, a list of specific rights and prohibitions which constitutes an adverse human rights impact when they are abused or violated. The list makes references to international instruments that have been ratified by all member states and that set sufficiently clear standards that can be observed by companies.

[1318] For a full overview on the timeline see: European Parliament (2024) Legislative Train Schedule: Legislative proposal on Corporate Sustainability Due Diligence, In "An Economy that Works for People"

[1319] European Parliament news (2024) Due diligence: MEPs adopt rules for firms on human rights and environment

[1320] https://www.insideenergyandenvironment.com/2023/12/provisional-agreement-on-the-eus-corporate-sustainability-due-diligence-directive-csddd-key-elements-of-the-deal/

[1321] (i) From 2027: Companies with 5,000+ employees and a net turnover of 1 ,500 million EUR must comply. (ii) From 2028: Companies with 3,000+ employees and a net turnover of 900 million EUR must comply. (iii) From 2029: Companies with 1,000+ employees and a net turnover of 450 million EUR must comply.

[1322] The upstream chain comprises activities of a company's suppliers in connection with the company's production of goods or provision of services, including the design, extraction, sourcing, production, transport, storage and supply of raw materials, products or parts of products and the development of the product or service.

[1323] The downstream chain includes the activities of a company's downstream business partners related to the distribution, transport and storage of a product if the business partners perform these activities for or on behalf of the company. The due diligence obligations do not cover the disposal of the product (including dismantling, recycling, composting or landfilling). Nor do the activities of a company's downstream business partners in relation to services provided by the company fall within the scope of the CSDDD.

activities, such as distribution, transport, storage or recycling. Further, it outlines also (2) measures on liability for violations of such obligations.

Regarding the scope of application, the proposed Directive, in its final shape, sets out a horizontal framework of due diligence obligations, under article 2 "Scope"[1324], applying to:

(i) EU companies with, on average, more than 1,000 employees and more than EUR 450 million global net turnover, in the last financial year for which annual financial statements have been or should have been adopted

(ii) Non-EU companies – namely companies which are formed in accordance with the legislation of a third country - with more than EUR 450 million net turnover in the EU;

(iii) Companies not reaching the thresholds in (i) and (ii) but are an ultimate parent company of a group that does reach those thresholds in the financial year preceding the last financial year.[1325]

(iv) Franchises with a turnover of over 80 million EUR if at least 22,5 million EUR was generated by royalties.[1326]

Outlining limitations, the last approved thresholds are significantly higher than the ones set out in the provisional agreement;[1327] the lower thresholds for companies operating in industries facing a higher likelihood of adverse impacts have been removed. This eliminates almost 70% of smaller companies operating in high-risk sectors (including textiles, food and extractive sectors)[1328] from the previous scope. Approximately 0.05% of the total number of EU companies are estimated to now be in scope.[1329] While SMEs appear to be outside the scope of the Directive, nonetheless they will be most likely impacted indirectly by the due diligence *cascading*.

The Due Diligence Process

The Directive sets out a horizontal framework of due diligence obligations. Pursuant to article 4 of the proposed Directive, on the "due diligence" process, companies are required to identify, prevent, mitigate and account for their adverse human rights, and environmental impacts, in their own operations and across their global value chains, defining clear obligations of means. The mentioned adverse impacts refer to "child labour, slavery, labour exploitation, production and use of prohibited persistent organic pollutants, deforestation, excessive water consumption or damage to ecosystems." The specific rights and obligations that constitute human rights and environmental impacts referring to international conventions are set out in the Annex to the Directive.

[1324] Council of the European Union (2024) Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937 - Letter to the Chair of the JURI Committee of the European Parliament, article 2

[1325] The CSDDD provides for an exemption regime that could apply in the case of (iii) above. The thresholds must have been met for two consecutive financial years.

[1326] Art. 2: "The company entered into or is the ultimate parent company of a group that entered into franchising or licensing agreements in the Union in return for royalties with independent third-party companies, where these agreements ensure a common identity, a common business concept and the application of uniform business methods, and where these royalties amount to more than EUR 22,5 million in the last financial year for which annual financial statements have been or should have been adopted, and provided that the company had or is the ultimate parent company of a group that had a net worldwide turnover of more than EUR 80 million in the last financial year for which annual financial statements have been or should have been adopted."

[1327] The provisional agreement applied to large limited liability companies, including EU and third-country companies operating in the EU market and smaller companies in high-risk sectors. Indeed, the agreement identified key high-impact sectors (including textiles, food and extractive sectors) requiring more targeted due diligence regime

The three categories under scope were: (1) EU-registered undertakings with more than 500 employees and a net worldwide annual turnover of more than EUR 150 million (Art 2(1)(a)); (2) EU-registered undertakings with more than 250 employees and a net worldwide turnover over EUR 40 million, of which 50% is generated in specific sectors (Art 2(1)(b) (i)-(iii)); and (3) Undertakings registered outside the EU if they generate annual net turnover inside the EU above the earlier stated thresholds (Art 2(2)).

[1328] The sectors identified as high-impact: (1) the manufacture of textiles, leather and related products (including footwear), and the wholesale trade of textiles, clothing and footwear; (2) agriculture, forestry, fisheries (including aquaculture), the manufacture of food products, and the wholesale trade of agricultural raw materials, live animals, wood, food, and beverages; (3) the extraction of mineral resources regardless of where they are extracted from (including crude petroleum, natural gas, coal, lignite, metals and metal ores, as well as all other, non- metallic minerals and quarry products), the manufacture of basic metal products, other non-metallic mineral products and fabricated metal products (except machinery and equipment), and the wholesale trade of mineral resources, basic and intermediate mineral products (including metals and metal ores, construction materials, fuels, chemicals and other intermediate products).

[1329] De Brauw, Blackstone, Westbroek (2024) EU Council approves Amended Version of Corporate Sustainability Due Diligence Directive

In details, Member States shall ensure that companies conduct risk-based human rights and environmental due diligence as laid down in Articles 5 to 11. The precise due diligence steps- enucleated under artt.5-11- should extend not only to a company's own operations, but also to those of its subsidiaries, contractors and subcontractors, at least to the extent of "established business relationships".[1330] Namely, companies would be asked to put in place "cascading" requirements reaching down all suppliers and covering all tiers of the supply chain, as recommended in the 2018 report of the UN Working Group to the General Assembly.[1331] Six specific steps of the "due diligence" process are envisaged:

1) integrating due diligence into policies and risk management systems;[1332]
2) identifying actual or potential adverse impacts[1333] and, where necessary, prioritising potential and actual adverse impacts;[1334]
3) preventing and mitigating potential adverse impacts, and bringing actual adverse impacts to an end and minimising their extent;[1335] providing remediation to actual adverse impacts;[1336] carrying out meaningful engagement with stakeholders;[1337]
4) establishing and maintaining a notification mechanism and complaints procedure;[1338]
5) monitoring the effectiveness of their due diligence policy and measures;[1339]
6) publicly communicating on due diligence.[1340]

At the end of the procedure, if the company does not "cause, contribute to, or is not directly linked to any potential or actual adverse impact on human rights, the environment or good governance", it shall publish a statement and include its risk assessment with data, information and methodology as proof, communicating it on the company website.[1341] A recommendation is to create a European centralised platform, supervised by the national competent authorities, as a Single European Access Point.[1342]
Given the aforementioned steps, there is a close correlation between the proposed due diligence process and the key stages prompted by Pillar 2 of the UNGPs.
Additionally, the CSDDD emphasizes also environmental and climate change risks. A novelty agreed by the Council and the Parliament in December 2023 and approved in March 2024 is that companies shall integrate due diligence into corporate policies and risk management systems and adopt a *climate change transition plan* to ensure that a company's business model complies with limiting global warming to 1.5°C.[1343] The transition plan should include the company's time-bound climate change targets, key actions on how to reach them and an explanation, including figures, of what investments are necessary to implement the plan.[1344]

[1330] European Commission (2024) Article 6.1
[1331] OHCHR (2018), Report of the Working Group on the issue of human rights and transnational corporations and other business enterprises "Corporate human rights due diligence emerging practices, challenges and ways forward" A/73/163
[1332] in accordance with Article 5
[1333] in accordance with Article 6
[1334] In accordance with article 6a
[1335] in accordance with Articles 7 and 8
[1336] In accordance with Article 8.c
[1337] In accordance with Article 8.d
[1338] in accordance with Article 9
[1339] in accordance with Article 10
[1340] in accordance with Article 11
[1341] Article 6
[1342] Proposed by the Commission in Capital Markets Union Action Plan (COM/2020/590).
[1343] The company size and jurisdictional applicability thresholds are still currently unclear. This obligation will add to the disclosures under the Corporate Sustainability Reporting Directive (CSRD), which does not by itself require companies to have climate change transition plans. For companies in scope of both this new CSDDD requirement and the CSRD's reporting requirements, this likely means that they will have to report on their transition plan as part of their annual CSRD disclosure. This potentially heightens the associated-legal risks.
[1344] European Parliament (2024) First green light to new bill on firms' impact on human rights and environment, News.

Penalties and Enforcement

Regarding the Directive enforcement, specific rules on penalties and civil liability in case of infringement of the due diligence obligations are laid down, delineating a specific legal regime to be set-up nationally. The Council and Parliament agreed on the following points[1345] in the 2023 provisional agreement, then confirmed in March 2024:

- Obligations of means: The preamble to the CSDDD states that its main obligations constitute "obligations of means". Companies must take appropriate measures to meet due diligence objectives by effectively addressing adverse impacts, proportionate to the degree of severity and likelihood of the adverse impact. Consideration should also be given to: the specifics of each case; the nature and extent of the adverse impact and relevant risk factors; the specifics of the company's business and its chain of activities; the sector or geographical area in which business partners operate; the company's ability to influence its direct and indirect business partners; and whether the company could increase its sphere of influence.
- Supervision: each EU Member State will designate a supervisory authority in charge of monitoring, investigating and imposing penalties on companies that do not comply with due diligence obligations. Foreign companies will be required to designate their authorised representative based in the member state in which they operate, who will communicate with supervisory authorities about due diligence compliance on their behalf. Furthermore, the Commission will establish a *European Network of Supervisory Authorities* to support cooperation among supervisory bodies.
- Administrative liability and penalties: firms will be liable if they do not comply with their due diligence obligations and will have to fully compensate their victims. The supervisory bodies will conduct inspections and investigations, imposing penalties on non-compliant companies. For companies failing to pay fines imposed on them in the event of violation, different injunction measures are envisaged, including pecuniary penalties based on the turnover of the company at stake. Emphasis is put on the obligation for companies to carry out meaningful engagement including a dialogue and consultation with affected stakeholders, as one of the measures of the due diligence process. The abovementioned EU Member States designated authorities shall impose fines of up to 5% of an organization's net worldwide turnover in case of violations.
- Civil liability: Companies may be held liable for damage caused to a natural or legal person, provided that (i) the company has intentionally or negligently failed to comply with the obligations to prevent and mitigate potential adverse impacts, and bring actual adverse impacts to an end and minimise their extent, where the right, prohibition or obligation listed in Annex I of the CSDDD is aimed to protect the natural or legal person; and (ii) as a result of such a failure, damage has been caused to the natural or legal person's legal interest protected under national law.

  Thus, a company cannot be held liable if damage was caused solely by business partners in its chain of activities.

  Member States will have to adopt complaints mechanisms and engage with individuals and communities adversely affected by their actions. Indeed, the Council and Parliament agreement outlined the need to reinforce access to justice for people affected by corporate adverse impacts, establishing a period of five years to bring claims by those affected (including trade unions or civil

[1345] European Council (2023) Corporate sustainability due diligence: Council and Parliament strike deal to protect environment and human rights
Edmonds-Camara H. et al (2023) Provisional Agreement on the EU's Corporate Sustainability Due Diligence Directive (CSDDD): Key Elements of the Deal, Post, Covington

society organisations). The liability regime does not regulate under what conditions civil proceedings can be brought; this issue is left to national law.[1346]

Most importantly, MSs should set-up new civil liability procedures to allow for in-scope companies to be held liable for the damage caused by breaching their due diligence obligations. Thus, civil liability procedures would be additional to existing national procedures. To foster more access to justice, the agreement limits the disclosure of evidence, injunctive measures, and cost of the proceedings for claimants in comparison to the Commission proposal. As a last resort, companies identifying adverse impacts on environment or human rights by some of their business partners will have to end those business relationships when the impacts cannot be prevented or ended.

Gaps and Opportunities: What about Public Procurement?

The new Directive opens the floor to flourishing debates on potential opportunities to create a European standard on sustainability due diligence and setting up a clearer regulatory framework inspired by the UNGPs, in a regional area where several corporations' parent companies are incorporated and often involved in human rights adverse impacts along their supply chains.[1347]

In terms of opportunities, the Directive would enhance legal certainty for both States and business and foster benefits in the long-term requiring a focus on prevention rather than on remediation of human rights harms. Thus, it would advance better outcomes for people and the planet, by scaling uptake of quality human rights and environmental due diligence and enhancing corporate accountability for due diligence failures.[1348] Addressing challenges of voluntarism, vagueness, fragmentation in HRDD which characterize the current EU legal landscape, the Directive may advance greater harmonization. Indeed, the lack of a joint Union-wide approach may hamper legal certainty for business prerogatives, creating imbalances in fair competition which would in turn disadvantage undertakings that are proactive in social and environmental matters. It may jeopardize the level playing field of enterprises operating in the Union, thus, it is crucial that the rules apply equally to all EU and non-EU undertakings which operate in the internal market. The comprehensive approach standardizing the due diligence steps and the wide and a-sectorial scope of application of the Directive represent key innovations comparing it to EU regulatory frameworks indirectly and partially addressing due diligence or sectorial regulations. The Directive, instead, would apply to all "large undertakings governed by the law of a MS or established in the territory of the Union" above certain thresholds- whether they are private or state-owned or operating as supplier to the State in public procurement situations. Furthermore, the application of the Directive also to non-EU companies under specific conditions open the floor to extraterritorial extension of the EU standards at international level, creating potentials in mainstreaming sustainability due diligence processes worldwide. Addressing potential transnational jurisdiction challenges, the Directive would also apply to companies operating in EU but not established in the EU territory and governed by the law of a third country.

Additionally, the Directive could be an opportunity to bridge accountability and enforcement gaps hindering liability consequences, proper access to justice and effective remedy for victims. As outlined in UNGPs Pillar III on "Access to Remedy", it is crucial to ensure a *smart-mix* of adequate judicial and not-judicial, State and non-State mechanisms. Indeed, as a primary duty of the State is to protect human rights and give access to justice, it is essential to provide adequate public judicial

[1346] In this regard, the text of the proposal allows for more flexibility in various ways, including by stipulating that member states must establish "reasonable conditions" that enable injured parties to grant NGOs or other organisations the authority to file legal actions to protect their rights. The phrase "in their own capacity" has been deleted to give member states more flexibility to apply this rule.

[1347] Bonfanti, A., 2018, Business and Human Rights in Europe: International Law Challenges (Transnational Law and Governance)

[1348] SHIFT (2022) Analysis of the EU Commission's Proposal for a Corporate Sustainability Due Diligence Directive, Shift Project Ltd

mechanisms to hold undertakings liable for damages occurring in their value chains.[1349] Regarding non-judicial measures, Article 9 "Notification mechanism and complaints procedure" requires undertakings to provide grievance mechanisms both as an early-warning mechanism for risk-awareness and as a mediation system, which must be legitimate, accessible, predictable, safe, equitable, transparent, rights-compatible and adaptable.[1350]

Reflecting on the links between public procurement and the Directive, both opportunities and limitations can be detected. In details, gaps emerge in grasping the *State-business nexus* in a comprehensive way representing a missed opportunity and source of legal unclarity.[1351]

Linking public procurement and HRDD constitutes a highly debated and controversial aspect if tracing back the CSDDD negotiation process, leading to multiple iterations on the matter. The European Parliament in its first *Resolution with recommendations to the Commission on corporate due diligence and corporate accountability* (2021) included explicit reference to public procurement.[1352] In details, it advanced the option for contracting authorities to request and evaluate tenderers' compliance with HRDD. It also provided that businesses, under the Directive scope, failing to undertake HRDD obligations, could be temporarily or indefinitely excluded from public procurement.[1353] Under para.19 of the Resolution, Member States were encouraged not to provide State support, including through […] *public procurement* to undertakings that do not comply with the objectives of this Directive. Among the substantive obligations, art. 18.2 on sanctions[1354] was particularly relevant providing that competent national authorities could temporarily or indefinitely exclude undertakings from public procurement, or from state aid, from public support schemes including schemes relying on Export Credit Agencies and loans, resort to the seizure of commodities and other appropriate administrative sanctions.

Such references to public procurement were, then, completely disregarded and removed from European Commission Proposal – issued in February 2022- where a specific article providing for binding requirement on public purchasers was missing.[1355] According to some scholars,[1356] this represented a golden missed opportunity at EU level for effectively grasping the *State-business nexus*.[1357]

Also, the Council adopting its General Approach in 2022 refrained from explicitly mentioning public procurement, as recommended by the Parliament. It only highlighted that the CSDD Directive does not prejudice the application of exclusion grounds to be found in Directive 2014/24.[1358] After further debates on the proposal, the EU Parliament adopted its amended text in early June 2023, calling again

[1349] Most international human rights instruments, including the UDHR (art. 8) and the ICCPR (art. 2) acknowledge the "right to an effective remedy", whereas some other international treaties mention "effective access to justice" (art. 13 of the Convention on the Rights of Persons with Disabilities). EU Charter of Fundamental Rights, Art. 47 - Right to an effective remedy and to a fair trial and ECHR Art.13 on the right to an effective remedy.

[1350] following the effectiveness criteria in Principle 31 UNGPs and the UN Committee on the Rights of the Child General Comment No 16 .

[1351] O'Brien, C. Caranta, R. (2024) Due Diligence in EU Institutions' Own-Account Procurement: Rules and Practice, European Parliament, Policy Department for Budgetary Affairs, Directorate-General for Internal Policies PE 738.335

[1352] Articles 20 and 24 of European Parliament, Corporate Sustainability Due Diligence Amendments adopted by the European Parliament on 1 June 2023 on the Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937.

[1353] Article 18.

[1354] MS shall apply for infringements of the national provisions adopted in accordance with this Directive and enforce them. The sanctions shall be effective, proportionate, dissuasive and shall take into account the severity of the infringements and if the infringement has taken place repeatedly

[1355] European Commission, Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937.

[1356] O'Brien, C., & Martin-Ortega, O. (2020). Missing a Golden Opportunity: Human Rights and Public Procurement. In S. Deva, & D. Birchall (Eds.), Research Handbook on Human Rights and Business Edward Elgar Publishing.

[1357] O'Brien, C. and Martin-Ortega, O. (2019) Discretion, Divergence, Paradox: Public and Private Supply Chain Standards on Human Rights in Bogojevic, Groussot, Hettne (eds), Discretion in EU Procurement Law (Oxford: Hart), University of Groningen Research Paper No. 18/2018

[1358] Recital 63 of Council of the European Union, Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937 – General Approach.

for harmonization between public procurement and human rights, explicitly including the need to assess the application of HRDD in public procurement.[1359] Notably, the Parliament stated that:

> "Under Article 18.2 of the Directive 2014/14/EU (…) Member States are required to take appropriate measures to ensure compliance with obligations under Union law with regard to procurement and concession contracts. Therefore, the Commission should assess whether it is relevant to review these directives to further specify the requirements and measures the Member States are to adopt to ensure compliance with the sustainability and due diligence obligations under this Directive throughout procurement and concession processes, from selection to performance of the contract".[1360]

Interestingly, the Council and the European Parliament in December 2023 took a step back agreeing on the inclusion of an explicit provision on public procurement: compliance with the CSDDD could be qualified as a criterion for the award of public contracts and concessions.[1361] Unlike the initial recommendation of the Parliament, the article provided for the use of HRDD and compliance with the Directive as award criterion and as contract performance condition applicable to the suppliers falling under the Directive scope, rather than as an exclusion ground.

Fortunately, in the final version of the Directive adopted by the Parliament and Council, a direct reference to public procurement has been eventually included, with direct mention of the EU Public Procurement Directives package in the Preamble. Despite the non-binding force of recitals – anyway extremely influential in the interpretation of EU law application - Recital 63 recommends the use of award criteria, contract performance conditions and exclusion grounds related to sustainability due diligence, and suggests to revise the Directives. Indeed, it outlines that MSs *should* ensure that compliance with the obligations resulting from the national measures transposing the CSDDD, or their voluntary implementation, qualifies as an environmental and/or social aspect or element that contracting authorities may take into account as part of the award criteria for public and concession contracts or lay down in relation to the performance of such contracts.[1362]

Regarding exclusion grounds, differently from the last proposals removing reference to exclusion grounds, the Recital outlines that

> "Contracting authorities may exclude or may be required by MSs to exclude from participation in a procurement procedure, including a concession award procedure, where applicable, any economic operator where they can demonstrate by any appropriate means a violation of applicable obligations in the fields of environmental, social and labour law, including those stemming from certain international agreements ratified by all Member States and listed in those Directives, or that the economic operator is guilty of grave professional misconduct, which renders its integrity questionable".

Furthermore, a key opportunity to build up further synergies between legislations in B&HR and public procurement and inspiring future reforming is the suggestion to the Commission to consider to update the EU Public Procurement Directives, to ensure coherence within EU legislation and support implementation. The suggestion regards particularly requirements and measures MS could adopt to ensure compliance with the sustainability and due diligence obligations throughout procurement and concession processes.

[1359] Furthermore, the Parliament referred to the obligations of Member States established in Article 18(2) of the Public Sector Directive. It further called for the EU Commission to assess whether it is relevant to review Directive 2014/24 to ensure compliance with the forthcoming HREDD obligations throughout the procurement process, from selection to performance of the contract.

[1360] Recital 54b of European Parliament, Corporate Sustainability Due Diligence Amendments adopted by the European Parliament on 1 June 2023 on the Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937.

[1361] New proposed article 24

[1362] In accordance with the Directive 2014/24/EU of the European Parliament and of the Council, Directive 2014/25/EU of the European Parliament and of the Council and Directive 2014/23/EU of the European Parliament and of the Council

In terms of obligations, Article 24 on "Public support, public procurement and public concessions" is the only provision referring expressly to public procurement:

> "MSs shall ensure that compliance with the obligations resulting from the national measures transposing this Directive, or their voluntary implementation, qualifies as an environmental or social aspect that contracting authorities may, according to the Public Procurement Directives,[1363] take into account as part of the award criteria for public and concession contracts, and as an environmental or social condition that contracting authorities may, in accordance with those Directives, lay down in relation to the performance of public and concession contracts".

Both the Recital and the article are potentially impactful for bridging gaps between B&HR and public procurement. Nonetheless providing for exclusion ground in case of non-compliance as obligation could have created even stronger impact by excluding *ex-ante* non-compliant suppliers, rather than *ex-post* with consequent difficulties in monitoring and the risk that HRDD remains a mere tick-box exercise. Furthermore, another potential opportunity to strengthen synergies between B&HR and public procurement would be the establishment of Supervisory Authorities and the aforementioned European Network of Supervisory Authorities that would be an important driver in terms of monitoring on human rights related matters. Indeed, as it will be also outlined in the national practices in Chapter 6, difficulties arise for several contracting authorities to set up effective monitoring systems on human rights respect and the existence supervisory authorities may strengthen incentives for suppliers to comply and support contracting authorities in the monitoring process.

Links with the EU Public Sector Directive and Legal Obstacles

Regarding possible links between the two regulatory frameworks on HRDD and public procurement, there are potential interconnections, reciprocal impacts and legal challenges to consider. Indeed, substantial debate remains over whether and how HRDD could be incorporated into public procurement, pursuant to the rules of Directive 2014/24/EU.[1364] The new disposition on public procurement could directly impact the public procurement regime as the compliance with the CSDDD could be qualified as a criterion for the award of public contracts and concessions. Furthermore, as suggested by Recital 63, possible reforming could happen to align the public procurement directives to the new regime.

Moreover, some indirect impacts on public purchasers' practice can be foreseen, providing further legal justifications to include human rights considerations in procurement. Thus, criteria on HRDD, could be included throughout the procurement contracts in different ways – if meeting the LtSM[1365]- including:

- as technical specifications (Article 42) when establishing the characteristics of a product;
- as discretionary exclusion ground (art. 57.4)
- as contract award criteria (Article 67) when assessing and determining the tenderer who will be awarded the contract;
- as contract performance conditions (Article 70) when setting conditions to be complied with by the successful tenderer during the contract performance.

The adopted Directive would have most likely implications on the interpretation of the Public Sector Directive. For example, the interpretation of Article 18.2 would be impacted, expanding the focus on B&HR obligations provided under EU law.

The Directive could also impact the applicability of facultative exclusion grounds for tenderers (57.4.a and 57.4.c), mitigating the risk of contracting with suppliers that abuse human rights. Indeed, the role of supervisory authorities (art. 18-20) monitoring, investigating, sanctioning businesses that fail to

[1363] in accordance with Directive 2014/24/EU of the European Parliament and of the Council, Directive 2014/25/EU of the European Parliament and of the Council and Directive 2014/23/EU of the European Parliament and of the Council,

[1364] Trevino-Lozano, Usal (2023), See section 3. Human rights and environmental due diligence as a contract performance condition

[1365] ibid

comply with due diligence obligations could facilitate public buyers in excluding non-compliant operators.

Further implications relate to selection criteria, since the HRDD reporting could be used by suppliers as proof of technical ability pursuant to art. 58.[1366] This could be reinforced by art. 24 setting the compliance with the CSDDD as possible award criterion of public contracts.

Also, the interpretation of Recital 97 of the Public Sector Directive could be impacted requiring some amendments. Indeed, the Recital provides that "the condition of a link with the subject-matter of the contract excludes criteria and conditions relating to general corporate policy, which cannot be considered as a factor characterising the specific process of production or provision of the purchased works, supplies or services. Contracting authorities should hence not be allowed to require tenderers to have a certain corporate social or environmental responsibility policy in place". The CSDDD would create the condition to use general corporate policy as award criteria (at least for the companies falling under the Directive) creating legal justifications for requiring HRDD as requirement to suppliers despite the LtSM.

Regarding contract performance conditions, the envisaged creation of Model Contractual Clauses (art.12)[1367] and Guidelines provided by the Commission to support companies to comply with the directive (art. 13) provides a powerful opportunity for public contracts.

Possible challenges in practical application must be considered. For example, the inclusion of HRDD as a contract performance condition has been endorsed as a virtuous procurement practice by the EU Commission.[1368] For instance, some countries in Northern Europe have implemented HRDD through templates to be incorporated into public contracts on a voluntary basis.[1369] However, the fundamental challenge to introduce HRDD criteria is linked to meeting the LtSM of the contract, as previously outlined in this chapter. Indeed, to comply with the LtSM, contract performance conditions should have "a link with the performance of the tasks necessary for the production of the goods being tendered".[1370] As confirmed by the case-law, the conditions under which the contractor and its suppliers produce a type of tendered product – including human rights and environmental adverse impacts, as required by HRDD - can meet the LtSM of the contract. Nonetheless, to meet the LtSM requirement, HRDD's scope of application would need to be narrowed down. HRDD's traditional scope would cover all the contractor's operations, supplies and suppliers, and this scope would exceed the LtSM of the contract. To avoid this tension, the six steps of HRDD would need to be limited only to the specific tasks the contractor and its suppliers undertake to produce the type of tendered product. Thus, limiting the scope of HRDD might legally fall within the limits of the LtSM. However, some legal challenges must be considered on the inclusion of HRDD in public contracts and their effectiveness:

1) The first HRDD step regard the contractor's general policies on human rights and the environment. Such policies are essentially CSR policies, which are explicitly prohibited by Directive 2014/24 due to their lack of LtSM of the contract.[1371] Notwithstanding the prohibition of requiring contractors to have general CSR policies, HRDD could still meet the LtSM as long as requirements to have such policies are limited to the contractor's commitments and oversight bodies applicable to the type of tendered product. Also, these policies would need to regard only the suppliers

[1366] Jointly with Part II(d) of Annex XII of the Public Sector Directive

[1367] Art 12: In order to provide support to companies to facilitate their compliance with Article 7(2), point (b), and Article 8(3), point (c), the Commission shall adopt guidance about voluntary model contract clauses.

[1368] For examples see European Commission, Making Socially Responsible Public Procurement Work: 71 Good Practice Cases (2020); European Commission, Buying Social A Guide to Taking Account of Social Considerations in Public Procurement, p. 93.

[1369] See DFO, Contract performance clauses for safeguarding basic human rights in the supply chain.

[1370] European Commission, 'Green Paper on the Modernisation of EU Public Procurement Policy Towards a More Efficient European Procurement Market' (2011), p. 39

[1371] See Recital 97 of the Directive 2014/24. See further O. Outhwaite and O. Martin-Ortega, 10 Human Rights and International Legal Discourse (2016); L. Ankersmit, 26 European Law Journal (2020).

involved in the production of the type of tendered product, and only in relation to the supply by them of the type of tendered product.[1372]

2) A second challenge regards the limitation that the LtSM has over HRDD's steps two to five. To meet the LtSM, the contractor cannot be obliged to assess all the adverse impacts it can be causing or contributing to cause and prioritizing those with more significant risk set in step two. Instead, the contractor would have to focus only on the adverse impacts of the type of tendered products and related suppliers. This constraint extends to steps three, four and five – addressing the identified adverse impacts, tracking and monitoring implementation and communicating – which are ultimately determined by the findings of step two. This may hinder the contractor from assessing, tracking and monitoring implementation and communicating adverse impacts deriving from other commercial operations not related to the type of tendered product. This limited approach poses a trade-off that might undermine the efficiency and aim of HRDD, particularly regarding the undertaking of prioritization by contractors with a large number of entities in their supply chain.[1373]
3) Finally, the last step providing for or cooperating in the remediation of adverse impacts is also problematic for complying with LtSM of the contract. The LtSM is determined by the type of tendered product and it would be met in the extent to which the adverse impact is linked to the suppliers engaged in the production process of the type of tendered products. Also, these suppliers would only be accountable in a public contract for the tasks involved in the production of the type of tendered products and not for any other type of product they might produce. Establishing the cause-consequence connection between the production of the type of tendered products and the adverse impacts might be overall challenging. It appears to be easier when the supplier exclusively produces the type of tendered products. However, it could be difficult to establish this connection when this supplier also produces other products besides the tendered ones.[1374]

All such aspects and challenges may be taken into account for future synergy creation and alignment with the Corporate Sustainability Due Diligence Directive, requiring future reforming.

Conclusion

In conclusion, public procurement may play an important role in encouraging more responsible supply chains.As analysed in this Chapter, in the dynamic European Union scenario, different opportunities are currently flourishing in linking public procurement, sustainable development and B&HR: a *Sustainable Public Procurement trend* has emerged particularly after the 2014 reform process of the Public Procurement Directives, creating multiple opportunities to include sustainability considerations as social and human rights criteria throughout the procurement process. Furthermore, an *EU B&HR momentum* is evident with the blossoming of multiple voluntary and mandatory initiatives in a dynamic and multi-faceted regulatory and policy context. The culmination of such on-going process is the cornerstone Directive on Corporate Sustainability Due Diligence (CSDDD), which opens the floor to multiple debates on the direct and indirect interconnection with the public procurement legal regime. Despite some synergies between public procurement and the B&HR field can be found in the newly approved version of the Directive - Article 24 and Recital 63 - however further efforts in bridging both legal spheres are truly needed for an effective paradigm shift.

In the next Chapter – Chapter 6- the analysis will continue shedding lights on the national level, to investigate selected regulatory frameworks and existing practices developed in EU Member States which could be exemplary in the process of synergy creation between public procurement and B&HR. Existing practices will, indeed, show that it is possible to advance such interconnection with positive

[1372] Treviño-Lozano, L., & Uysal, E. (2023)
[1373] ibid
[1374] ibid

impacts, although the efforts at the international and the regional legal level is still slow, hindered by legal frictions and limitations which would require more legal justification and convergence between law and practice.

Part IV: Exploring Practices at National Level

6. Insights from Practice on B&HR-based Public Procurement at EU Member States Level

Introduction

After having depicted the complex puzzle of voluntary and mandatory measures adopted so far in EU, showing the inevitable link between the *SPP trend* and the *B&HR momentum*, the focus shifts to the EU Member States level. Both regulatory and policy experiences will be considered at domestic level to explore the *status quo* on B&HR and responsible purchasing, to explore opportunities on *B&HR-based public procurement* in the EU regional setting. Then, specific insight will be on selected good practices, scrutinizing possible ways for hardening the soft through public procurement.

The first section (6.1) of the chapter captures a general snapshot of the *State-business nexus* and *B&HR based procurement* in EU Member States, evidencing its uptake and implementation gaps. Despite the developments in EU, implementation challenges remain a concrete obstacle for internalization at domestic level linked to the inherent *soft law* nature of B&HR instruments. Furthermore, on the SPP side, the discretionary power left to the EU Member States in the transposition of the Public Sector Directive and especially of measures related to social considerations, such as Art. 18.2, foster doubts in terms of effective enforcement. Thus, the focus will be on two levels of analysis complementing each other:

- The legislative level, reviewing normative efforts in B&HR and HRDD with potential impact on public procurement; and scrutinizing selected public procurement regulatory frameworks and entry points for SRPP and SPP which could be relevant for the *State-business nexus*.
- The policy level, reviewing the role of soft law instruments and programmatic sources as National Action Plans on SPP and on B&HR fostering initiatives in *B&HR based public procurement*.

In the second section (6.2), two selected domestic practices in EU will be unpacked in depth, to showcase on practices to hardening the soft through public procurement and setting up B&HR-based criteria and requirements.

Sweden is selected as frontrunner country having advanced one of the first and most comprehensive approach on *B&HR based public procurement* – a collaborative model started from a regional pilot-project in the Swedish Counties and then expanded as national initiative. The attention will be on potentials of a Shared Code of Conduct set up between the public authorities and suppliers and the comprehensive development of B&HR criteria tailored for different product categories. The Swedish example represents a good practice on the inclusion of B&HR started as a policy and voluntary practice, then become mandatory and hardened through public contracts.

Furthermore, Italy is selected as case-study. Indeed, the country has an advanced SPP regulatory framework, being one of the few requiring mandatory minimum environmental criteria by law to all public buyers targeted to different product categories.[1375] Despite the legislation is more advanced on the environmental dimension of sustainability, some interesting insights regard also social aspects and B&HR based criteria for categories exposed to human rights risks. Indeed, a set of voluntary social criteria, referring also to human rights and HRDD, are recommended. Despite their non-mandatory nature, their inclusion under Ministerial Decrees is growing for different procurement categories, suggesting a road ahead towards *B&HR based procurement* and further standardization at national level.

6.1. Mapping the Status Quo in EU on B&HR and Public Procurement

After having assessed the mix of mandatory and voluntary measures adopted at EU law level in the previous Chapter, the analysis is narrowed down to the national scale. To depict the EU landscape

[1375] Jannsen W., Caranta R. (2023) Mandatory Sustainability Requirements in EU Public Procurement Law: Reflections on a Paradigm Shift, Hart, see Part 3

and mapping the status quo in EU on *B&HR based public procurement,* different normative initiatives in domestic settings will be at stake highlighting the raising *momentum on B&HR* with efforts towards regulating HRDD at national level and inevitable impacts on public procurement. The domestic perspective is necessary to capture a realistic picture on the actual uptake of Socially Responsible Public Procurement and B*&HR-based public procurement* and to understand common trends, gaps and differences in implementation. Thus, mapping the *status quo*, domestic practices are at stake evidencing a patchwork of different initiatives emerging at both regulatory and policy level in several EU Member States. So, a snapshot on SRPP and B&HR-based public procurement in EU Member States will be provided with attention to hard and soft sources. Finally, the legal role of National Action Plans (NAPs) will be addressed as relevant instruments to connect SPP and B&HR in a field where specific sources lack or are under current negotiation.

Normative Developments in Domestic Settings on B&HR

In Chapter 5, the EU B&HR Strategy emerged as a patchwork of voluntary and mandatory initiatives internalizing due diligence elements and the UNGPs within the EU setting. As a matter of fact, a progressive and evolving process towards the UNGPs implementation through mandatory HRDD measures[1376] is visible at Member States level. Some countries like France, the Netherlands and Germany have integrated due diligence obligations into their legal frameworks with specific duties for businesses to address and account for adverse impacts. Thus, to complete the puzzle, it is essential to shed lights also on Member States initiatives and regulatory frameworks, which are relevant in stimulating and reinforcing the debates in EU on mandatory HRDD.

Member States' efforts to adopt specific legislations on mandatory HRDD have started with the French Loi relative au Devoir de Vigilance[1377] (2017), followed by the Dutch Child Labour Due Diligence Act[1378](2019) and the most recent German Supply Chain Act (2021)[1379]- already anticipated in Chapter 4. Debates in other MSs, as in Sweden, Austria, Finland, Denmark, Luxembourg are also currently ongoing,[1380] showing an emergent trend towards binding legislations. Nonetheless limits of such regulatory initiatives are that they are most often limited to specific countries, addressing mainly large undertakings and focused on specific human rights requiring further synergy and the creation of a binding comprehensive framework.[1381] Furthermore, most legislative initiatives do not address public procurement directly.[1382] A normative insight on the main legislations towards mandatory HRDD in France, the Netherland and Germany will follow, outlining -where present- the link with public procurement. Then, a snapshot will be provided on the status of development of different hard and soft law initiatives in different EU Member States relevant grasping the current *momentum on B&HR* in different national contexts.

[1376] Corporate Justice, Comparing Corporate Due Diligence and Liability laws and legislative proposals in Europe
[1377] Loi no. 2017-399 du 27 Mars 2017 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre (2017), Cossart,S. et al (2017) The French Law on Duty of Care: A Historic Step Towards Making Globalization Work for All, 2 B&HR Journal.
[1378] Wet van 24 oktober 2019 houdende de invoering van een zorgplicht ter voorkoming van de levering van goederen en diensten die met behulp van kinderarbeid tot stand zijn gekomen (Wet zorgplicht kinderarbeid), Stb. 2019, 401 (2019)
[1379] Bundestag adopted in June 2021 German Lieferkettengesetz proposal, German Supply Chain Law Division 5 Section 22
[1380] Austrian Supply Chain Legislation, Belgian Duty of Vigilance Legislation, Finnish Due Diligence Legislation.
[1381] Botta,G. (2021) Public Procurement & Human Rights: The Intergenerational Duties for States and Corporations to Advance Responsible Business Conduct in the EU debate on Mandatory Human Rights Due Diligence, in Pantalone P. Doveri Intergenerazionali e Tutela dell'Ambiente
[1382] Treviño-Lozano, L., & Uysal, E. (2023). Bridging the gap between corporate sustainability due diligence and EU public procurement. Maastricht Journal of European and Comparative Law; Krajewski, M. et al (2021) Mandatory Human Rights Due Diligence in Germany and Norway: Stepping, or Striding, in the Same Direction?, 6 Business and Human Rights Journal

a) Normative Insights: The French Law on the Duty of Vigilance

The French Law on the Duty of Vigilance,[1383] adopted in 2017, introduced a legal duty to undertake human rights and environmental due diligence processes applicable to large French companies employing at least 5000 employees in France or at least 10.000 employees worldwide.[1384] The key objective of this legislation is to implement the UNGPs through the establishment of a duty of vigilance on the parent company to identify, prevent and address human rights issues in its own activities but also in the activities of its subsidiaries and the companies that it controls directly or indirectly, as well as the activities of subcontractors and suppliers with whom the company maintains an established business relationship.[1385]The duty of vigilance is characterized by the threefold obligation to *set-up*, *disclose* and *implement* a vigilance plan (*plan de vigilance*), detailing the

> "Reasonable vigilance measures to identify risks and prevent serious violations of human rights and fundamental freedoms, health and safety and the environment resulting from the own activities of the company or the companies under their control, or from the activities of their subcontractors and suppliers with whom they have an established business relationship".[1386]

The vigilance plan must include five elements: 1) a mapping of the risks involved, containing in particular the identification, analysis and prioritization of risks; 2) procedures to regularly assess risks associated with the activities of subsidiaries, subcontractors or suppliers with whom the company has an established business relationship; 3) actions to mitigate risks and prevent serious harm; 4) a whistleblowing mechanism collecting reports of potential and actual risks and effects, drawn up in consultation with the company's representative trade unions; 5) a mechanism to monitor measures that have been implemented and evaluate their effectiveness. This list, which is not exhaustive, covers the main elements envisaged by the UNGPs in HRDD, namely human rights impact assessment, integrating and acting upon the findings, tracking responses and communicating how impacts are addressed, previously unpacked in Chapter 4.

Regarding enforcement, in case of failure to implement the law, interested parties can seek an injunction to order a company to establish, implement and publish a vigilance plan, accompanied by periodic penalty payments in case of continued non-compliance.[1387] In addition, a civil liability regime is created by such legislation. Indeed, interested parties can file civil proceedings, under the general principles of French tort law, whenever a company's failure to comply with the obligations set forth in the legislation gives rise to damage.[1388] The burden of proof remains on the claimants, who will need to prove that they suffered a damage as a result of a breach of the vigilance obligations on the part of the parent company. However, the burden of proof constitutes one the main hurdles faced by claimants of business-related human rights claims in accessing remedy, especially when combined with issues linked to the complexity of corporate structures and the lack of access to information and internal documents preventing claimants from substantiating their claims.[1389] As a result, key difficulties remain in terms of legal and practical barriers in access to justice.

[1383] French National Assembly (2022) Report "on the evaluation of the law of 27 March 2017 on the due diligence of parent companies and ordering companies. French National Assembly (2022), Report "to include among the priorities of the French Presidency of the European Union the adoption of ambitious legislation on due diligence of multinationals"

[1384] No publicly available database exists nor official list compiled by the French government on the companies subjected to the law. However, according to the non-exhaustive list compiled by Sherpa on its recently created website dedicated to the law, at least 237 companies fall within the scope of the legislation, which is a rather small number. See Sherpa, Duty of Vigilance Radar

[1385] Beau de Loménie et al (2019) From Human Rights Due Diligence to Duty of Vigilance: Taking the French Example to the EU level in Angelica Bonfanti (ed), Business and Human Rights in Europe (Routledge 2019) 133.

[1386] Loi No 2017-399, Art 1.

[1387] Cossart,S. et al (2017), p 322.

[1388] Articles 1240 and 1241 of the French Civil Code

[1389]Marx, A, Bright C.and Wouters,J. Access to Legal Remedies for Victims of Corporate Human Rights Abuses in Third Countries, Study requested by the droi Committee, European Parliament, p.15.

In conclusion, the French legislation has been described as "a historic step forward for the corporate accountability movement"[1390] and a cornerstone example in the spectrum of existing legislative measures on mandatory HRDD. Nevertheless, issues of non-compliance have been reported.[1391]However, a 2019 report on the first year of implementation revealed that the vigilance plans published tended to focus on the risks to the business itself and its performance rather than the risks to the rights-holders or the environment.[1392] Progress remains to be made for an effective implementation of the HRDD requirements by companies and also of further measures on public procurement, whose explicit reference is currently missing in the legislation.

b) Normative Insight: The Dutch Child Labour Due Diligence Law

The *Child Labour Due Diligence Law* issued in 2019 and entered into force in 2022[1393] introduces a duty for companies providing goods and services to the Dutch end-users to undertake due diligence[1394] in order to identify and address child labour risks in their supply chains.[1395] In terms of scope, the law has extraterritorial reach as it concerns companies bringing goods or services into the Dutch market, including the ones domiciled outside of the jurisdiction, and applies throughout their supply chains.[1396]

In terms of substantial content, the due diligence requirement entails investigating, based on "reasonably knowable and consultable sources", whether there is reasonable suspicion that the goods or services have been produced using child labour.[1397] If such suspicion is identified, companies are required to set out an *action plan* on how to address it and to produce a statement on their investigation.*[1398]* Furthermore, in terms of monitoring compliance, a supervising authority has the duty to monitoring and enforcing compliance with the law. Companies are required to submit their statement to the supervising authority, which will make them publicly available in an online public registry. Third parties affected by a company's actions or failure to comply with the law can file a complaint with the supervising authority, after having submitted it first to the company, on the basis of concrete evidence of non-compliance. In case of non-compliance, the law provides for both administrative and criminal law sanctions.[1399]

Despite the advanced legislation and sanctioning system, the Dutch law has some limitations in effectively implementing the UNGPs. Firstly, like other legislation focusing on a specific human rights issue- in this case child labour - the law only partially responds to the UNGPs' call on companies to carry out due diligence covering *all* of their adverse human rights impacts. Secondly, the absence of specifications as to the form or content of the statements and action plans creates legal uncertainty for companies and may in practice lead to significant variation in terms of the quality of due diligence approaches.[1400] Thirdly, the fact that the reporting requirement is a one-off exercise limits the possibility

[1390] Cossart et al. (2017) p. 317. A recent report by EDH revealed that the French Duty of Vigilance Law has had some positive impacts on corporate practices and prompted 70% of companies to start mapping risks of adverse human rights and environmental impacts or to revise existing mappings and processes. EDH (2019) Application de la loi sur le devoir de vigilance: Plans de vigilance 2018-2019
[1391] Sherpa, Duty of Vigilance Radar
[1392] Renaud et al (2019) Loi sur le devoir de vigilance des sociétés mères et entreprises donneuses d'ordre, Année 1: les entreprises doivent mieux faire
[1393] de Jonge,A. (2019) Have products been made with clean hands? The Dutch Child Labour Due Diligence Act is a step in the right direction, Lexology. Marcelis,A. (2019) Dutch Take the Lead on Child Labour with New Due Diligence Law
[1394] Hoff, A. (2019) Dutch Child Labour Due Diligence Law: A Step Towards Mandatory Human Rights Due Diligence
[1395] Civil society such as the MVO Platform has welcomed the adoption of the child labour due diligence law in May 2019. However, NGOs have also been calling on the Government to investigate the possibility of broad due diligence legislation.
[1396] MVO, Frequently Asked Questions about the new Dutch Child Labour Due Diligence Law
[1397] Altschuller S.et al (2017), Proposed Dutch Legislation on Child Labor Due Diligence: What You Need to Know, CSR and the Law
[1398] Unlike the UK or the Australian Modern Slavery Act, this is a one-off exercise and does not have to be repeated on an annual basis.
[1399] The supervising authority can impose a fine of up to €8,200 in case of failure to produce the statement. It can also impose a fine of up to €820,000, or, alternatively, 10% of the company's turnover, after having given a binding instruction, in case of continued noncompliance with the due diligence requirements. Repeat offence with-in five years will constitute an economic offence and may lead to criminal sanctions for the company directors
[1400] Marcelis A (2018)

of evaluating progress and is not in line with the UNGPs' definition of HRDD as a dynamic, ongoing process.[1401] Fourthly, given that the authorities would not actively enforce the law if not in response to a third-party complaint, it relies on the watchdog role of civil society to ensure its effectiveness. Finally, as in the case of the French Duty of Vigilance Law, the Dutch law does not contain any specific direct provision on public procurement or reference to exclusion grounds in case of non-compliance, representing a missing opportunity to drive the market of public suppliers in the direction of more responsible production.

c) Normative Insight: The German Supply Chain Due Diligence Act and Impact on Public Procurement

In 2021, Germany adopted the Supply Chain Due Diligence Act,[1402] requiring due diligence obligations on enterprises with their central administration, principal place of business, administrative headquarters, statutory seat or branch office in Germany to comply with environmental and human rights standards throughout their supply chains. Concerning the coverage, mainly large German companies[1403] are required to undertake due diligence to identify, prevent and remediate adverse human rights and environmental impacts in their activities and throughout their supply chains.[1404]

In terms of due diligence process[1405], the act introduces a comprehensive list of obligations, including the development of a risk management system for compliance, preventive and remedial measure, reporting and mandatory complaint procedures- entailing major fines in case of violations. So, in order to comply with the Act, organizations must monitor and act on violations both within their own operations, as well as those of their direct suppliers regardless of whether the activity was performed in Germany or abroad.

Similarly, if an organization becomes aware of a possible violation of environmental standards or human rights by one of their indirect suppliers, it is required to perform a risk analysis of the possible violations immediately.The Act establishes not only a very clear onus on organizations over their supply chain performance, but mandates action and meaningful remediation.

A key link with public procurement can be found in the penalties provided for non-compliance, including:

- Fines: Monetary penalties of up to EUR 8 million can be assessed depending on the nature and gravity of the violation. Moreover, companies with an average annual turnover of over EUR 400 million can be fined up to 2% of their average annual turnover.
- Ban from public tenders: violating companies can be excluded from winning public contracts in Germany for up to three years.

Thus, the German Act is the only domestic legislative initiative on B&HR explicitly mandating the exclusion from the award of public contracts of those companies that have been fined for breaching its human rights and environmental provisions.

Additionally, trade unions and NGOs can also be granted the authority to conduct litigation for an affected party. Furthermore BAFA (Federal Office for Economic Affairs and Export Control)[1406] has been equipped with effective enforcement abilities to monitor companies' supply chain management and can act on its own initiative or at the request of an affected person.

[1401] UNGPs Guiding Principle 18;

[1402] Gesetz über die unternehmerischen Sorgfaltspflichten in Lieferketten, LkSG

[1403] Large companies, as defined by section 267 para. 3 of the German Commercial Code, must fulfil at least two of the following criteria: a minimum of 250 employees, a balance sheet total of at least €20 million, or a minimum turnover of €40 million. The legislation might also cover medium-sized companies operating in high-risk sectors.

[1404] Norton Rose Fulbright, 'Compliance update – Germany' (March 2019)

[1405] Corporate due diligence obligations in supply chains act, 22 July 2021. Corporate Social Responsibility in cooperation with the Federal Ministry of Labour and social affairs,22 July 2021, "Supply Chain Act Act on Corporate Due Diligence Obligations in Supply Chains" Foreign Office, 13 October 2020, "Monitoring of the National Action Plan for Business and Human Rights"

[1406] Bundesamt für Wirtschaft und Ausfuhrkontrolle (BAFA)

The German act therefore seeks to implement the UNGPs not only by creating an overarching mandatory due diligence framework but also by addressing some of the barriers to access to legal remedies faced by claimants. Furthermore, it explicitly addresses public procurement, including supplier's exclusion from public tenders as sanction for the violation of the due diligence obligations, constituting a key driver for a more responsible market.

Overview on Other Member States

Although the French, Dutch and German legislative examples are the most advanced in creating comprehensive human rights due diligence frameworks, nonetheless they remain circumscribed to specific jurisdictions and to specific rights as in the case of child labour in the Dutch legislation. Anyway, looking at other MSs approach to B&HR, different initiatives and soft law actions suggest an increasing overall interest in the EU landscape for regulating HRDD. The table below grasps some examples of initiatives, especially promoted by civil society action and governmental steps in this direction.

Table 6.1 Domestic initiatives on HRDD in different EU Member States

EU Member State	**Domestic initiatives on HRDD**
Austria	**Civil Society Action** • Civil society including the Network on Social Responsibility of Corporations (NeSoVe) called for a national mandatory HRDD law since 2018.[1407] **Governmental Steps** • In July 2018, and again in May 2020, the Social Democratic Party submitted a draft bill on social responsibility in the garment sector to the Austrian parliament.[1408] • In March 2021, the Social Democratic Party presented a proposal for a supply chain law, which is to be introduced to the Environment and Justice Committee.[1409] In addition, the draft bill on social responsibility in the garment sector was referred to the relevant parliamentary committee although deliberations have not yet started.
Belgium	**Civil Society Action** • In April 2019, civil society organisations published an open letter calling for a Belgian mandatory HRDD law.[1410] • In June 2020, the Leuven Centre for Global Governance Studies published a report looking at legislative options.[1411] • In March 2022, civil society groups launched a national campaign called "Human rights have no price".[1412] **Governmental Steps** • In April 2021, the Federal Parliament voted in favour of a mandatory HRDD law proposal to strengthen the obligations of companies throughout their supply chains.[1413]
Denmark	**Civil Society Action and Institutional Steps:** • In January 2019, three political parties put forward a parliamentary motion requesting the Government to develop a mandatory HRDD law proposal with the support of over 100 civil society organisations, the trade union confederation, the Danish Consumer Council and some businesses.[1414]

[1407] B&HR Resource Center (2018) Austrian civil society calls for mandatory human rights due diligence
[1408] B&HR Resource Center (2020) Österreich: Nationalratsabgeordnete legen Entwurf über verbindliche Sorgfaltspflichten für Bekleidungsunternehmen vor Zeitleiste
[1409] Parlamentskorrespondenz Nr. 162 Vom 23.02.2022 Lieferkettengesetz: Nationalrat diskutiert EU-Vorschlag
[1410] B&HR Resource Center (2019) Belgique: Des ONG demandent une loi qui oblige les entreprises à respecter les droits de l'homme et l'environnement
[1411] Bright C. et al (2021) Options for Mandatory HRDD in Belgium, Leuven Centre for Global Governance Studies, NOVA
[1412] CNCD (2022) Les droits humains n'ont pas de prix
[1413] Proposition de résolution concernant les principes d'une législation belge sur le devoir de vigilance visant à protéger les droits humains, les droits du travail et les normes environnementales et s'appliquant aux entreprises tout au long de leurs chaînes de valeur.
[1414] Proposal for a parliamentary resolution on mandating human rights due diligence legislation for companies and ensuring access to effective remedies", 24 January 2019

Finland	**Civil Society Action:** • In September 2018, a coalition of over 140 civil society organisations, companies and trade unions launched a campaign calling for mandatory HRDD.[1415] **Governmental Steps** • In June 2019, the Government committed to mandatory HRDD at the national and EU levels.[1416] In June 2020, the Ministry of Economic Affairs and Employment released a study on regulatory options for a national mandatory HRDD law. [1417] • In 2022, a Memorandum was published investigating the possible content of a due diligence obligation in national legislation[1418].
Ireland	**Civil Society Action:** • In October 2021, a civil society campaign, the Irish Coalition for Business and Human Rights, was launched to call on the Government to introduce corporate accountability legislation.[1419]
Luxembourg	**Civil Society Action** • In 2018, 17 civil society organisations launched an initiative on the introduction of mandatory HRDD legislation for companies headquartered in Luxembourg. **Governmental Steps** • The coalition agreement (2018-2023) committed the Government to supporting initiatives to strengthen the human rights responsibilities of companies. • In 2020, the National Action Plan on B&HR (2020-2022) was issued.[1420] • In May 2021, the Ministry of Foreign Affairs commissioned a study on the possibilities to legislate mandatory HRDD at the national level.[1421]
Italy	**Civil Society Action:** • Human Rights International Corner has published an overview of Law 231/2001 on the administrative liability of legal entities and its implications in relation to business and human rights, as well as a report on the strengths and weaknesses of the law as a model for mandatory due diligence.[1422] **Governmental Steps** • Under its National Action Plan on Business and Human Rights, the Government has committed to a review of existing law to assess legislative reform introducing human rights due diligence for companies.[1423]
Spain	**Civil Society Action:** • Spanish Civil Society Organisations, including the Spanish Observatory on Corporate Social Responsibility, launched a civil society campaign in 2021 on human rights & environmental due diligence legislation[1424], creating the Plataforma por Empresas Responsables presenting a technical proposal for the legislation[1425] **Governmental Steps** • The Government included the legislative initiative for the protection of human rights, sustainability and due diligence in transnational business activities in its Annual Regulatory Plan (2022)[1426]

B 82 Forslag til folketingsbeslutning om at gøre det lovpligtigt for virksomheder at udøve nødvendig omhu på menneskerettighedsområdet og om indførelse af effektive retsmidler.

[1415] B&HR Resource Center (2018) Finland: Co's, civil society & trade unions launch campaign calling for mandatory HRDD

[1416] B&HR Resource Center (2019) Finland commits to mandatory human rights due diligence at national & EU levels

[1417] B&HR Resource Center (2021) Finland: Govt. publishes study on possible regulatory options for proposed due diligence legislation

[1418] "Memorandum on the due diligence obligation – Review of the national corporate social responsibility act", 12 April 2022

[1419] B&HR Resource Center (2021) Ireland: CSO coalition launches campaign calling on Government to introduce corporate accountability legislation

[1420] Plan d'action national du Luxembourg pour la mise en œuvre des Principes directeurs des Nations Unies relatifs aux entreprises et aux droits de l'Homme

[1421] Projet de loi relatif à la mise en œuvre du règlement (UE) 2017/821 du Parlement européen et du Conseil du 17 mai 2017

[1422] HRIC (2019) Report "Italian Legislative Decree No. 231/2001: a model for a human rights due diligence legislation?"

[1423]Inter-ministerial Committee for Human Rights (CIDU), National Action Plan on Business & Human Rights (2021-2026)

[1424] B&HR Resource Center (2021) Spain: CSOs launch campaign calling for human rights & environmental due diligence legislation, Article

[1425] Platform for Responsible Business » Technical proposal, June 2021

[1426]Gobierno de Espana (2022) Plan Annual Normativo 2022, Administración General del Estado

	• It issued a "Preliminary Draft Bill for the Protection of Human Rights, Sustainability and Due Diligence in Transnational Business Activities", in public consultation period from 14 February until 3 March.[1427]
Sweden	**Civil Society Action:** • In May 2019, CONCORD Sweden's Working Group for Business & Human Rights published a position paper calling for the Government to investigate the possibility of a mandatory HRDD law. In 2020, a campaign, bringing together CSOs, trade unions, and businesses was launched.[1428] **Governmental Steps** • In March 2018, the Swedish Government Agency for Public Management released a report recommending that the Government look into the possibility of a mandatory HRDD law.

The fragmented due diligence-related law-making process at a domestic level has encouraged different playing rules in the public market for bidders and contractors across Europe. It has, also, created a complex environment with little certainty over whether and how HRDD can be incorporated into public procurement.[1429] In such fragmented and scattered landscape, what are the entry points for B&HR in public procurement and what is the state of play of SRPP and B*&HR-based public procurement*?

Snapshot on SRPP and B*&HR-based public procurement* in EU Member States

Despite the recent SPP trend in EU and the fact that SPP is widely recognized by EU MSs' legislations as a strategic lever to drive innovation and foster sustainable development, the integration of sustainability in procurement processes, procedures, tools have not been fully accomplished yet. There are, indeed, different levels of awareness and approaches in the various countries, leading to fragmented implementation efforts and results.[1430] As emerged from the UNEP Global Review Survey 2022,[1431] SPP considerations and socially responsible requirements, which could be relevant for B&HR, have been advanced through:

- Public procurement regulations inclusive of SPP provisions, such as public procurement acts, government decrees, circulars and guidelines.
- Overarching and thematic policies and strategies on sustainable development, environmental and socio-economic policies and strategies, promoting SPP provisions.
- Dedicated SPP policies, strategies and action plans, as well as public procurement strategies inclusive of SPP provisions.

Given such premises, a spectrum on selected *B&HR-based public procurement* experiences in EU Member States is outlined under Annex 1.[1432] It captures the status of development limited to selected EU Member States, in terms of both regulatory and policy initiatives on public procurement with relevance for SRPP and B&HR based-public procurement. The countries were selected based on their adoption of programmatic measures, having in place both a National Action Plan on SPP and a National Action Plan on B&HR.

In details, the following components are analysed in the matrix for the selected countries:

- Regulatory Framework: Laws and regulations inclusive of SPP provisions
- SRPP Prioritized Objectives and Provisions

[1427] Congress of Deputies Spain (2022), Directorate of Research, Analysis And Publications Department Of European Affairs, April 2022, Legislative National Context Regarding Due Diligence

[1428] Visa handlingskraft (2020) Petition: Take Action!

[1429] Treviño-Lozano, L., & Uysal, E. (2023).

[1430] UNEP (2017) Factsheets on Sustainable Public Procurement in National Governments. Supplement to the Global Review of Sustainable Public Procurement.

[1431] UNEP (2022) Global Review. Part I. Current state of sustainable procurement and progress in national governments, pp. 39-42
UNEP (2022) Global Review. Factsheets on Sustainable Public Procurement in National Governments.

[1432] To develop the snapshot, the selection of the EU MSs and data collection has been conducted by combining data from the 2022 UNEP Survey on SPP status and NAPs on B&HR document analysis and data from the DIHR 2016 Survey on B&HR and Public Procurement. The selected countries in the cross-examination include: Belgium, Check Republic, Denmark, Finland, France, Germany, Ireland, Italy, Lithuania, Netherlands, Poland, Slovenia, Spain, Sweden.

- Policy Level: Dedicated SPP policies/ action plans and overarching thematic policies
- B&HR: State-business nexus (based on B&HR NAP and other initiatives)

Starting from the regulatory level, each EU MS has a regulatory public procurement framework in place transposing the EU Directives package, thus providing quite similar legal possibilities on SPP and SRPP.[1433] All 27 EU Member States[1434] had to transpose the EU Public Procurement Directives package by 18 April 2016.[1435] In details, transposition refers to the process of incorporation of EU Directives into the national laws of EU Member States. Unlike regulations and decisions, the directives are not directly applicable throughout Member States but require national laws to incorporate their rules into the national legislation. The Commission, on its side, examines the text to ensure that it meets the aims of the directive and ensures that the transposed law is implemented and meets the required deadline, taking measures in case on non-compliance.[1436]

As captured by the matrix, the key regulatory framework in each selected country corresponds essentially to the transposition of the EU Public Procurement Directives package, including SPP and SRPP key references. Most of the countries have transposed the key provisions related to environmental and social considerations within their national codes, by amending or reforming them in recent years[1437], including the "horizontal clause" (art. 18) and other references to sustainability, for instance under exclusion grounds, award criteria and contract performance conditions.[1438] In addition, a number of other legal instruments indirectly support SPP in different countries, for instance environmental protection requirements for specific purchasing (such as public transports, vehicles, buildings) or energy efficiency acts incentivising the use of SPP. Regarding SRPP, this is less common, however some regulations encourage the use of social clauses, as the French Law on the Social and Solidarity Economy.[1439] Another example is the Polish Labour Act, enabling contracting institutions to support social policy objectives by introducing social requirements under employment contracts.[1440]

Regarding B&HR based public procurement, the effort to include social and human rights considerations through SPP legal possibilities and provisions of the national regulatory framework is evident in different countries. Nonetheless, some national regulatory frameworks are more proactive than others.[1441] Indeed, although the integration of the Public Procurement Directives provisions is part of a broader approach to sustainability in EU,[1442] various MSs and contracting authorities may have

[1433] Valenza et al (2016) Assessing the implementation of the 2014 Directives on public procurement: challenges and opportunities at regional and local level, European Committee of the Regions.

[1434] Austria, Belgium, Bulgaria, Croatia, Republic of Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia, Spain and Sweden

[1435] Most EU MSs failed to meet the deadline, except for Denmark, France, Germany, Hungary, Italy, Slovakia and the UK. As of June 2016, only 13 MSs had transposed or were soon to transpose the public procurement Directives into national laws. In December 2017, the EC referred four MSs (Austria, Luxembourg, Slovenia and Spain) to the CJEU over the failure to notify complete transposition of EU rules on public procurement and concessions.

[1436] The Commission may take a case to the CJEU when the Member State did not adopt national measures to transpose the directive or has taken measures but the Commission considers that the measures are not satisfactory. If the Court agrees with the Commission on the infringement and the Member State does not comply with the judgement, then the Court may impose a penalty payment or lump sum at the request of the Commission.

If a Member State fails to notify its national implementing measures to the Commission within the deadline, the Commission may specify the amount of the lump sum or penalty to be paid by the Member State. If the Court confirms that there is an infringement and that the amount set by the Commission does not exceed the amount set by the Court, the payment obligation shall take effect (Article 260.3 TFEU).

[1437] Reforming processes towards more inclusion of sustainable development in public procurement happened in Belgium, France, Italy, Poland recently.

[1438] For a full insight on the main provisions: European Commission (2019) Promoting Social Considerations into Public Procurement Procedures for Social Economy Enterprises - Matrix of the social clauses of Directive 24/2014/EU

[1439] Art. 13, Law on Social and Solidarity Economy (SSE Act) seeks to ensure that more public purchases are made from socially responsible businesses (many of which are part of the SSE) and that better use is made of social clauses in procurement contracts.

[1440] Art. 22.1 of the Act of 26 June 1974, the Polish Labour Code, fostering the introduction of social requirement under employment contracts

[1441] See Art.21 of the Polish Public Procurement Law (2019) (Journal of Laws of 2021, items 1129 and 1598): it provides for the introduction of a legal basis for the creation of the State purchasing policy as a tool for implementing the state economic policy, including in particular the purchase of innovative or sustainable products and services, taking into account, among others, CSR and the use of social aspects. For relevance for human rights see also artt. 94-96, 100, 108, 224, 242.

[1442] Manunza E. (2020) Towards a More Coherent and Effective Legal Framework for Public Procurement: On how the legislator and the courts create a layered dynamic legal system based on legal principles

different implementation approaches to socially responsible aspects in public procurement, in some cases requiring mandatory application by law,[1443] in others leaving discretion to the single contracting authorities. Indeed, due to the discretionary application of SPP and related limitations as the LtSM of the contract, SPP is often implemented by initiative of pro-active contracting authorities, department or agency within governments, resulting in a complex framework of practices.[1444]

Alongside the regulatory framework, policy and other programmatic sources play a crucial role in the consolidation process of practices and rules on public procurement and human rights. In most MSs, dedicated SPP policies and other relevant overarching and thematic policies exist. Indeed, SPP policies vary widely across national governments. Trying to make sense of different policy vehicles to drive SPP, most national governments include SPP provisions in overarching or thematic policies and strategies, while a smaller proportion include them in procurement regulations or in policies specifically dedicated to the promotion of SPP. Regarding SRPP, a common trend is the promotion of prioritized social objectives in public procurement[1445] through Guidelines and National Plans supporting public administration and local authorities. Although they constitute soft law instruments, in some cases they have a hortatory impact on contracting authorities' approach to public procurement. A few examples of Guidelines include: the Czech Republic Guidelines for the Application of Responsible Public Procurement and Commissioning Applied by the Public Administration and Local Authorities[1446]; the Danish Guidelines for Responsible Procurement in the Public Sector, developed in collaboration with municipalities and other relevant parties;[1447] the Dutch National Plan for Socially Responsible Procurement (2021); The Italian Guide for the Integration of Social Aspects in Public Procurement[1448] and the Guidelines for the implementation of gender and generational equality considerations in public procurement procedures.[1449] Furthermore, alongside Guidelines, a common trend is the adoption of National Action Plans, namely programmatic action plans, specific on both SPP and on B&HR, providing interesting inputs on the interconnection between the two fields.

The Role of National Action Plans to Connect SPP and B&HR

In the consolidation process linking SPP and B&HR, where hard law provisions are often missing, a crucial role is played by National Action Plans (NAPs). Overall, NAPs are programmatic policy documents outlining a government's commitments, planned measures and initiatives regarding a specific area of intervention.[1450] NAPs are usually not built into other legal instruments adopted by States, such as regulations or legislations, but are, rather, released as part of a specific policy or initiative.[1451] Although they are not legally-binding sources, they provide political *impetus* to the process of SPP implementation, allowing Member States to choose the options that best suit their political framework and the level they have reached.

[1443] Italy constitutes the example of country requiring mandatory application of Minimum Sustainability Criteria (CAMs) to all public buyers for all contracts related to 20 categories of purchasing (see art. 57.2, Public Contracts Code).
[1444] UNEP (2022) 2020/2021 Data collection for SDG Indicator 12.7.1- Main results and conclusions from the first reporting exercise
[1445] UNEP (2017) and (2022) Factsheets and Global Review Surveys collected data on prioritized objectives related to Social Procurement, including *among others* promoting compliance with promoting compliance with ILO standards and decent work, promoting fair trade, promoting gender equality, promoting opportunities for social economy enterprises, promoting SMEs, protecting against human rights abuses, protecting and promoting groups at risk.
[1446]Resolution No. 531/2017 dated 24 July 2017, Guidelines for the Application of Responsible Public Procurement and Commissioning Carried out by the Public Administration and Local Authorities
[1447] See CSR INDKOB
[1448] Ministerial Decree of June 6, 2012, as part of the National Action Plan on Green Public Procurement (PANGPP)
[1449] Ministerial Decree n. 173/2023, Linee guida volte a favorire le pari opportunità generazionali e di genere , nonché l'inclusione lavorativa delle persone con disabilità
[1450] Bordignon M. (2020) National Action Plans and Their Legal Value, in Buscemi et al, Legal Sources in Business and Human Rights Evolving Dynamics in International and European Law
[1451] EU Directorate General for External Policies (Policy Department, (2017) Implementation of the UNGPS

In terms of SPP and SRPP, since 2003 the European Commission in the EU Communication on Integrated Product Policy (IPP)[1452] encouraged MSs to draw up National Action Plans (NAPs) fostering sustainable public procurement strategies and measures. All Member States, sooner or later, have adopted a NAP on SPP.[1453] In a number of MSs, the NAPs are mainly associated with the environmental dimension of SPP, being titled National Action Plan on GPP. Anyway, the scope of SPP is widening to increasingly include multiple social objectives, as evidenced by the UNEP Global Review Survey conducted in 2017 and 2022, where most EU national governments outlined SPP commitments covering also multiple socio-economic and ethical issues and human rights aspects.[1454] In details, NAPs contain an assessment of the existing situation and targets for the subsequent three years, specifying what measures are envisaged to achieve them. In different cases, measures refer to the development prioritized sustainability criteria tailored to different product categories, often relying on the EU GPP criteria developed by the European Commission.[1455]

Regarding *B&HR based public procurement*, the national regulatory frameworks are accompanied in different countries by policy initiatives (either dedicated to SPP or broader on sustainability and circular economy) embedding a human rights perspective within public procurement. Thus, to complete this non-exhaustive analysis on EU experiences and to better understand the *State-business nexus* development, lights are shed on the role played by NAPs on Business & Human Rights (NAPs on B&HR).[1456] As recommended by the *UN Working Group on Business and Human Rights and transnational corporations and other business enterprises,*[1457] a number of MSs adopted a NAP on B&HR. Particularly, since 2011, the EU Commission has exhorted the EU MSs to develop NAPs as key mechanism to support the UNGPs implementation at domestic level,[1458] becoming the first region to call on its governments to implement NAPs. Also, the Council of Europe, under COE's Recommendation, has invited European States to produce NAPs.[1459] Europe has, thus, become the regional area with the widest number of released NAPs on B&HR: so far 29 States at global level have issued a NAP on B&HR, among which 16[1460] are EU Member States, making EU a global leader.[1461]

[1452] EU Commission (2003) Communication from the Commission to the Council and the European Parliament - Integrated Product Policy - Building on Environmental Life-Cycle Thinking COM/2003/0302 final

[1453] An overview of the NAPs on SPP adopted by EU MSs is available under the EU Commission, Green Procurement Advisory Group website and a full overview is available on CIRCAB (2023)

[1454] UNEP (2017) and UNEP (2022)

[1455] For a full insight on EU MSs practices on Sustainability criteria, see European Commission (2023) GPP NAPs situation.

[1456] See OHCHR, Working Group on Business and Human Rights, National action plans on business and human rights

[1457] Following the end of the SRSG's mandate in 2011, established to promote the "effective and comprehensive dissemination and implementation" of the UNGPs. UN Working Group published its official 2016 Guidance on business and human rights NAPs, mandated by the Human Rights Council to promote the effective and comprehensive implementation of the UNGPs.

[1458] The first document giving an effective input for the NAPs drafting and adoption is the 2011 Communication of the European Commission on "A renewed EU strategy 2011–14 for Corporate Social Responsibility". In the framework of enhancing EU policy coherence and contributing to the achievement of EU objectives with respect to B&HRs, the Commission invited all the EU Member States to develop a NAP – originally by 2012 – to implement the UNGPs. Following this first initiative, in its 2014 Resolution on 'Human Rights and Transnational Corporations and Other Business Enterprises' the UN Human Rights Council 'encouraged all States to take steps to implement the Guiding Principles, including to develop a national action plan or other such framework'. (Following the 2015 Action Plans on Human Rights and Democracy, the deadline to adopt NAPs on B&HR initially set on 2012, has been postponed to 2017, attracting high levels of participation, both inside and outside the EU. See O'Brien, C., Mehra, A., Blackwell, S., Poulsen-Hansen, C. (2016). NAPs: Current Status and Future Prospects for a New Business and Human Rights Governance Tool. Business and Human Rights Journal. 1. 117-126.

[1459] O'Brien, C. (2021) B&HR in Europe 2011-2021: A Decade in Review. Philip Czech et al (eds.) European Yearbook of Human Rights

[1460] Belgium, Czechia, Denmark, Finland, France, Germany, Ireland, Italy, Luxembourg, Netherlands, Norway, Poland, Slovenia, Spain, Sweden.

[1461] OHCHR (2016) Guidance on National Action Plans

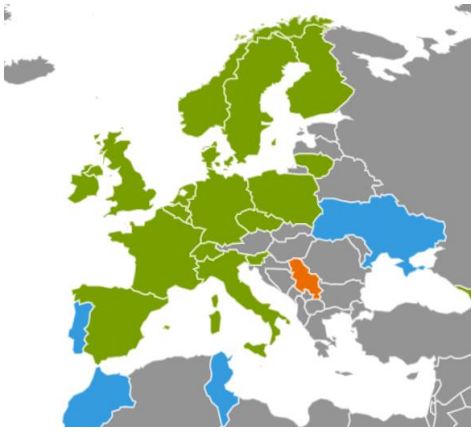

Image 6.1: Map on implemented NAPs on B&HR in EU (Source: DIHR Global NAPs).[1462]

Regarding their structure, although, there are not mandatory requirements to draft NAPs, anyway international guidance and toolkits to draft NAPs have been developed to harmonize the approaches and outputs of such process.[1463] Although some common features can be identified,[1464] in terms of enforcement there is no systematic mechanism for assessing their content and effectiveness at international level and there is no harmonized approach of States to the drafting and consultation phases needed to develop a NAP on B&HR.

In terms of their inherent legal nature and possible impacts on public procurement, NAPs are programmatic documents outlining strategies and instruments to comply with their duty to prevent and redress corporate-related human rights abuses, articulating priorities and actions to support the implementation of international, regional, or national obligations and commitments.[1465] They also identify gaps and reforms to increase coherence with the government's human rights commitments across business-related legal and policy frameworks and programs. The legal status of NAPs and their impact have attracted interest from both public procurement law and international law scholars.[1466] Regarding NAPs legal status in the public procurement context, questioning whether they could be used as a parameter of legality in Courts, the legal value of *soft law* is a highly debated topic in different national jurisdictions and public procurement litigation. For example, in Italy, lively debates on "soft law with hard effects" have been raised around the relevance of non-binding programmatic Guidelines issued from the National Anti-Corruption Authority (ANAC).[1467] While soft law instruments may not have direct legal enforceability, they can still be considered persuasive authority, especially when there is a lack of clear statutory or regulatory provisions on a particular issue. For instance, scholars refer to the ANAC Guidelines as "soft law with hard effects"[1468] being an essential reference point in the

[1462] Source: DIHR Global NAPs - in green countries which have published a NAP, in blue countries which are currently developing a NAP, in grey countries which do not have a NAP in place.
[1463] Among the existing tools and guidance: DIHR and ICAR (2017), National Action Plans on Business and Human Rights Toolkit; The UN Working Group on Business and Human Rights (2016) Guidance on National Action Plans on Business and Human Rights.
[1464] Common elements are: (i) establishing a clear governance structure and budget for the NAP; (ii) organizing a consultation process with all relevant stakeholders; (iii) publishing a National Baseline Assessment; (iv) giving an exhaustive definition of scope, content, and priorities; and (v) following transparency and accountability principles, and providing follow-up mechanisms.
[1465] Methven O'Brien, C. 2021.
[1466] Methven O'Brien, C. Mehra, A. Blackwell S. et al. (2016) National Action Plans: Current Status and Future Prospects for a New Business and Human Rights Governance Tool, 1(1) Business and Human Rights Journal, pp. 117-126; M. Bordignon, (2020) National Action Plans. A Pathway to Effective Implementation of the UNGPs?, in A. Bonfanti (ed.), Business and Human Rights in Europe: International Law Challenges, Routledge 2020. Cantú Rivera, H. (2019), National Action Plans on Business and Human rights: Progress or Mirage? 4(2) Business and Human Rights Journal, pp. 213-237.
[1467] Autorità Nazionale Anti-Corruzione (ANAC) Guidelines. For example ANAC (2016) Guideliens n. 6 on Means of Proof of Grave Professional Misconducts and Anti-trust, delibera n. 1293, 16.11.2016
The issuance of soft-law Guidelines has increased considering the significantly reduced - although not entirely eliminated - ANAC's binding regulatory power after the reform "Slocca-cantieri". See Nardone, A. (2018) I poteri di vigilanza, controllo e regolazione dell'ANAC, par. 2.
[1468] Martino G (2020) Le linee guida non vincolanti dell'Autorità Nazionale Anti-Corruzione: soft law with hard effects, Amministrazione in Cammino

operational activity of contracting authorities. In practice, in fact, administrations tend to (try to) comply with the guidelines,[1469] also in order to protect themselves from possible liability. It would, however, be reductive to assume that non-binding guidelines produce effects exclusively in *de facto* terms. Indeed, "non-binding" does not equate to legal irrelevance.[1470] Similar reflections can be extended to NAPs as soft-law instruments. Scholars have stressed that guidelines may be used by the administrative judge as a criterion for the interpretation of primary legislation and, therefore, affect the verification of a possible violation of the law by the downstream measure.[1471] Furthermore, similarly to what the CJEU has affirmed with reference to Commission notices,[1472] non-binding guidelines cannot exhaust the discretionary power of the administration. For instance, the margin of appreciation must always remain "downstream" of them. Otherwise, in fact, the guidelines would be transformed into binding indications, contrary to the rationale of their very institution.

In the B&HR field, it has been outlined that NAPs are not a substitute for direct business regulation. However, as "key tools for effective implementation of the UNGPs"[1473], NAPs "allow governments to assess the current *legal-cum-policy framework,* so as to identify what is working and what is not in terms of ensuring that companies respect human rights".[1474] Thus, NAPs have become the turning point for the policy-making processes both at national and international level and have contributed to the implementation of the UNGPs by facilitating a convergent approach among States.[1475] A study published by EU emphasizes the broader consensus on these government-led instruments, highlighting that, together with the UNGPs, they are helping States to comply with their duty to protect human rights, specifically against the adverse impact of business activities.[1476] Indeed, according to international law scholars, NAPs have not traditionally been used for implementing international law obligations in the domestic sphere, such as the State duty to protect, respect and fulfil human rights recalled by the 1st pillar of the UNGPs.[1477] However, NAPs may have potential to contribute to solving multi-level business and human rights problems[1478] by stimulating sector-based dialogues, networks, analyses, and commitments.[1479] Such hybrid mechanisms may be crucial where the wider legal framework is not conducive to hard law interventions,[1480] paving the way for new business and human rights legislations[1481] or fostering approaches that could harden B&HR through other means such as public procurement. Indeed, NAPs could play a key role in ensuring *momentum* to promote the "enforcement"

[1469] F. Marone, Le linee guida dell'Autorità Nazionale Anti-Corruzione, cit., par. 6. In essence, as argued with regard to soft law by B. Boschetti, Soft law and normativity, cit., p. 48, "Soft law remains non-binding, but non-compliance is made more costly (and, therefore, disincentivised)"; in this regard, the "existential" efficacy of the guidelines is mentioned in F. Cintioli, Il sindacato del giudice amministrativo sulle linee guida, cit., par. 7.

[1470] Although in some cases, the Consiglio di Stato has adopted a more "restrictive" approach, stating that Guidelines "are not suitable to represent a parameter of legitimacy of the decisions adopted by the individual contracting authorities in establishing the tender rules " , however the violation of the guidelines is very frequently invoked in appeals against measures of contracting authorities, and this aspect is carefully assessed by the administrative judges.

[1471] Pacini F. (2022) Ai confini della normatività. Hard law e soft law in "tempi difficili", Relazione al Convegno annuale dell'Associazione "Gruppo di Pisa", Modello costituzionale e trasformazione del sistema delle fonti nelle crisi economica e pandemica. Emergenza e persistenza

[1472] CJEU, judgment 19.07.2016, C-526/14, Kotnik and A., paras. 39-45. The decision concerned a Commission notice establishing guidelines for the compatibility assessment of State aid in the banking sector. The Court found the Notice to be lawful because it left room for discretionary assessments by the Commission 'downstream'. This approach has marked similarities with the concept of 'open mindedness' developed by American doctrine: on this point see B. BOSCHETTI, Soft law and normativity, cit., pp. 37 ff.

[1473] UNHRC (2014) Report of the Working Group on the Issue of Human Rights and Transnational Corporations and other Business Enterprises, UN Doc. A/HRC/26/25, 5 May 2014, 11.

[1474] Deva S., (2016) Background Paper for India's National Framework on Business and Human Rights, The Ethical Trading Initiative.

[1475] Bordignon, M. (2020)

[1476] EU Directorate General for External Policies (2017) Study on National Action Plans on Business & Human Rights

[1477] Bordignon (2020)

[1478] Methven O'brien, C., Ferguson J., Mcvey,M. 'National Action Plans on Business and Human Rights: An Experimentalist Governance Analysis', Human Rights Review,

[1479] Huyse, H. And Verbrugge, B., (2018) 'Belgium and the Sustainable Supply Chain Agenda: Leader or Laggard? – Review of human right due diligence initiatives in the Netherlands, Germany, France and EU, and implications for policy work by Belgian civil society', Report.

[1480] A. Ansong 'SDG 8 and Elimination of Child Labour in the Cocoa Industry in Ghana: Can WTO Law and Private Sector Responsible Business Initiatives Help?' (2020) 47(2) Forum for Development Studies, pp. 261-281

[1481] The German NAP pegged a promise to take further action to a target for uptake by companies of human rights due diligence, with a process culminating in adoption of a new national due diligence law.

of the UNGPs, thereby contributing to the institutionalization of practices as the inclusion of human rights considerations in public procurement.

Thus, despite their soft law nature, NAPs have a relevant legal value, as they are the most widespread programmatic documents adopted in most EU MSs with insight on B&HR measures and also on the interlink with public procurement. Indeed, most EU MSs with a B&HR NAP in place do address also public procurement.[1482] On this matter, the NAPs fill gaps related to the *State-business nexus* most often introducing follow-up measures and commitments, highlighting the key provisions in the legislation enabling the use of human rights criteria, training, fostering the use of B&HR requirements and criteria in specific sectors, best practices repositories. This is crucial in filling gaps in an area poorly regulated at regional and national level as B&HR based public procurement, which is mainly based on discretionary application by MSs. As pointed out by Professor Cantú Rivera,[1483] the level of commitment expressed by a government in a NAP on B&HRs is fundamental for scrutinizing the real political will of a State to abide by international human rights law and this may apply also to B&HR based public procurement. NAPs indeed could be a crucial instrument to raise awareness and also indicator of willingness of governments to invest in the State-business nexus, at the same time fostering effective changes in a State's approach to the overall international human rights framework. Examples of commitments and measures promoting human rights in commercial transactions and public procurement fostered by NAPs are: strengthening and monitoring the respect for human rights in public procurement at national and local level[1484], the commitment of governments in voluntary initiatives promoting human rights and ethical responsibility in public contracts[1485] and in multi-stakeholder supply chain initiatives;[1486] the publication of set of common Guidelines for responsible procurement in the public sector in collaboration with municipalities and other relevant parties[1487] and the recommendation to promote careful risk assessments;[1488]awareness raising activities and training on the inclusion of social aspects in public procurement procedures.[1489]

In conclusion, the EU landscape results in a complex patchwork of initiatives slowly moving towards the direction of B&HR based public procurement. To continue the analysis and unpack possible practices which could drive a more effective change, two selected MSs practices will be scrutinized in depth, to showcase on how countries could overcome barriers and implement B&HR considerations in public procurement in practice.

6.2 Benchmarking EU Member States Fragmented Practices towards more Standardization

6.2.1 Insight from Practice: Public Procurement & Human Rights in Sweden

In the EU panorama, Sweden constitutes a key frontrunner in SPP and SRPP practices, having adopted a *National Public Procurement Strategy* in 2016 fostering public procurement that contributes

[1482] Morris D. et al (2018), National Action Plans on Business & Human Rights: An Analysis of Plans From 2013 – 2018, DIHR
[1483] Cantú Rivera,H. (2019)
[1484] See Belgian NAP on B&HR, Action Point 13.
[1485] See Check Republic NAP on B&HR: Fairtrade Town Guidance on a responsible approach to public procurement and purchasing has been adopted incorporating human rights issues
[1486] See German NAP on B&HR: Since 2010, the federal, state and local authorities have been cooperating in the framework of the Alliance for Sustainable Procurement, chaired by the Federal Government. Since 2012, the Centre of Excellence for Sustainable Procurement at the Procurement Office of the Federal Ministry of the Interior has been assisting public contracting bodies in applying procurement criteria. Since 2014, a sectoral agreement in the form of a Declaration on Social Sustainability for IT was adopted and it provides for adherence to the ILO core labour standards in procurement procedures. Another key initiative is "Kompass Nachhaltigkeit" (Sustainability Compass), an information platform funded by the Federal Government, provides an overview of sustainability standard systems and supplementary requirements and assists public contracting.
[1487] See Danish NAP on B&HR
[1488] See Dutch NAP on B&HR: Government suppliers should perform a risk analysis to show that they respect human rights in accordance with the UNGPs. In its 2014 evaluation of the sustainable procurement policy social conditions, the Ministry of the Interior and Kingdom Relations will examine whether this policy is in line with the OECD Guidelines and the UNGPs.
[1489] See Slovenian NAP on B&HR, p. 28: awareness raising and training are provided by a single point of contact, the Helpdesk, offering professional assistance to contracting authorities and economic operators participating or interested in public procurement procedures.

to a socially sustainable society. Thus, an overview on the Swedish Public Procurement Framework and SRPP legal opportunities will be provided.

Regarding human rights risks arising throughout supply chains of suppliers, thanks to the pro-active role of civil society in Sweden, scandals related to human rights and workers conditions violations connected to public procurement were brought to the public eye. This was the case of healthcare public procurement and the surgical instruments industry, characterized by complex and labour-intensive supply chains with manufacturing dispersed in developing countries, where risks of forced labour, child labour, international labour standards violations, health and safety issues etc. were documented. The public buyers' reaction against reputational and legal risks led to setting up a comprehensive approach fostering B&HR in public procurement. The collaborative model coordinated by the Sustainable Public Procurement Secretariat - "Sustainable Public Procurement: A Collaboration between the Swedish Regions"- will be outlined in depth. Peculiar attention will be on the collaborative model based on continual interchange between the public and the private actors, on the identification of priority purchase categories, the set-up of a shared Code of Conduct for Suppliers and sustainable supply chains criteria based on the UNGPs and HRDD processes.

Final reflections will be on the monitoring and remediation challenges in public procurement, outlining the collaboration between the Central Purchasing Body (ADDA) and the Sustainable Public Procurement Secretariat and their iterative methodology to address supply chains and the risk of State-labour exploitations, developed for the electronics sector.[1490]

Framing the domestic Public Procurement Framework and SRPP

Public procurement plays a significant role in the Swedish economy[1491], disbursing an estimated EUR 68 billion annually, approximately a fifth of its GDP. It is characterized by a decentralized and dispersed public procurement model, corresponding to the three democratic levels of government - the federal, regional and local ones.[1492] Indeed, according to the local self-government principle enshrined in the Swedish Constitution and regulated by the Local Government Act (1991), State agencies, county councils, municipalities are responsible for their own procurement of goods, works and services.[1493]

- At national level, the Government is assisted by Government Offices, comprising Ministries, 400 central government agencies and public administrations. State agencies' procurement concerns mainly defence, material administration and transport administration (roads, rails).
- At regional level, Sweden is divided into 21 Counties. County Councils are in charge of local self-government and responsible for public healthcare, medical services like dental care, public transportation and cultural institutions.
- At local level, Sweden counts a total of 290 municipalities. The municipalities public procurement responsibilities entail education, caring services for the elderly, recreational and cultural activities, traffic, urban planning and more technically water supply and sewerage, rescue services, refuse disposal, etc.

The public procurement regulatory framework is based on EU primary law and the *EU Public Procurement Directives* (2014) package transposition. The *Swedish Public Procurement Act (LOU)*[1494]

[1490] The information collected in this section are the result of interviews conducted with: Pauline Gothberg- National Coordinator, National Secretariat Sustainable Public Procurement; Karin Loaneus - Sustainability Strategist, National Secretariat Sustainable Public Procurement. Åsa Edman. Chief Legal Officer at Adda Central Purchasing Body and Kristin Tallbo – Sustainability Strategist at ADDA

[1491] UNEP (2017), Global Review of Sustainable Public Procurement 2017 Global Review Factsheet: Total procurement expenditure for the central government: USD 23 667 millions. % of the procurement expenditure as part of the overall government's expenditure: 20%

[1492] Konkurrensverket (Swedish Competition Authority), 2018, The Swedish Procurement Monitoring Report 2018

[1493] Government Offices of Sweden (GOS) (2016), National Public Procurement Strategy, Ministry of Finance

[1494] Konkurrensverket (2016) The Swedish Public Procurement Act, 1145, entered into force from 1 January 2017. It applies to purchases of public works, goods and services, covering both public and private purchasers, defined as "contracting authorities". Concerning public entities, it covers contracting authorities including (1) decision-making bodies in municipalities and county councils; (2) publicly-governed bodies,

adopted in 2016, together with the *Act on Public Procurement in the Utilities Sectors* (LUF)[1495], the *Defence and Security Procurement Act* (LUFS)[1496] and the *Act on Public Procurement of Concessions* (LUK)[1497], constitutes the cornerstone regulatory framework on public procurement. Further, regarding procurement of services, Sweden has a unique framework under the *Act on System of Choice in the Public Sector* (LOV), which is not covered by EU procurement legislation. All the acts have a different subject matter and scope of application depending on the object of the purchase or the industry for which the purchase is made and the main type of operations encompassed by the contract. The framework regulates procedures for all contracts above and below the EU Directive thresholds. Indeed, the Acts entail two parts: one defining the EU-based rules for above threshold contracts, and the other outlining national rules for procurement not covered by the EU Directives. Below the threshold, contracting authorities may use a simplified or a selection procedure through direct procurement.[1498]

In terms of SPP, Sweden is considered, among other European countries, a frontrunner in Sustainable Public Procurement practices promoting innovation, environmental policy goals and social criteria throughout the procurement process.[1499] Initiatives in SPP and SRPP with focus on human rights and labour rights considerations along the supply chain have been launched at the national, regional and local level, as promoted Chapter 17.1 of the Public Procurement Act. The legislation encourages the use of sustainability requirements, which "*should"* be included in all procurements, although this is not mandatory by law. Indeed, procuring entities have discretion on including environmental and social criteria in the procedures. In October 2021, the Swedish government proposed a new law[1500] under review requiring local authorities to consider six elements - climate, environmental, human health, animal rights, and social and labor laws - in public procurement.

Although the public procurement system is mainly decentralized, at institutional level there are key institutions setting procurement policy objectives and providing support also in the field of SPP, such as the *Swedish Competition Authority*[1501](KKV) operating under the Ministry of Enterprise and Innovation as supervisory body and the *National Agency for Public Procurement* (UHM)[1502] under the Ministry of Finance. The National Agency is particularly relevant for SPP priorities, promoting legal certainty, socially and environmentally sustainable procurement, as well as innovative solutions in procurement, supported by the *Swedish Agency for Economic and Regional Growth* (SAERG), under the Ministry of Industry.[1503] With the purpose to promote a national strategy and an effective framework for contracting authorities with harmonized national objectives on SPP, it issued the *National Public Procurement Strategy* in 2016. By setting a strategic approach to purchasing, the aim was to promote

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such as undertakings, associations and foundations established to meet needs in the general interest not having an industrial or commercial character, which are (i) financed mainly by the government, a municipality, a county council or a contracting authority; (ii) subject to control by the government, a municipality, a county council or a contracting entity; or (iii) in which more than half of the members of the board or the managing body have been appointed by the government, a municipality, a county council or a contracting authority; and (3) associations of one or more authorities and bodies. LOU contains the general underlying principles applying to all procurement of goods, services and works in Sweden: equal treatment, non-discrimination, transparency, proportionality and mutual recognition.

[1495] The Act on Public Procurement in the Utilities Sectors (LUF) applies in the field of water, energy, transport and postal services

[1496] Defence and Security Procurement Act (LUFS) regards defence and security procurement

[1497] Act on Public Procurement of Concessions, (LUK) is applicable to works and services concessions.

[1498] Chapter 19 LOU regulates procurements falling completely or partially outside the directives' scope of application. allowed if the value of the contract does not exceed 28% of the EU Directive threshold for goods and services, when the Public Procurement Act is applicable to the contract. Regarding the Utilities Procurement Act applicability to contracts, the threshold is 26%. For concessions, the threshold is less than 5% of the EU Directive.

[1499] UNEP (2017).

[1500] Regeringen (2021) En skyldighet att beakta visa samhällsintressen vid offentlig upphandling

[1501] Konkurrensverket (KKV) plays a supervisory role, overseeing procurement for efficiency and adherence to regulations, and is empowered to report irregularities to the administrative courts for investigations and eventually sanctions, imposing for instance procurement penalty fines. A public procurement fine may be imposed if an illegal direct award of contracts has taken place.

[1502] The National Agency for Public Procurement Upphandlings Myndigheten was established in 2015 aiming at strengthening the strategic importance of public procurements and focusing on the potential of public contracts as a driver for achieving societal goals. It provides support to contracting authorities to procure goods and services that are more sustainable from an environmental, social and economic perspective.

[1503] The SPA follows up on the implementation of the National Public Procurement Strategy, issuing a bi-annual survey to all procuring agencies (government agencies, municipalities, regional authorities and state-owned companies) to measure participation and understand current challenges

effective procurement management demonstrating the benefits for the society, driving increased growth and employment together with sustainable development of environmental, social and ethical aspects. Thus, at policy level, different initiatives were launched to promote sustainability criteria and environmental and social concerns.[1504] The National Strategy entails 7 main objectives:

Image 6.2: National Public Procurement Strategy (2016): 7 Policy Objectives

As outlined in the National Strategy, the Government prioritised the reform of national public procurement, however the effective implementation of social and environmental considerations stands on the active role and willingness of the contracting authorities to accomplish such objectives through their operations and procedures. Indeed, "the real work starts once the policy objectives actually are to be put into practice".[1505]

The Strategy refers expressly to environmentally responsible public procurement as one of the main objectives that procuring entities are recommended to pursue.[1506] Regarding a link with human rights protection, the Strategy expressly refers in the "7th Objective" to SRPP focusing on social criteria, building on the UNGPs and SDGs frameworks. The social considerations include: promoting employment opportunities for disadvantaged groups, equal opportunities for women, men, children, goods, services, favouring products available and *fit for use* by everyone, respecting conditions and needs of all different groups, such as national minorities.[1507] To take action, the Strategy suggests expressly to weigh up risks in terms of human rights at an early stage of the public procurement process and to produce an internal code of conduct or a sustainability policy so that contracting authorities and entities can demonstrate clearly their responsibility for ensuring a socially sustainable society.[1508]

Thus, different tools were developed by the National Agency for Public Procurement to support the procurement strategy's implementation: (i) a criteria service, which features a database of criteria for different product categories (with three ambition levels) – which are unpacked below; (ii) a risk analysis service, detailing where in the supply chain different products pose higher social and environmental

[1504] CSR Compass (CSR-kompassen) is a step-by-step tool including templates, examples and advice on how social criteria can be formulated, implemented and monitored in public procurement. Templates on environmental and social criteria are also developed.
[1505] National Agency for Public Procurement (UPM) (2017), Mapping Initiatives for Ethical Public Procurement in Europe, Report, 2017:6 Commissioned on behalf of the European Working Group on Ethical Public Procurement and National Agency for Public Procurement.
[1506] The "6th objective", calling for increased green public procurement, using purchasing as strategic means to achieve environmental goals, setting also animal welfare criteria.
[1507] When strategically planning procurement, the contracting authorities have to apply the principle of universal design, ensuring that products and services are used by as many people as possible without excluding certain users in advance, conducting, for instance, an equal opportunity analysis for prior setting specifications.
[1508] GOS (Government Offices of Sweden) (2016) National Public Procurement Strategy, Ministry of Finance

risks; and (iii) a LCC tool, allowing users to calculate the cost of the product or service over its whole life cycle.

National Agency for Public Procurement: Sustainable Supply Chains Criteria

As anticipated, the National Agency for Public Procurement develops and manages sustainability criteria, namely pre-formulated requirements which take into account environmental and social considerations in public procurement, which result more ambitious than the legislation requirements to drive effective change towards sustainability.

The "Sustainable Supply Chains criteria – Level: Advanced" are the most relevant contract conditions in connection with *B&HR based public procurement*, aiming to ensure that suppliers have an efficient risk management in their own operations and supply chains, covering human rights, labour rights, environmental protection and anti-corruption. The criteria include "Suppliers' Obligations" to comply with different international human rights law and international labour standards.[1509]

The section "2. Policies and Routines" provides that to fulfil its obligations, the suppliers shall take measures, namely *policies and routines*, to prevent and manage any deviations from the terms. The measures are to be applied concurrently throughout the entire contract period in their own operation, as well as in the operation of any subcontractors, part of its supply chain.[1510] As explicitly referred "the measures shall be taken in accordance with the UNGPs, or the equivalent".

A crucial phase included in the criteria is the monitoring and follow-up. The contracting authority has, indeed, the right to follow-up that the supplier fulfils its obligations, which can be carried out in different steps including self-assessment, audit and management of deficiencies, which will be all unpacked in depth lately.

Regarding the application of such criteria at regional level, they are included regional and counties procurement, as it will be outlined below unpacking the National Secretariat for Sustainable Public Procurement approach. Furthermore, they are explicitly included into framework agreements fostered by the Central Purchasing Bodies of Sweden. Particularly relevant is the experience of the Swedish Central Purchasing Body (ADDA) dealing with Regional procurement, having developed standardized approaches with the Secretariat and the National Authority of Public Procurement to foster the use of the described sustainable supply chains conditions of contract.

The Start: Scandals in the Healthcare Public Procurement and Surgical Instruments Sector

The awareness of human rights abuses arising along global supply chain of goods, works, services purchased by procuring entities has grown exponentially since 2005.[1511] As a matter of fact, the Swedish municipalities, county councils and government authorities procure goods for more than euro 63 billion annually, with a large proportion manufactured in countries where the risk of adverse impacts on human rights is high. Key risks relate to working conditions below the international labour standards: low wages, forced or child labour and excessive overtime are problems in the manufacturing of a number of product groups.[1512]

[1509] The UN Universal Declaration on Human Rights; the UN Convention on the Rights of the Child, art. 32; the 8 core conventions of the ILO regarding forced or compulsory labour, child labour, discrimination, as well as freedom of association and the right to collective bargaining, (no 29, 87, 98, 100, 105, 111, 138, and 182); the labour law in force in the country where the work is performed, including regulations for salary, working hours, leisure time, and work environment; the environmental law in force in the country where the work is performed; the UN Convention against Corruption.

[1510] The measures include: (1) Adopt a commonly accessible policy, issued by the highest management including a commitment to respect the Terms; (2) Adopt routines to convey their commitment to respect the Terms in their own operation and in the supply chain; (3) Appoint a manager at the highest management level, responsible for compliance with the Terms; (4) Adopt routines to regularly carry out risk analyses, to identify and prioritise current and potential risks of deviation from the Terms, as well as mapping the supply chain with special regard to high risk operations; (5) Adopt routines for regular follow-up of the Terms compliance; (6) Adopt routines to immediate action to prevent and limit deviations from the Terms, and to make amendments to identified deviations.

[1511] Gothberg, P. (2019) "Public Procurement and human rights in the healthcare sector: the county councils' collaborative model".

[1512] Sundstrand, A., Agren, R. (2018) "The implementation of Directive 2014/24/EU in Sweden: a sanguine approach" in Treumer, S.; Comba, M. (eds), Modernising Public Procurement, Edward Elgar Publishing, 2018 260

The civil society in Sweden has played an influential role in human rights advocacy, reporting cases on human rights harms connected with public buyers' supply chains. In details, the NGO *Swedwatch* brought to the public eye multiple ILS violations and human rights abuses happening in suppliers' supply chains of the Swedish public authorities. Some examples of sectors regard the electronics and the food production, such as the poultry industry in Thailand and coffee production in Brazil[1513]. The NGO has focused on scandals in the healthcare sector, regarding the procurement of surgical instruments and plastic gloves whose manufacturing is mainly dislocated in developing countries such as Pakistan, Malaysia, Bangladesh, Thailand.[1514]

Overall, healthcare procurement in EU plays a crucial role, with approximately 9% out of 14% GDP allocated to health services and medical goods, with the primary objective to provide universal access to quality healthcare at an affordable cost, allowing effective enjoyment of the human right to health to everyone.[1515] Public procurement has increasingly been promoted as a tool for developing efficiency as well as contributing to better health outcomes; as the European Commission *Opinion of the Expert Panel on effective ways of investing in Health* outlines that MSs and EU should enhance the use of environmental and social criteria for policy goals for healthcare procurement. In Sweden, 21 County Councils are responsible for public healthcare and medical services like dental care, procuring for approximately EUR 13 billion per year, with healthcare spending accounting for 80% of the regions' procurement. The County councils started focusing on SRPP more comprehensively since 2007, after that the NGO *Swedwatch* reported instances of severe labour conditions in the Swedish healthcare procurement, especially in the surgical instrument industry, whose production and manufacturing are located in Pakistan[1516], in the Punjab region and in the Sialkot cluster, supplying many EU and US-based healthcare multinational corporations. The first investigations were led by the British Medical Association, whose *Medical Fair and Ethical Trade Group* visited factories in Sialkot, part of the UK National Healthcare System supply chain, revealing unethical working conditions in the manufacture of medical goods routinely used in UK hospitals.

Swedwatch followed a similar approach, reporting since 2007 labour rights violations and appalling working conditions in the Pakistani surgical instruments industry. "The Dark Side of Healthcare" Report[1517] brought to the public-eye the labour conditions of industries and local workshops linked to the Swedish healthcare procurement, documenting hazardous working environments, widespread use of child labour[1518], unfair contractual obligations and wage, excessive overtime, anti-union policies and practices.[1519] The report outlined that although surgical instruments are mainly procured through companies based in EU and US, it must be considered that their actual manufacturing take place in developing countries in dangerous conditions. Indeed, surgical instruments are generally made of carbon steel, stainless steel, titanium or aluminium, produced in a wide range of sizes and specifications requiring highly-labour intensive production processes.[1520] Most of the instruments, such as retractors, scissors and forceps, procured by Swedish county councils are branded in EU, where the automatic

[1513] Swedwatch (2016) Agents for Change: How public procurement can influence labour conditions in global supply chains. Case studies from Brazil, Pakistan and Thailand, Report 82.

[1514] Swedwatch, BMA, Medical Fair & Ethical Trade Group (2015), Healthier Procurement: Improvements to Working Conditions for Surgical Instrument Manufacture in Pakistan, Report 73. Swedwatch, Finnwatch (2015), Trapped in the kitchen of the world- The situation for migrant workers in Thailand's poultry industry, Report 76

[1515] The right to health is recognised in numerous international and regional instruments, starting with the UDHR (Art 25) and including the ICESCR (Art 12), the Convention on the Rights of the Child (Artt 6, 24), the Convention on the Elimination of All Forms of Discrimination against Women (Art 10, 11, 12, 14), and the European Social Charter.

[1516] Pakistan, is a major exporter of surgical instruments, with global market of €4.4 billion, produced in the industrial district of Sialkot.

[1517] Swedwatch (2007) Vita rockar och vassa saxar en rapport om landstingens brist på etiska inköp

[1518] Although in 2016 the Government of Punjab raised the minimum employment age to 15 years in most sectors, and to 18 years in hazardous occupations, including the manufacturing of surgical instruments, child labour is prominent in the informal sector.

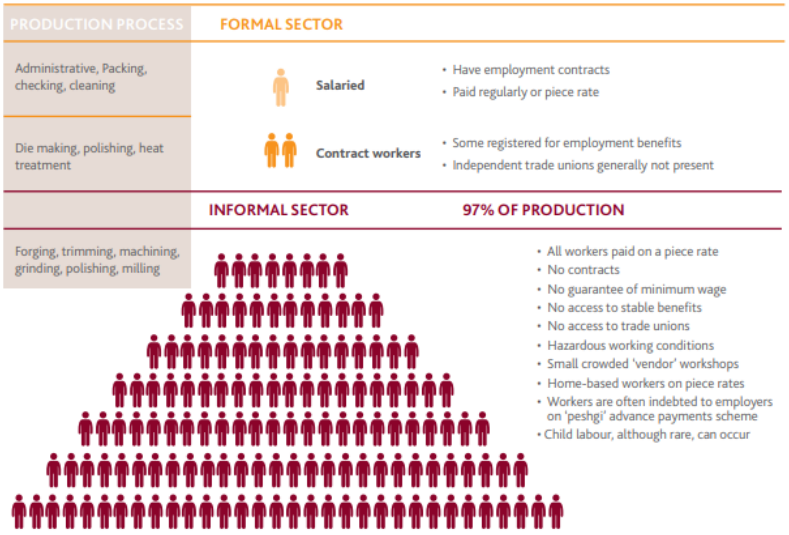
[1519] Gothberg, P. 2019, "Public Procurement and human rights in the healthcare sector: the county councils' collaborative model".

[1520] Wakim R., van den Akker D. (2018) Sustainable Public Procurement as a Driver of Change: The Case of Surgical Instruments, Master Thesis, Uppsala Universitet

forging is performed or from where the raw materials are. But the products grinding, milling, piling and sharpening takes place mainly in Pakistani factories and upon completion, sent back to EU to be branded.[1521] The global market for surgical equipment production is massive in Pakistan, particularly in the area of Sialkot, the surgical industry produce more than 150 million surgical instruments every year of which almost 95% exported, with a global market value of €277 million, considered the key SME export sector in Pakistan.[1522] Among 100,000 to 150,000 workers are engaged in direct employment and it creates indirect employment for 300,000 to 400,000 workers.

Sialkot's surgical instrument global production and value chain is labour-intensive and highly complex, involving the import or local production of raw materials, multi-tiered manufacturing centres, registered factories ("formal sector" workplaces), vendor-operated large, medium and small informal workshops, traders and suppliers of semi-finished and finished products, intermediary agents and international buyers. Formally registered factories employ both permanent staff as well as workers on temporary or agency contracts. Their terms and conditions of work are generally understood to meet Pakistani as well as international labour standards. However, it is estimated that over 95% of production is outsourced to the informal sector (where worksites are unregistered and work is carried out in small units and family homes). The informal sector is largely unregulated, and there is evidence of child labour, unsafe working conditions[1523], excessive working hours, low wages[1524], discrimination and vulnerability to abuse and exploitation, anti-union practices.[1525]

Image 6.4 Formal and Informal Sector in the Surgical Instrument Industry in Sialkot (Source: ETI, 2020)



In conclusion, the media and NGOs advocacy played a crucial role in shedding lights on human rights violations along the global supply chains also when the State is the buyer, and in calling for

[1521] Jaekel T, Santhakumar A. (2015) Healthier procurement: Improvements to working conditions for surgical instrument manufacture in Pakistan. Stockholm: Swedwatch & British Medical Association.

[1522] Bhutta M., Santhakumar A. (2016) In good hands: Tackling labour rights concerns in the manufacture of medical gloves, BMA and European Working Group on Ethical Public Procurement

[1523] Concerning health and safety at work, after in-site visits by the NGO, working conditions in the informal sector were found generally unhygienic and hazardous for workers and their employers. Small vendor units, particularly forging shops, were found dirty, cramped and poorly lit, without ventilation or health and safety equipment. Forging, cutting, grinding and polishing by hand expose workers to harmful dust and debris, without proper equipment.

[1524] In formal factories across the entire manufacturing industry in Sialkot, it was found that only 44% workers were registered at the Punjab Social Security Institution. In the surgical instrument sector specifically, only 29% of formal workers were registered with the Employees Old-Age Benefit Institution, entailing no access to social and employee benefits for informal workers. According to the Global Living Wage Coalition Report in 2017, living wages in Pakistan is set at PKR 20,000 for urban Sialkot and PKR 18,000 for rural Sialkot. However, the informal sector, incomes vary between PKR 15,000 and 30,000 per month, keeping informal workers in the poverty trap.

[1525] Pakistan ratified ILO core labour standards, including the right of workers to freedom of association and collective bargaining, however, many workers are in practice prevented from joining an independent, democratically elected trade union or may be threatened if they do so.

action. Indeed, such scandals constituted the springboard for multiple initiatives on more ethical and responsible business along supply chains of public suppliers. For instance, in a follow-up study with audits and in-site visits, initiated by the Stockholm County Council and conducted by Swedwatch in 2010 improvements were reported as a result of increased social requirements from public buyers. More structured initiatives have been later developed at national level coordinated by the *National Secretariat on Sustainable Public Procurement*[1526], understanding the urgency to act in the direction of a more socially sustainable and B&HR based public procurement.

The Public Buyers' Reaction and Collaborative Models: "Sustainable Public Procurement – A Collaboration between the Swedish Regions"

Although public procurement is decentralized in Sweden and each public entity is responsible for its own procurement, sustainability commitments and human rights criteria have been progressively standardized at regional and national level through different initiatives, aligning with the *National Strategy* objectives. One of the most important initiatives has been led by the Swedish Counties, through regional cooperation, providing opportunities to speed up the transition to a more sustainable society by demanding socially and environmentally sustainable products and services. The 21 Swedish county councils, each responsible for providing healthcare, dental care and public transports, started to focus on SRPP in a more comprehensive way since 2007, collaborating in a national effort towards sustainable procurement. Since 2012 the regions collaborate on SPP through a Shared Code of Conduct and common contract clauses, under coordination of the *National Secretariat for Sustainable Public Procurement* - Hållbar Upphandling. Furthermore, since 2015, the Central Purchasing Body (Adda) and the National Secretariat for Sustainable Public Procurement signed a letter of intent to cooperate and monitoring human rights risks throughout public contracts.

As reaction to the media coverage and scandals reported by Swedwatch on human rights abuses along the Swedish public purchasing supply chains,[1527] a pilot project was launched in 2007: the "*Sustainable Public Procurement – A collaboration between Swedish Regions"*.[1528] The project was promoted by initiative of the chief procurement officers of the Stockholm County Council, the Region of Vastra Gotaland and the Region of Skane. By 2007, only a few references to environmental requirements existed, while human rights considerations and social criteria were scarcely included in public procurement. Initially, the project was influenced by private sector CSR measures, such as supply chain controls introduced by Swedish brands as H&M, Indiska and IKEA and international initiatives as the UN Global Compact, ISO 26000, the OECD Guidelines for Multinational Enterprises. Particularly, the UNGPs endorsement in 2011 was a driver for the project scale-up, requiring suppliers of the Swedish regions to set procedures for identifying and mitigating risks associated with human rights, workers' rights, the environment and corruption, in their own operations, as well as throughout the entire supply chain. The project was then expanded, entailing a process of institutionalization by appointing a Steering Committee, a National Coordinator for social responsibility, an Expert Group and Point of Contact in each County Council,[1529] with responsibility of the regions for the continuous follow-up with support of the **N**ational Office.

In 2010, the collaborative model[1530] was extended nationally from the three regions to all the regions at national level[1531], thus standardising a common approach to *B&HR based procurement* characterized

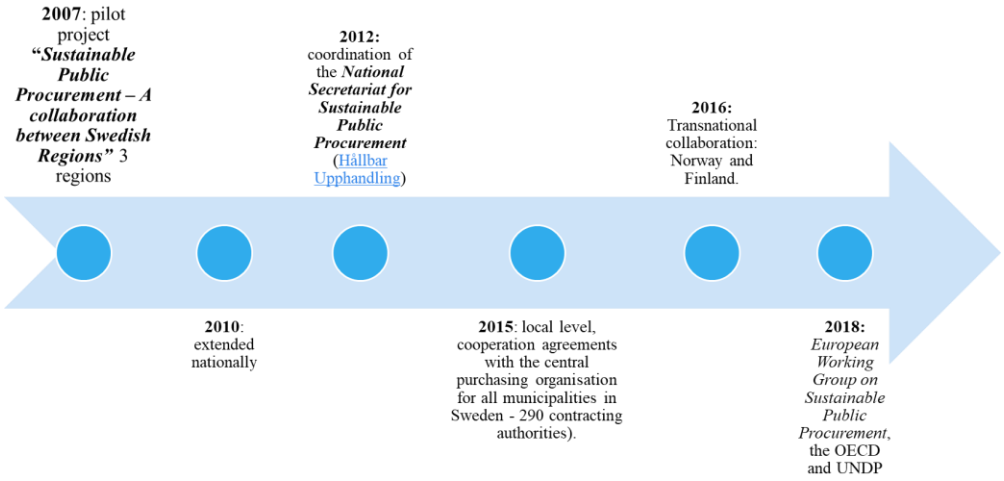
[1526] Woods, T. (2019). Utilizing Supply Chain Transparency Measures to Combat Trafficking in Persons: A Comparative Analysis of the U.S. and Swedish Systems. Public Contract Law Journal, 48(2), 423–444.
[1527] Swedwatch, (2017) Vita rockar och vassa saxar – en rapporto m landstingens brist pa etiska inkop, Report n. 16
[1528] In Swedish: Socialt Ansvartasgtagande i Offentlig Upphandling – Ett samarbete mellan Sveriges landsting och regioner.
[1529] The work in the regions is divided into eight regional coordinators and contact persons for both environmental and social issues
[1530] Budget of 25 cent per inhabitant, amounting to 240.000 euro budget annually for two years
[1531] Collaboration among the Swedish regions: Stockholm, Uppsala, Sormland, Ostrgotland, Jonkoping, Kalmar, Blekinge, Skane, Halland, Vastra Gotaland, Varmland, Orebro, Vastarmanland, Dalarna, Gavleborg, Vasternorrland, Jamtland, Vasterbotten, Norrbotten, Gotland

by precise human rights requirements at national level; identification and mitigation of human rights risks in the supply chain, establishment of a division of responsibility for operationalizing HRDD in the procurement process as well as follow-up measures, with an aim to share costs for staff, time, capacity development and financial resources for conducting third-party audits.[1532] A key step was the establishment of the *National Secretariat on Sustainable Public Procurement*[1533] in 2012 under the Ministry of Finance. Since 2015, the potentials of the project were enlarged at local and also transnational level: cooperation agreements were set up on one side with the central purchasing organisation for all municipalities[1534] in Sweden (290 contracting authorities); on the other with the national purchasing organizations in Norway and in Finland. Then, collaboration was established with members of the *European Working Group on Sustainable Public Procurement*, with the OECD and UNDP.[1535]

As it will be unpacked in depth below, the "Sustainable Public Procurement – A Collaboration between the Swedish Regions" initiative builds on the importance of a collaborative approach and alliancing between multiple stakeholders - both public and private. On this note, collaborative models of public procurement have proved to be successful in various jurisdictions and could be a way forward to foster human rights protection throughout supply chains. For example, the *Collaborative Procurement* model[1536], applied extensively in UK, US, Australia - particularly to works procurement and complex infrastructures projects - has showcased the importance of strengthening supply-chain collaboration[1537] rather than transferring risk down the supply chain.[1538] So, following Mosey (2020) argument, building alliances between stakeholders and fostering dialogue is a key. Indeed, alliances describe a range of agreements between two or more parties, working in any sector, who agree to pursue a set of agreed objectives. The aim is to establish long-term arrangements which offers opportunities for benefits to be gained by coordinated action and cost-sharing over a number of projects or an on-going programme'.[1539] It is essential to foster a collaborative and integrated team brought together from across the supply chain, sharing a set of common goals and work under common incentives.[1540]
In the Swedish case, collaboration has been built between different public actors involved, including the Swedish Regions, the Sustainable Public Procurement Secretariat, procurement entities, central purchasing bodies (ADDA), and also the private suppliers. Furthermore, supply chain collaboration, namely integrating supply chain in the alliancing is particularly relevant, to involve as much as possible also sub-contractors, suppliers, manufacturers and operators and foster dialogue.

[1532] Gothberg, P., (2019) "Public procurement and human rights in the healthcare sector: the Swedish county councils collaborative model" ELECD 1141; in Martin-Ortega, O, Methven O'Brien, C (eds), "Public Procurement and Human Rights", Edward Elgar Publishing, 2019 165
[1533] Hållbar Upphandling, see http://www.xn--hllbarupphandling-8qb.se/
[1534] SKL Kommentus AB, owned by the Swedish Association of Local Authorities and Regions (SALAR). Since 2011, SKI offer customers supplier monitoring services, consisting of social and environmental audits, through "Hållbarhetskollen"
[1535] Konkurrensverket (2018), The Swedish Procurement Monitoring Report 2018
[1536] Mosey D.(2019) Collaborative Construction Procurement and Improved Value, Centre of Construction Law & Dispute Resolution, Dickson Poon School of Law King's College London
[1537] Mosey's collaborative procurement comprises "A set of processes and relationships through which teams can develop, share and apply information in ways that improve the design, construction and operation of their projects. It supports team selection and team integration, and it offers a fresh approach to legal and cultural issues that can otherwise reduce efficiency and waste valuable resources". Mosey (2019), p. 2
[1538] Collaboration among individuals engaged on a project or programme of work is only made possible by integrating the differing needs and commercial priorities of the organisations who employ them.
[1539] Baker, E. (2007), Partnering strategies: the legal dimension. Construction Law Journal 23:345.
[1540] Mosey D. (2019) p. 293

Image 6.3: Timeline - Sustainable Public Procurement, A Collaboration between the Swedish Regions (Source: Gothberg P. 2019)



Priority Purchase Categories

The standardized approach on human rights in public procurement led by the *National Secretariat for Sustainable Development* is based on risk assessment – conducted every year – and on the identification of priority purchase categories, particularly exposed to human rights adverse impacts.

Initially, the County Councils identified 8 prioritized risk areas due to high procurement volumes and associated risks of adverse human rights and environmental impacts, requiring a sustainability approach in their procurement management. The risk areas were: surgical instruments, surgical gloves, food, ITC, med-tech products, textiles, pharmaceuticals, dressings[1541]. Then, the product categories have been updated and expanded in the years; the 2023-2025[1542] prioritized categories include:

- Basic medical equipment (A)
- General Consumables (A & F)
- Housekeeping (B)
- Food (B)
- Nutrition (B)
- IT - Workplace and Technical Platform (C)
- Wound care and compression (D)
- Dental Care (D)
- Medicines (E)
- Incontinence (F)
- Medical Technology (G)
- Laundry and textile

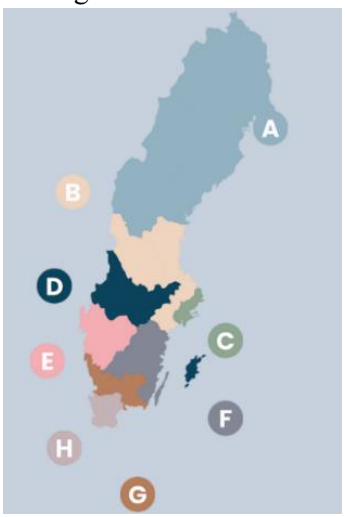


Image 6.4: National Organization and Division of Responsibility among the regions for the risk-areas (Source: Hållbar Upphandling, 2024)

To identify, map and assess risks in the most efficient way, the risk areas and product category have been divided between eight Swedish regions – as in the map above- which are each responsible for

[1541] Initially identified six categories as high risk for human rights abuses: surgical instruments, textiles, gloves, syringes and cannulas , dressings and wound care and single use products. At the end of 2010, the list was extended to include ICT and pharmaceuticals

[1542] Hållbar Upphandling (2024) Priority purchase categories, available at https://www.xn--hllbarupphandling-8qb.se/prioriterade-ink%C3%B6pskategorier

developing a 3-year risk-based Action Plan on the assigned product category, made publicly available for suppliers. Each region is further responsible for its follow-ups, stakeholder dialogues, development of new criteria/tools, etc. A key aim of this approach is that each region shares summarized results from completed audits with the aim of streamlining follow-ups for other procurement authorities. In each region, Regional Coordinators, contact person for the environment and contact person for social responsibility are appointed to conduct the risk assessment and develop the Action Plans, which are, then, supervised by the National Secretariat and the Steering Committee.

Shared Code of Conduct for Suppliers

One of the most innovative aspect of the collaborative model is the adoption by all county councils and regions of a shared Code of Conduct (CoC) for Suppliers set up in 2010 and updated in 2019[1543], in order to harmonize and standardize human rights requirements to suppliers within the public procurement cycle. The CoC is to be applied when procuring products within one targeted high-risk sectors identified by the Secretariat. The Secretariat has developed specific due diligence contractual terms for sustainable supply chains, shared also by the National Public Procurement Authority, and provides guidance on their application to both public buyers and suppliers The *National Secretariat for Sustainable Public Procurement* has developed specific guidelines on the contractual terms[1544] and it provides guidance to economic operators to fulfil due diligence commitments and to align to the CoC requirements.

The Code refers explicitly to international human rights and labour rights obligations, setting-up contractual terms which harmonize and clarify the region's expectations of suppliers regarding sustainable supply chains. In details, the contractual terms require to perform the contract in accordance with: the UN UDHR (1948), the ILO's eight core conventions on forced labor, child labor, discrimination and freedom of association[1545]; the UN Convention on the Rights of the Child, Article 32; the occupational health and safety and health and safety legislation in force in the country of manufacture; the labor law, including rules on pay conditions, and the social insurance coverage that applies in the country of manufacture; the environmental protection legislation in force in the country of manufacture; and UN Convention against Corruption.[1546]

The CoC is structured following the Global Compact's ten principles, divided into four main areas: human rights, workers' rights, the environment[1547] and business ethics.[1548] The CoC contains a general commitment to respect human rights, in line with UNGP 11:

> "The supplier must fulfill the contract in accordance with the commitments in appendix [1] Code of conduct for suppliers regarding human rights, workers' rights, the environment and business ethics and take the measures specified in [this chapter/contract section]."[1549]

Such requirements are to be included in the contractual terms established with all county council contractors, which are expected to respect the CoC and doing their utmost to achieving the requirements within their own supply chains.

[1543] See Annex 2

[1544] Hållbar Upphandling, Guidance on Contract Conditions

[1545] ILO Convention Nos. 29, 87, 98, 100, 105, 111, 138 and 182

[1546] Hållbar Upphandling, (2019), Sustainable Supply Chains Guidelines contractual terms, p. 6

[1547] The commitment on climate and environmental impact is about: compliance with national environmental legislation; promotion of climate measures that contribute to achieving national and international climate goals; reduction in the use of virgin raw materials; no use of raw materials from species listed in CITES; control or evaluation of chemical use including, if applicable, substitution and/or implementation of alternative processes; storing, handling, transporting and disposing of waste in a manner that protects the health of workers, people in surrounding communities and the environment; promoting strategies for efficient water use where applicable; reduction or elimination of emissions that pose a danger to health and the environment

[1548] The commitment to business ethics covers corruption, anti-competitive behavior and taxation. The commitment is based on the OECD's guidance for multinational companies, which emphasizes the importance of not entering into agreements that aim to distort competition or abuse a dominant position. In terms of taxation, this means preventing abuse of the welfare systems, ensuring that everyone pays the right tax in the right country and promoting competition on equal terms. The commitment is based on the Swedish Tax Agency.

[1549] Extract CoC

In order to fulfil the contractual obligation, the supplier must take measures to prevent and manage any deviations from the basic conditions and the measures must be documented and applied continuously throughout the contract period in the company's own operations and with subcontractors at all levels. Serious deviations refer to forced labour, child labour, working conditions that endanger life, serious environmental damage, large-scale corruption and attacks on environmental and human rights defenders.[1550]

The code requirements are generally implemented through contract performance clauses to be included in the invitation to tender:

> "The tenderer is expected to carefully read the document CoC for suppliers in connection with tendering. This is because the accepted supplier undertakes, with the signing of the agreement, to comply with the terms regarding social and environmental responsibility in the agreement. When signing the contract, the supplier must provide the name and contact details of the person within the company who has the operational responsibility for social and environmental responsibility for the applicable agreement".[1551]

Before the supplier submits a tender, it is important that all economic operators are aware of the CoC terms and understand the requirements for internal policies and routines that the supplier is expected to have in place at the start of the contract. Moreover, specific clauses including provisions for sanctions have been developed in 2014 through dialogue with the *Swedish Environmental Management Council (SEMCO)* and inspired by the UNGPs framework, requiring suppliers to have procedures to ensure that goods and services supplied to the county councils are produced under conditions compatible with fundamental human rights, as stated in the contract.

In details, the specific requirements for the suppliers at the start of the contract include *commitment* (§1), *policies and routines* (§2), *follow-ups and audits* (§3*), sanctions* (§4). Suppliers, since the start of the contract must (1) have adopted a publicly available policy, decided by the top management, which includes a commitment to respect the terms; (2) have adopted routines for communicating the commitment to respect the conditions in one's own business and in the supply chain; (3) have appointed a manager at management level who is responsible for compliance with the terms; (4) have adopted procedures for conducting regular risk analysis, ie identifying and prioritizing current and potential risks of non-compliance with the conditions, including a survey of the supply chain with special regard to high-risk activities; (5) have adopted routines for regularly monitoring compliance with the conditions; and (6) have adopted procedures to take immediate action to prevent and limit deficiencies in compliance with the conditions, as well as to rectify identified deficiencies. Further, it is expressly outlined that measures shall be taken in accordance with the UNGPs.

The contract conditions require suppliers of the prioritized high-risk sectors to implement HRDD, thus to have policies and processes in place to identify, prevent, limit and remedy negative impacts on people, the environment and society in their own operations and in the supply chains. Within the scope of the contract term on due diligence for sustainable supply chains, due diligence includes identifying, preventing, limiting and remedying negative impacts on people, the environment and society in your own operations and in the supply chains. The specific mandated performance requirements and process requirements include:

- Process requirement 1: integrating the commitments into corporate policies.[1552]

[1550] The serious deviations are defined in Hållbar Upphandling, Appendix 1: Code of conduct for suppliers stating that: "Forced labour, child labour, working conditions that endanger life, serious environmental damage, large-scale corruption and attacks on environmental and human rights defenders are serious deviations."

[1551] Hållbar Upphandling, (2019) p. 4

[1552] It describes what requirements are placed on policies and how responsibility should be distributed between the board, people in management functions and employees

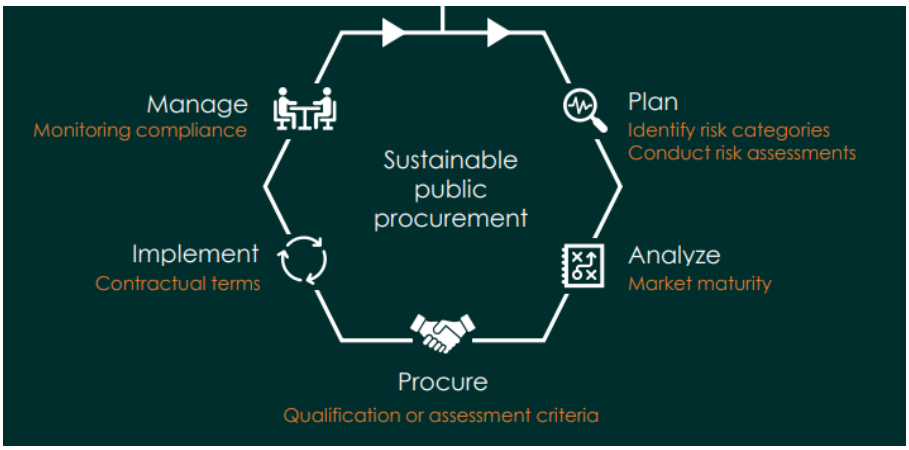
- Process requirement 2: identifying and assessing negative impacts and risks.[1553]
- Process requirement 3: preventing and limiting negative impact that supplier causes or contributes to.[1554]
- Process requirement 4: preventing and limiting negative impact connected to the supplier.[1555]
- Process requirement 5: following up the measures to prevent and limit negative impact[1556]
- Process requirement 6: enabling complaints.[1557]
- Process requirement 7: providing redress.[1558]

Furthermore, suppliers hold key reporting obligations. They must report the actual circumstances as well as the implemented and planned measures in accordance with clauses 2.1.1–2.1.7 of the contract condition.[1559]

Including Human Rights throughout the Procurement Cycle: Public Buyers' Perspective

The Swedish collaborative model entails guidance to public buyers on how to include human rights throughout the public procurement cycle, fostering SPP from planning to procurement and contract management, by introducing human rights considerations and the UNGPs recommendations. Indeed, the Secretariat provides support not only to suppliers but especially to procurers to prepare the procurement based on the contract terms on due diligence for sustainable supply chains, to then execute the procurement and realize the contract. The suggested methodology built on the procurement cycle entails the following stages: planning; analysis; procurement; implementation; contract management and monitoring.

Image 6.5: The SPP cycle inspired by the CoC (Source: Hållbar Upphandling, 2020)[1560]



[1553] It describes the concepts of risk suppliers, mapping the supply chain, consultation with rights holders and particularly vulnerable groups, and how to prioritize risks based on probability and seriousness

[1554] It describes the responsibility and the need to cease activities that cause or contribute to negative impact, establish action plans and consider purchasing methods.

[1555] It describes the responsibility and the need to use your influence through, among other things, supplier assessments, drawing up action plans and passing on the requirements.

[1556] It describes what we mean by following up on action plans, by consulting in a meaningful way with rights holders and by handling deviations.

[1557] It describes the key functions of complaints mechanisms, which stakeholders they should be open to, the need to handle complaints raised and the different requirements for your own business and supply chains.

[1558] It describes the concept, when you are obliged to make amends and the need to consult in a meaningful way with affected rights holders and evaluate whether they are satisfied with the process and the outcome.

[1559] This means that suppliers must: (1) Investigate what is a potential or actual circumstance. This includes drawing attention to particularly vulnerable groups and, if possible, consulting in a meaningful way with the rights holders concerned. (2) Cease activities that cause or contribute to the serious deviation, if it occurs in your own operations or if you contribute to it in the supply chains. (3) Establish and follow up action plans to prevent and limit the serious deviation, if possible, in meaningful consultation with affected rights holders or their representatives. (4) Promote purchasing methods that do not make it difficult for the subcontractor to comply with the commitments, if the serious deviation occurs in the supply chains (5) Enable affected rights holders, their representatives and environmental and human rights defenders to make complaints related to the serious deviation. (6) Establish and implement remedial plans, if you have caused or contributed to the serious deviation. If you are only connected to the serious non-conformity, you should develop a plan for how you will use your influence to get the party that caused or contributed to the serious non-conformity to make amends.

[1560] Information in this section have been collected after interviews with the National Coordinator, Head of Unit, National Secretariat for Sustainable Public Procurement Ms. Pauline Gothberg and the National Senior Sustainability Strategist Ms. Karin Lonaeus

Unpacking the procurement cycle, in the *planning* phase, public buyers have to identify risk categories and conduct risk assessments when planning a procurement. If the procurement entails goods, works, services in one of the nationally prioritized purchase categories, identified as "high risk" areas, the specific Action Plans developed by the Regions must be taken into account,[1561] together with the abovementioned contract conditions for Due Diligence for Sustainable Supply Chains. The conditions can also be used in procurements of other categories where the risks are judged to be high.[1562]

More in details, in the preparation phase, it is necessary to (i) set requirements for sustainable supply chains and decide when to use them; (ii) to identify and assess the negative impacts on people and the environment in the supply chain; (iii) to map the conditions in the current industry and (iv) to plan for follow-up. A careful and effective planning, indeed, facilitates the process of inclusion of human rights throughout the procurement cycle. Further, as second step, the *analysis* of the market maturity is crucial to adapt human rights and sustainability requirements to the market context.

Thirdly, the *procurement* phase entails including in the bidding documents qualification and assessment criteria inspired by the CoC, deciding when to use the due diligence requirements for sustainable supply chains. it is crucial for the suppliers that the procurement documents contain all relevant information to be able to submit tenders, including the contract terms for sustainable supply chains accompanied by the regions' shared Code of Conduct for suppliers requiring that suppliers fulfil contracts in accordance with human rights, workers' rights, the environment and business ethics. When the procurement documents are ready, it is time to advertise the procurement so that suppliers are aware of them and can submit their tenders.

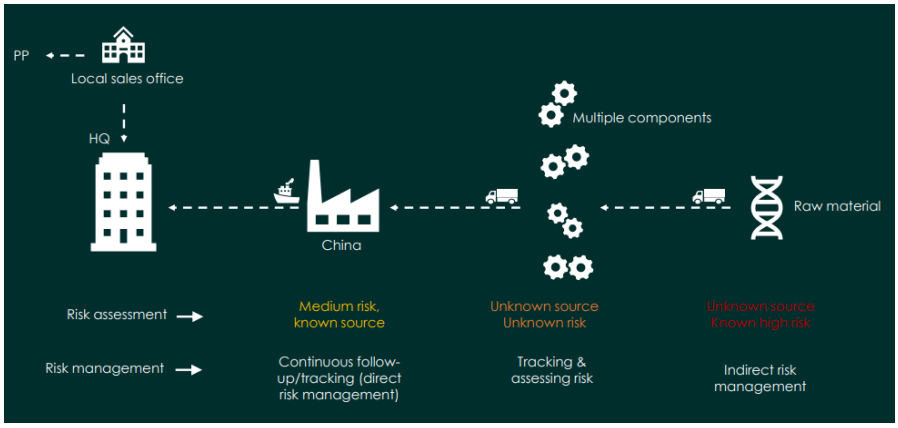
Furthermore, during the *implementation* phase and contract management, according to the contractual terms setting requirements on suppliers, 1) measures shall be taken to ensure compliance with the CoC; 2) the measures which entail policy commitment, forwarding requirements, division of responsibility, risk assessment, tracking and managing, remedy shall be all taken in accordance with the UNGPs or the equivalent; 3) it is crucial to ensuring right to follow up through self-assessment and audits; 4) and, also, provide for sanctions, corrective actions, fines and termination.

Regarding *HRDD*, the risk assessment and risk management must be conducted in all phases of the supply chain of the procured products, going back to all multi-tiers of the supply chain. Starting with the raw material collection phase, it is one of the crucial steps where human rights abuses are prevalent and more hidden, entailing *unknown source* and *known high risks* which require *indirect risk management*; taking into account the production of all multiple components part of a product, the chain is complicated by *unknown sources* and *unknown risks*, so it is important to track and assess risk through risk management. Further, the manufacturing and delivery phase regard *medium risk and known source* requiring a continuous follow-up and tracking, through direct risk management.

[1561] If the procurement covers one of the regions' priority purchasing categories, a need assessment has already been carried out at national level and the conditions must always be used. If the work within the framework of the contract is carried out under such conditions that Swedish labor law is not applicable, public buyers are in some cases obliged to demand that the supplier fulfills the contract in accordance with the ILO's core conventions - on the condition that this is "necessary".

[1562] For other categories, the Swedish National Procurement Authority provides basic contract terms. The base level is available in the Procurement Authority's criteria service. For instance, National Agency for Public Procurement- Upphandlings Myndigheten , Labor law conditions according to ILO core conventions and sustainable supply chains.

Image 6.6: Example of due diligence in PP supply chain (Source: Hållbar Upphandling, 2020)



Additionally, in the *contract management and monitoring phase*, after having prepare suppliers[1563] it will be crucial to plan follow-ups[1564] and carrying out them[1565] through various methods such as dialogue, self-reporting, transparency in the supply chains and audit. Indeed, monitoring compliance is crucial through follow-ups which is considered the most important part of the process. The contract performance clauses require, indeed, suppliers to have procedures in place to ensure that the production of goods and/or services are delivered during the term of the contract under conditions that are compatible with the CoC. The follow-up aims are to check that such routines are effectively in place at the supplier level and continuously applied to products on contract. To evaluate compliance, the regions have common routines for following up the contract terms in the form of *self-assessment, desktop-audit and factory-audit*.

A follow-up starts with the supplier answering a self-assessment, where the supplier is asked to describe its policy commitment, division of responsibility, its procedures for identifying and managing risks. The supplier is also asked to present its due diligence for specific products delivered to the regions. Further, the *desktop audit* envisages that the auditor goes to the supplier's office to monitor compliance against the contract terms. Through dialogue and document reviews, the auditor verifies the answers in the self-assessment and ensures that the procedures described are integrated into daily operations, so it is useful to ensure that the supplier is actively identifying and managing risks in the supply chain. Furthermore, the *factory audit* entails that the auditor goes to a factory, either the supplier's own factory or a subcontractor's, to verify compliance with the fundamental terms through in-site visits by a team of auditors, which goes to the factory to speak to management, interview workers as well as inspect the factory and dormitories.

A further essential step is taking action, in case deviations are detected during a follow-up. In the *action phase*, the supplier is given the opportunity to managing and remedying deviations, since the main objective is to increase close dialogue among the contracting authority, suppliers, auditors to improve the situation and measures are to be taken is in proportion to the severity of the deviation[1566]. In connection with deviations, an action plan is always drawn up, including a timetable, which is

[1563] Hållbar Upphandling (2024) Realize the agreement. It is advisable to have a start-up meeting with suppliers after the contract lock has expired. At the start-up meeting it is advised to: clarify the terms of the contract for suppliers by going through this guide. Establish contact with the persons responsible for due diligence. Communicate how the follow-up will be done. Capture any questions or concerns. Establish contact with the people responsible for due diligence is a prerequisite for a functioning collaboration and not least for the follow-up.

[1564] Hållbar Upphandling (2024) Realize the agreement. Purchase categories that the regions have assessed as having particularly high risks for people and the environment are followed up in a joint process led by the Regions' Office for Sustainable Procurement.
When you plan the follow-up of a supplier, it can be valuable to review the results of previous follow-ups. It can also save time to contact the Regions' Office for Sustainable Procurement to get information about which suppliers will be followed up in the coming year.

[1565] Suppliers are obliged to participate in follow-up. The follow-up methods dialogue, self-reporting, transparency in the supply chains and audit have been specified in the contract terms. The contract terms also allow for the use of other methods, such as origin verification, open data or authority databases.

[1566] Hållbar Upphandling (2024) Realize the agreement

determined by the supplier and approved by the region.[1567] Terminating a contract should be seen as a last resort after repeated attempts to correct the discrepancies. This also applies to serious deviations, as problems that are identified often persist and may even worsen if a contract is terminated, which is why it is also important that public buyers act responsibly.

Finally, *sharing results*[1568] with all regions and communicating with collaboration partners[1569] is recommended as a last crucial phase, after that an audit has been carried out, entailing information on the type of follow-up carried out and if any deviations are handled. The methodology recommended by the National Secretariat of Sustainable Development has been implemented in the healthcare sector procurement, showing the importance of conducting effective follow-ups as crucial step to allow transformative action to ensure human rights along the supply chain. For instance, audits were conducted in surgical instrument manufacturers in Pakistan and gloves manufactories in Malaysia, including third party, desktop and factory audits. Results were shared showing human rights violations and labour rights abuses. This prompted a corrective action plan comprising urgent and long-term improvements to fulfil regions social contract performance conditions. The follow-up proved to be successful, as a consequent action phase allowed to raise awareness and build dialogue among the parties towards a common solution. Follow-ups have increased commitment between the procuring agencies, contractors and their subcontractors to reinforce human rights due diligence along the procurement cycle. The county councils and regions have expanded and standardized follow-ups procedures in the last years, entailing 125 self-questionnaires evaluation and 5 on site audits conducted in 2016-17, increased in comparison to previous years. In 2016, indeed, following the recommended steps, studies and results collected by the NGO Swedwatch and Electronics Watch and the British Medical Association BMA audits have demonstrated that integrating human rights requirements into public procurement was making a difference to workers, by including human rights considerations and anticorruption and reference to UNGPs in public procurement.

Monitoring Challenges: The Swedish Central Purchasing Body (ADDA) Approach to Human Rights in Public Procurement

The Swedish Central Purchasing Bodies play an influential role in SPP criteria setting.[1570] Among other central purchasing bodies, the is on Adda, the dedicated purchasing body for municipalities and regional authorities, which account for most public purchasing in Sweden, responsible for commissioning the four-year framework agreements for local authorities.[1571]The framework agreements require state authorities to investigate the environmental and social requirements of a purchase, being an important leverage to foster SPP. Regarding human rights and public procurement, in 2015, the National Secretariat for Sustainable Public Procurement signed a letter of intent with the Swedish Central Purchasing Body for Swedish municipalities, regions and their companies (Adda)[1572] to cooperate on monitoring the respect of the CoC and of HRDD requirements.[1573] Since most of the products on the framework agreements[1574] are manufactured in countries where there

[1567] If the supplier does not comply with the approved time and action plan, the contract terms contain several sanction options. The regions also have a national escalation ladder where measures are proposed to be taken if the deviations are not remedied.
[1568] Hållbar Upphandling (2024) Realize the agreement, Communicate the Results
[1569] such as Sykehusinnkjøp and SKL Kommentus Inköpscentral / Hållbarhetskollen
[1570] The NPS acts as central purchasing body for the State administration and State-related entities, offering central government authorities coordinated framework agreements for goods and services. NPS is a department within the Legal, Financial and Administrative Services Agency of the Ministry of Finance, established in 2011- and by the Swedish National Financial Management Authority, which procures and manages central Government framework agreements for administrative systems and services.
[1571] National law mandates that four-year framework agreements must be established for goods and services that government agencies procure frequently, on a large scale or that are of high value, in order to reduce costs.
[1572] Adda is the central purchasing body for Swedish municipalities, regions and their companies, a body owned by the Swedish Association of Local Authorities and Regions (SKR), providing framework agreements and setting up dynamic purchasing systems.
[1573] Edman Å (2023) Adda and Swedish National CPBs, University of Copenhagen
Edman Å (2023), Adda Central Purchasing Body, Sustainable Procurement and Sustainable Supply Chains - Monitoring of supply chains
[1574] ADDA (2024) Framework agreements and agreement categories

are significant sustainability risks in terms of human rights, workers' rights, environmental protection and corruption, Adda include in its contracts and framework agreements specific Sustainable Supply Chains clauses.[1575] Such criteria have been standardized at national level by the National Public Procurement Authority being aligned with the UN Global Compact and the UNGPs.[1576] Key requirements for suppliers regard setting up *policies and routines* mechanisms, prescribing to: take measures to prevent and manage any deviations from terms for sustainable supply chains; set up a commonly accessible policy, adopted by the highest management including a commitment to respect sustainable supply chains terms; have routines to convey commitments to respect sustainable supply chains terms in their own operation and in the supply chain; have a manager at the highest management level, responsible for compliance with the sustainable supply chains terms; develop routines to regularly carry out risk analyses, for regular follow-up of the terms compliance and to take immediate action to prevent and limit deviations from the sustainable supply chains terms.

Monitoring the adoption and effectiveness of the *policies and routines* constitute a key challenge. Adda has set up a systematic and comprehensive follow-up process, entailing different steps, including self-reporting, document review, office audits and re-audits. Through such approach, Adda checks out that suppliers have policies and procedures in place to effectively manage the risks to human rights, workers' rights, environmental protection and corruption. If needed, also on-site and factory audits at manufacturing facilities are envisaged, where Adda can follow up on specific risks- for example the situation of migrant workers related to debt slavery or other forms of forced labour. If deficiencies are discovered, correction measures are requested, while in the event of gross violations, fines or contract termination can be used.[1577]

Image 6.7: Requirements for policies & processes and management systems. Source: Edman Å (2023), Adda Central Purchasing Body, Sustainable Procurement and Sustainable Supply Chains - Monitoring of supply chains.

In details, the starting point of such iterative process is the supplier self-assessment (conducted through a digital system), whose quality is a cornerstone setting up the framework for the follow-up. The methodology envisages monitoring process that starts at early stages of the agreement (0-6 months). Early monitoring would require suppliers to comply with the requirements since the very beginning and would allow sufficient time for any follow-up audits.

In case descrepancies or risks are detected, office audit is conducted as second step, allowing to verify the self-assessment questionnaire answers through interviews and document review and monitoring in

[1575] National Agency for Public Procurement- Upphandlings Myndigheten , Sustainable Supply Chains Criteria and Sustainability Criteria

[1576] The National Agency for Public Procurement was founded in 2015 with the aim of strengthening the strategic importance of public procurements and focusing on the potential of public contracts as a driver for achieving societal goals. Thus, it provides support to contracting authorities to procure goods and services that are more sustainable from an environmental, social and economic perspective. In this regard, the National Agency for Public Procurement develops and manages sustainability criteria, namely pre-formulated requirements which take into account environmental and social considerations in public procurement. In order to push the market towards more sustainable product and services, the criteria are more ambitious than the current legislation.
Among sustainability criteria, the "Sustainable Supply Chains criteria – Level: Advanced" are the most relevant contract conditions fostering a B&HR based public procurement. It aims to ensure that suppliers have an efficient risk management in their own operation and in the supply chain, covering the areas human rights, labour rights, environmental protection and anti-corruption.

[1577] Example, framework agreement Services for contract follow-up 2018-2 – Sustainable supply chains .

direct way how policies and processes are applied.[1578] Examples of common deviations regard that contract terms are not addressed adequately, proper risk assessments are not conducted, suppliers' and sub-contractors' assessment or monitoring is missing.

In case of continuous deviations, factory audit is the next step – at either suppliers or sub-suppliers' production site. Auditors visit a production facility conducting interviews, document review, factory tour, to scrutinize the compliance of the production process and facilities with the contractual terms.

Different risks require different measures and competencies for the auditors to be able to effectively capture deviations and develop action plans. Thus, the auditors' competence and methodology must be adapted to the sector, industry, main risk and adverse impacts in the supply chain at stake.[1579] Reflections on the application of such iterative follow-up approach and audit steps have led to multiple benefits, including improved codes of conduct, clearer divisions of internal responsibilities, increased risk awareness, increased awareness-raising on the UNGPs and the need for traceability, importance of risk analyses covering the entire supply chain, increased focus on the most severe risks. Since supply chains are often very complex and non-transparent, which makes monitoring difficult, corrective actions are almost always needed, monitoring is one of the best ways to achieve improvements in the supply chain and it leads to dialogue with suppliers which provide valuable input to future procurements.

An example of joint efforts in monitoring B&HR in public procurement is a cooperation process between Adda, the Swedish Regions- Hållbar Upphandling - and the Church of Sweden with a pilot project launched in 2020. It deals with a collaborative effort to conduct due diligence and monitoring risks of state imposed forced labor in the supply chains of the goods and services procured by the Regions.[1580] In practical terms, a complex monitoring methodology was developed addressing the electronics supply chains procurement[1581] and risks of human rights violations happening in China targeting Uyghurs and other ethnic minority citizens.[1582] The monitoring methodology was based on information gathered from various civil society and government organizations and a follow-up process involving the electronics suppliers. The purpose of the monitoring was to identify instances of forced labor on Uyghur and other ethnic minorities[1583] in public buyers' supply chains with the intention of possibly using the sanctions in public contracts. Further, the methodology aims to ensure that suppliers were correctly conducting HRDD in accordance with the contract terms. Contract terms are, indeed, based on the UNGPs, which means expecting suppliers and brands to identify, prevent, mitigate and account for how they address the risk of state-imposed forced labor in China. The focus was to determine whether effective methods to detect state-imposed forced labor risks were used.

The first step was to map potentially affected procurement categories and prioritize contracts and suppliers based on volume and spend. As multiple studies outlined that the whole electronics sector is at risk[1584], a mapping exercise was developed by prioritizing 17 suppliers delivering hardware from a total of 26 electronics brands.

In terms of contractual responsibilities, most of electronics suppliers are resellers and although the contractual responsibility for what is procured lies with the contracting authority, the contractual responsibility for performance of the contract lies with the supplier. Hence, it is the supplier, in most

[1578] Cost: SEK 20,000-30,000. Number of hours to coordinate and manage results: 40 hours

[1579] So far, most attention of Adda has been on forced labour; work permits, passports and other documents seized; illegal recruitment costs; debt to employers or recruitment agencies; child labor; illegal salary deductions; offensive treatment; unpaid overtime; discrimination; health & safety issues; manipulated activities of official visits; systematic and irrational dismissals; toilet visits supervised.

[1580] ADDA, Hållbar Upphandling, Svenska Kirkar (2021) State Imposed Forced Labor in China, Swedish Buyers' Monitoring of Electronics Supply Chains

[1581] The focus has been mainly on electronics, solar cells and healthcare textiles including face masks.

[1582] Polaschek R. (2021) Responses to the Uyghur Crisis and the Implications for Business and Human Rights Legislation. Business and Human Rights Journal. 2021;6(3):567-575.

[1583] The attention was on production in Xinjiang, East China or both.

[1584] Xiuzhong Xu V. et al (2022) Uyghurs for Sale: 'Re-education', forced labour and surveillance beyond Xinjiang, ASPI Policy Brief Report 26/2020

cases a reseller, that is contractually bound to monitor the performance of its suppliers – in this case the brands.[1585]

The following steps were undertaken: (i) gathering information on production location and undertaken due diligence (ii) verification of received information, and (iii) industry dialogue. In details:

- Step 1 included requiring suppliers to investigate whether forced labor of Uyghur and other Turkic and Muslim groups occurred in the supply chains.[1586]
- In step 2, the responsibility for posing follow-up questions to brands was divided between suppliers. The monitoring was addressed to sample products including laptops, desktops, monitors, tablets and phones, and three factories were covered per brand.
- In Step 3, depended on the information gathered in steps 1 and 2. In a limited number of cases a sufficient information was received to end the monitoring – often because none of sample products were manufactured in China. In most cases, more information and audit reports were requested.
- In Step 4, the consultancy Globalworks was solicited to conduct a forced labor risk assessment of 23 manufacturing sites in China.[1587]
- Step 5 consisted of a meeting with the Responsible Business Alliance to gain more insight into how suppliers have developed their methodologies and tools to improve their ability to identify, prevent, mitigate and account for state-imposed forced labor.

In terms of results, the monitoring revealed no instances of final assembly production in Xinjiang, however it was not possible to exclude the risk of state-imposed forced labor at factories in supply chains in other parts of China. Indeed, the risk of state-imposed forced labor is still prevalent and should be part of regular monitoring activities of electronics supply chains for brands, suppliers and buyers. The reasons for this are:

- The industry in general is ill-prepared to identify, prevent, mitigate and account for how it addresses the risk of state-imposed forced labor in China.
- The audit methods used by the industry are in many cases not adapted to detect the risk of state-imposed forced labor in China.
- With very few exceptions, brands are not as transparent as they need to be to fulfill their due diligence obligations, nor to enable buyers to conduct their own due diligence.
- More groups are targeted by China's poverty alleviation program and at risk of state-imposed forced labor, than Uyghurs and other ethnic minority citizens.[1588]

Regarding key lessons learnt identified by Adda from both the buyer and supplier perspective from the State as buyer and the suppliers were different. Regarding the public buyer's point of view, it is crucial to implement clear and enforceable contract clauses on sustainable supply chains, including due diligence requirements in line with UN and OECD guidelines. Furthermore, cooperating with other buyers in the monitoring of contract performance and requiring verifications from suppliers and brands, for example audit reports and certificates, is a key. Also regularly gathering information from civil society and NGOs could allow to gain a better understanding of risks of adverse impacts in public buyers' supply chains, and to monitor developments on the ground.

From the suppliers' perspective, the project evidenced that it is necessary to build capacity to identify, prevent, mitigate and account for how potential and actual adverse impacts in supply chains are addressed, including state-imposed forced labor. This would ensure compliance with contractual

[1585] ADDA, Hållbar Upphandling, Svenska Kirkar (2021), p. 12-14
[1586] Ibid p. 15
[1587] The assessment was based on publicly available documents and articles on the social media platform WeChat and China's largest search engine Baidu. Before this work could begin, Sheffield Hallam University assisted us in looking up the factory names in Mandarin through Sayari Graph.
[1588] ADDA, Hållbar Upphandling, Svenska Kirkar (2021), p.35

obligations and upcoming legislation on sustainable corporate governance. Moreover, it is recommended to participate in industry initiatives to share information and experiences and to develop trainings, processes and tools to ensure that the industry as a whole, and not just the frontrunners, is prepared for the due diligence requirements in the upcoming legislation on sustainable corporate governance. Finally, if several suppliers are sourcing from the same brand, developing a common set of requirements could be the solution and would provide a leverage to encourage the brand to implement effective measures.

In conclusion, Sweden constitutes a frontrunner country in EU in SRPP practices and particularly on B&HR awareness-raising in public procurement, which could inspire a standardization process towards B&HR also in other EU MSs. Since 2007, thanks to the pro-active role played by the civil society in detecting human rights risks and adverse impacts in public buyers' supply chains - particularly in the healthcare sector - regional and national reactions have led to gradual standardization of approaches on B&HR based public procurement. Despite numerous challenges, for instance in monitoring processes, standardized criteria, contract terms and shared code of contract fostering attention to human rights and HRDD have been developed for different procurement categories. Various initiatives have been pivotal in such process, such as the "Sustainable Public Procurement – A Collaboration between the Swedish Regions" led by the Sustainable Public Procurement Secretariat. Also, the role of Adda central purchasing body has been outlined in promoting crosscutting methodologies in monitoring B&HR in public procurement.

In the next section, the case of Italy will be at stake, as further example of good practice in fostering attention to B&HR in public procurement, in relation to peculiar sectors and procurement categories. Differently from Sweden, where the development of national approaches to B&HR raised as bottom-up processes starting from Regions' pro-active approach, the focus will be more on the role of the legislation in fostering the use of minimum social criteria at national level.

6.2.2 Insight from Practice: Potentials of Mandatory Minimum Sustainability Criteria and Voluntary Social Requirements in Italy

In the EU landscape, Italy represents one of the most prominent example of Member States adopting mandatory Minimum Sustainability Criteria (in Italian *Criteri Ambientali Minimi* - *CAMs*) in public procurement law for specific procurement categories since 2017. Such developments constitute drivers of transformation towards mandatory green public procurement,[1589] incentivizing also experimentation in human rights-based criteria for product categories exposed to human rights risks and adverse impacts.[1590] Thus, to better grasp possible strategies to implement B&HR based requirements at national level in the direction of increased standardization and mainstreaming, the experience of Italy may inspire initiatives in other jurisdictions and at EU level. Indeed, although still embryonal - as human rights criteria are not yet mandatory - the Italian approach showcase on an on-going transformation process and regulatory experimentation towards human rights-based procurement. In this section, at first an overview of the Italian Public Procurement legal system and policy framework is provided, showing the gradual pathway towards mandatory SPP. Indeed, Italy is one of the first EU country imposing a mandatory approach to SPP by law through mandatory minimum sustainability requirements (CAMs). CAMs will be unpacked with focus on their peculiarities, set-up procedure, structure and uptake, exploring potential transformation and current barriers in their development. Despite CAMs refer to environmental criteria, a link between B&HR and public procurement is evident

[1589] Caranta R., Marroncelli S. (2021). Gli appalti pubblici tra mitigazione e resilienza: il contributo del GPP alla lotta contro i cambiamenti climatici. *Riv. giuridica dell'ambiente, 23.i.*

[1590] Cellura L. et al. (2022). Manuale per l'applicazione dei criteri sociali negli appalti pubblici – Strumenti e procedure per l'attuazione del Sustainable Procurement. *Appalti & Contratti, Maggioli Editore*

requiring further scrutiny. Indeed, CAMs include some voluntary social criteria and B&HR considerations such as HRDD requirements for specific categories of procurement in specific sectors. Such categories will be unpacked in depth, reflecting on the role played by Ministerial Decrees and human rights requirements in public contracts for hardening the soft.

Overview of the Italian Public Procurement Legal System

Public procurement in Italy represents an important share of GDP. Data from the Italian Anti-Corruption Authority[1591] (ANAC) shows that €169.9 trillion is spent yearly by over 22,000 public agencies at the central, regional and local levels. It constitutes a significant share to orientate the market towards more sustainable consumption and production[1592] and more compliance to B&HR in the country.[1593]

Regarding the public procurement legal system, pursuant to Article 117 of the Constitution, the State has exclusive competence to regulate competition in public procurement markets. The law governing public contracts is the Italian Public Contracts Code (*Codice dei Contratti Pubblici*), recently updated with Legislative Decree 31 March 2023, No. 36, and applicable to all new public tenders from 1 July 2023 onwards. The new Code supersedes the previous one adopted in 2016 with Legislative Decree 50/2016, transposing the 2014 Public Procurement Directives.[1594] The Code applies to all types of public procurement and concession contracts related to goods, works, and services, both above and below the EU threshold.

Although the applicable law is the same all over Italy, the actual management of procurement procedures is mostly decentralised.[1595] National and sub-national authorities and their sub-entities, including local healthcare authorities, are competent to award public contracts. The legislator has progressively introduced measures of centralisation.[1596] Regarding the EU thresholds, all contracting authorities may award public works contracts (under € 5.538.000) and supply and services contracts (under €143.000)[1597] but above those thresholds can do so only when holding a specific qualification.[1598] Alternatively, they can have recourse to central purchasing bodies. Amongst the 32 qualified central purchasing entities, Consip S.p.A. is the most relevant at the national level, acting as a national central purchasing body for frequently purchased supplies and services via framework agreements.[1599]

The Pathway towards Mandatory Sustainable Public Procurement

Having transposed the 2014 Public Procurement Directives, the current Italian legislative framework contains multiple legal *possibilities* to include sustainability considerations in procurement, being a powerful springboard for the State duty to protect human rights and the corporate responsibility to respect human rights.[1600] Focusing on the environmental dimension of SPP, the legislation has gradually evolved from fostering SPP as voluntary process, to providing it as mandatory legal

[1591] Agenzia Nazionale Anti-Corruzione (ANAC), (2020). Rapporto Annuale 2020.
[1592] Mazzantini, G. (Analisi economica della spesa pubblica italiana' in L Fiorentino and A La Chimia (eds), *Il procurement delle pubbliche amministrazioni, tra innovazione e sostenibilità* (Napoli, Astrid, 2021).
[1593] Fiorentino, L. & La Chimia, A. (2021). Il procurement delle pubbliche amministrazioni. *Tra innovazione e sostenibilità, Astrid Editore.*
[1594] The Code was then modified by Legislative Decree 57/2017 (Decreto Correttivo) and updated by Legislative Decree 76/2020 (Decreto Semplificazioni) and Legislative Decree 77/2021 (Decreto Semplificazioni PNRR).
[1595] Albano G.L., Nicholas C. (2016) The Law and Economics of Framework Agreements. In: The Law and Economics of Framework Agreements: Designing Flexible Solutions for Public Procurement. Cambridge University Press; i-ii.
[1596] Racca G. (2021) Central Purchasing Bodies in Italy: Reluctance and Challenges in Risvig Hamer C. and Comba M. (eds), *Centralising Public Procurement: The Approach of EU Member States*. Cheltenham, Edward Elgar.
[1597] See art. 14 d.lgs. 36/2023
[1598] Botta G. (2023) Italy: Leading the Way Towards Mandatory Sustainable Public Procurement through Minimum Environmental Criteria, in Janssen W. and Caranta R (2023) Mandatory Sustainability Requirements in EU Public Procurement Law: Reflections on a Paradigm Shift, Hart, Oxford. pp. 189-204
[1599] Guerrieri V (2021) Centralizzazione e sostenibilità: CONSIP e altri soggetti aggregatori' in L Fiorentino and A La Chimia (eds), *Il procurement delle pubbliche amministrazioni, tra innovazione e sostenibilità*, Napoli, Astrid
[1600] Magri,M. (2020) 'La sostenibilità degli appalti pubblici come problema di coerenza' in A Maltoni (ed), *I contratti pubblici: La difficile stabilizzazione delle regole e la dinamica degli interessi* (Editoriale Scientifica, Napoli, 2020).

requirement, through mandatory minimum environmental criteria (CAMs).[1601] To understand this evolutionary process and to explore new directions towards social and human rights considerations, cornerstone steps towards mandatory SPP are at stake, starting with early stage developments within the first Public Contracts Code (2006) inspired by EU law to the most recent novelties after its reform in 2023.

The Public Contracts Code (2006)

Early-stage developments towards sustainability were already visible in the Italian Code of Public Contracts (2006), implementing Directive 2004/18/EC, allowing for the use of sustainable considerations in specific provisions.[1602] The Italian legislature paid specific attention to social and sustainable procurement in additional provisions,[1603] such as in Article 2 on procurement principles. The Code introduced the possibility to link the Most Economically Advantageous Tender (MEAT) criterion to considerations inspired by social demands, environmental, health protection and the promotion of sustainable development (Article 83). Regarding environmental aspects, Article 68 explicitly required that, wherever possible, technical specifications have to be defined in such a way as to take into account the criteria of environmental protection.[1604] Finally, embryonal environmental criteria were being developed by proactive public authorities. For instance, some Regional Environmental Authorities (ARPA) developed advanced criteria for specific procurements.

The National Action Plans on Green Public Procurement - NAP-GPP (2008, 2013, 2023)

The National Action Plan on Green Public Procurement (NAP-GPP)[1605] constitute a cornerstone programmatic source in the consolidation process towards mandatory SPP. The Plan was firstly adopted by the Ministry of the Environment- nowadays named *Ministero dell'Ambiente e della Sicurezza Energetica* (MASE) - in 2008, then updated in 2013 and lastly in 2023. It marked a fundamental step to give effect to Communication 302/2003, being shaped by three key objectives: (i) the reduction of greenhouse gas emissions; (ii) circular economy and the efficient use and preservation of natural resources; and (iii) the reduction of waste and hazardous substances. In this regard, the Ministry committed to defining non-mandatory minimum environmental requirements applicable to purchasing procedures above and below the EU threshold for eleven product categories, identified by the Finance Act (2007)[1606] and inspired by the EU GPP criteria.[1607]

The NAP-GPP was, then, revised in 2013, emphasising the need to establish minimum mandatory environmental criteria and reinforcing commitment not only to green but also to social requirements[1608] and a socially inclusive revolution supporting the adoption of the *Italian Guide on the Integration of Social Aspects in Public Procurement* (2012).[1609] The last version of the Plan was updated in 2023, titled "National Action Plan for the Environmental Sustainability of Consumption in the Public

[1601] Caranta R., Marroncelli S. (2021) p.23; Apolloni et al (2014) Is Public Procurement Going Green? Experiences and Open Issues, in G Piga and S Treumer (eds) *The Applied Law and Economics of Public Procurement,* Oxford, Routledge.
Carpineti, L. (2022). From Green to Social Procurement. In: Valaguzza, S., Hughes, M.A. (eds) Interdisciplinary Approaches to Climate Change for Sustainable Growth. Natural Resource Management and Policy, vol 47. Springer, Cham
[1602] Recitals 1, 5, 6, 27, 29, 33, 43, 44 and 46 and Arts 23, 26, 27, 48, 53.
[1603] Art 42.1.f Technical and professional ability of suppliers; Art 44 Labels and environmental management systems; Art 69 Contract performance conditions; Art 83.1.e MEAT.
[1604] Botta G. (2023)
[1605] Ministry of the Environment, National Action Plan on Green Public Procurement at www.mase.gov.it/pagina/piano-dazione-nazionale-sul-gpp.
[1606] Art 1.1127 Law 296/2006: 1) furniture; 2) construction materials; 3) road maintenance; 4) green areas; 5) lighting and heating; 6) electronics; 7) textiles; 8) stationery; 9) catering and food; 10) sanitation; 11) transports.
[1607] Public Procurement for a Better Environment (n 16); Sustainable Consumption and Production and Sustainable Industrial Policy Action Plan COM(2008) 397.
[1608] Cellura, L.,Cellura T., Galluzzo, G. (2022) *Manuale per l'applicazione dei criteri sociali negli appalti pubblici*, Milano, Appalti & Contratti Maggioli Editore.
[1609] Ministry of the Environment, D.M. 6.06.2012, Guida per l'integrazione degli aspetti sociali negli appalti pubblici.

Administration Sector".[1610] The alignment with the *National Strategy for the Circular Economy (2022)*[1611] and various plans and strategies pursuing sustainability, innovation and social cohesion objectives are the key novelties. The Plan aimed also at reviewing the CAMs already in force and integrating new salient categories of goods, works, services into the Italian SPP strategy. Alongside the three aforementioned environmental objectives in the 2008 Plan, other socio-economic objectives to which SPP contribute were clearly outlined, including:

- promoting the spread of sustainable consumption and production, strengthening the demand for greener products, services, infrastructures and processes;
- accompanying the transition process towards circular economic models, accelerating a conscious and virtuous adhesion of the entrepreneurial fabric, including SMEs, to such models
- promoting and supporting innovation in the production system, favouring the competitiveness of enterprises and the creation of new enterprises in this field;
- fostering ethical considerations and social requirements, especially throughout global supply chains;
- strengthening the internalisation of negative externalities of traditional economic activities.

Linking B&HR and public procurement, the Plan refers expressly to the "Need to protect ethical and social aspects along global supply chains" through public procurement, as will be addressed lately.

Collegato Ambientale (2015)

At legislative level, Law 221/2015 on "Environmental provisions to promote green economy measures and to limit the excessive use of natural resources" (*Collegato Ambientale*) marked a turning point in the process towards mandatory SPP. It introduced a new provision in the 2006 Public Contracts Code (Article 68-bis), laying down an obligation for *all* public administrations to include mandatory environmental requirements (*Criteri Ambientali Minimi-CAMs*) under specific procurement categories. Paragraph 1 obliged the contracting authorities to fully comply with CAMs in a few specific sectors,[1612] while paragraph 2 provided for other categories[1613] where CAMs had to be applied to at least 50% of the value of the tender-both below and above the EU threshold.

The Public Contracts Code (2016)

The fundamental shift towards binding SPP criteria for a broader number of categories was the adoption of the Public Contracts Code in 2016, transposing the 2014 Public Procurement Directives. The Code emphasised the importance of sustainability and the role of public procurement in protecting the environment in multiple provisions. A first explicit reference was under Article 4, laying down the core procurement principles: the award of public contracts must respect cost-effectiveness, efficacy, impartiality, equal treatment, transparency, proportionality, publicity, safeguard the environment and pursue energy efficiency.[1614] Pursuant to Article 30, economic considerations may take a backseat when conflicting with social, health, environmental and heritage protection considerations and the promotion of sustainable development.[1615]

The key provision on SPP and mandatory requirements in public procurement law was Article 34 on *Energy and environmental sustainability criteria*, as amended by Article 23 of Legislative Decree 56/2017. Paragraph 1 mandated that contracting entities shall contribute to the achievement of environmental goals provided for in the NAP-GPP, by including CAMs at least as *technical*

[1610] The Decree of August 3, 2023 of MASE, entitled "Approval of the national action plan for the environmental sustainability of consumption in the public administration sector 2023" was published in the Official Journal on August 19, 2023.
[1611] Ministerial Decree on 24 June 2022
[1612] Public lighting, electronics, energy services for buildings.
[1613] Waste management, toner cartridges, green spaces, paper, catering and food, cleanings, textiles, office furniture.
[1614] Codice dei Contratti Pubblici (2016), Art 4 *Principles relating to the award of excluded public contracts.*
[1615] Codice dei Contratti Pubblici (2016), Art 30 *Principles for the award and execution of procurements and concessions.*

specifications and *contract performance clauses* in public procurement documents. Furthermore, paragraph 2 made it possible to include CAMs as *award criteria* when adopting MEAT, thereby fostering quality, innovation and sustainable development. Finally, paragraph 3 contained a core clarification: CAMs must be applied to all public contracts of any value. Accordingly, it specified that the obligations of paragraphs 1 and 2 shall apply to the award of any contract, whatever its value, in relation to the categories of supplies, services or works falling within the defined subject matter of the CAMs.

The Public Contracts Code (2023)

The 2016 Code was subject to a process of reform, being updated in 2023 by Legislative Decree n.36/2023. The rationale behind the reform was to streamline and modernize public procurement processes, removing bureaucratic constraints, and fostering simplification and digitalization as main drivers to overcome structural delays and inefficiencies, to fulfil at the same time the objectives of the National Recovery and Resilience Plan (PNRR).[1616] The latter, under the Green Revolution and Ecological Transition mission, has outlined the relevance of SPP, envisaging reforms to rationalise public contracts regulations and to streamline the implementation of the CAMs,[1617] providing more technical support to contracting authorities and expanding requirements to new sectors.

In terms of SPP, Delegated Act No. 78 of 21 June 2022 lists as inspiring objectives of the code the simplification of procedures aimed at the realisation of investments in green and digital technologies, innovation, research and social development, to achieve the objectives of the 2030 Agenda for Sustainable Development and to increase sustainable public investments.[1618] However, differently from the previous Code where environmental protection and sustainability were explicitly mentioned under artt. 4 and 30, the new one does not include any explicit reference under the principles of procurement, resulting controversial.[1619] Indeed, the key principles of procurement - listed under Title I, art. 1-12 – include some innovative ones as the "principle of result" and the "principle of trust", but do not include sustainability. Nonetheless, scholars have pointed out that direct legal and constitutional sources on sustainable development could be inevitably used as justifications[1620] for SPP, including:

- Artt. 9 and 41 of the Constitution, recently reformed by Constitutional Law n. 44/2022[1621]: the "protection of the environment, biodiversity and ecosystems, even in the interest of future generations" have been elevated to primary constitutional value. Furthermore, Art. 41 on constitutional economic rights and duties now states that economic initiatives shall not be carried out "in such a way as to damage health and the environment" suggesting a stronger commitment to shift to a sustainable consumption and production paradigm.[1622]
- Art. 3 quater, para. 1 and 2, of Legislative Decree 152/2006: all human activities legally relevant under the code "must comply with the principle of sustainable development, in order to ensure that the satisfaction of the needs of present generations cannot compromise the quality of life and possibilities of future generations". Thus, also the activities of the public administrations (including public procurement) must "be aimed at enabling the best possible implementation of the principle of sustainable development".

[1616] Piano Nazionale di Ripresa e Resilienza – PNRR
[1617] Osservatorio Appalti Verdi (2021) GPP ai tempi del PNRR. Gli acquisti verdi per promuovere la sostenibilità ambientale e sociale
[1618] Art. 1 c.2 letter f)
[1619] Maltoni A. (2023) Contratti pubblici e sostenibilità ambientale: da un approccio "mandatory-rigido" ad uno di tipo "funzionale"?, CERIDAP, vol. 3/2023
[1620] Massera, A., Merloni, F. L'eterno cantiere del Codice dei contratti pubblici, in Dir. Pubbl., 2, 2021, 587 ss., spec. 590.
[1621] Constitutional Law 22.02.2022, n. 44 'Modifiche agli Articoli 9 e 41 della Costituzione in Materia di Tutela dell'ambiente'.
[1622] Fontanesi, L. (2022) Modification of Italian Constitution: Environment Elevated to Protected Primary Value, XII *National Law Review*.

Despite a missing direct provision on sustainable development as principle of procurement, art. 57 on *Social Clauses and Environmental and Energy Criteria* is central when discussing mandatory requirements in public procurement law.[1623] The article supersedes art. 34 of the 2016 Code, substantially confirming its content with further novelties. The focus on sustainability is expanded including reference not only to environmental protection but also to social aspects. In details:

- The first paragraph is relevant for social clauses, providing that in case of procurement procedures for works and physical services and concession contracts - particularly linked to cultural heritage and landscape protection sectors - tender documents shall include specific social clauses. Requirements envisages, *inter alia*, measures aimed at guaranteeing equal opportunities in terms of generations, gender and labour inclusion for disadvantaged groups and disabled persons. Social clauses regard also employment stability of the staff employed, as well as the application of national and territorial collective agreements of the sector at stake. Such aspects were previously regulated by art. 50 of the 2016 Code. The key novelty has been the shift from voluntary to mandatory obligation.
- The second paragraph is the main provision on mandatory environmental criteria reflecting the previous art. 34 content. It mandates that contracting entities shall contribute to the achievement of environmental goals provided for in the NAP-GPP, by including CAMs *at least* as technical specifications and contract performance clauses in public procurement documents. Furthermore, CAMs could be included as *award criteria* when adopting MEAT[1624], thereby fostering quality, innovation and sustainable development.[1625] Differently from the previous Code, art. 57 does not include the third paragraph of art. 34 clarifying that the obligation to include CAMs applied to any procurement contract of any amount, with regard to the selected categories of supplies, services and works. Although this is not repeated, art. 48.3 of the new Code expressly provides that "to contracts below the European thresholds, the provisions of the code shall apply, unless derogated from (...), the provisions of the code shall apply."

  Further specific mention is on the necessity to adopt CAMs in case of catering services and food supply procurement, pursuant to art.130. Also, the specific case of renovation works in construction, including demolition and reconstruction, requires the adoption of CAMs, particularly *CAM for buildings*.[1626]

Other examples of relevant provisions, *inter alia*, mentioning SPP include: art. 79 on technical specifications; art. 80 on labelling together with Annex II.5, art. 108. 4 on awarding criteria[1627]; art. 113 on contract performance conditions relating to social and environmental requirements; art. 130 specific on catering services and food supply procurement[1628] and Annex II.8 which is entirely devoted to LCC

[1623] Technical specifications (Art 68.5); labels (Art 69); exclusion grounds (Art 80); means of proof (Arts 85(f) and 86); quality assurance (Art 93); MEAT (Art 95.2); LCC (Art 96.3).
[1624] See article 108.4 and 5
[1625] Arrowsmith S., Kunzlik, P. (2009)'Public Procurement and Horizontal Policies in EC Law: General Principles' in S Arrowsmith and P Kunzlik (eds), *Social and Environmental Policies in EC Procurement Law: New Directives and New Directions* (Cambridge, Cambridge University Press).
[1626] Ministero dell'Ambiente e della Sicurezza Energetica, Green Public Procurement – Criteri Ambientali Minimi
[1627] Establishing that MEAT must be identified on the basis of the best quality/price ratio and is evaluated on the basis of objective criteria, such as "qualitative, environmental or social aspects, related to the subject matter of the contract".
[1628] awarded exclusively on the basis of the criterion of MEAT, identified on the basis of the best quality/price ratio, and that the evaluation of the technical offer takes into account in particular, through the attribution of a bonus score: "... b) compliance with the environmental provisions on sustainable economy (green economy), as well as the relevant CAMs.

for goods, works, services.[1629] Regarding concession contracts, which are also object of the Code, art. 178.2[1630] and art.185.2 more specific on awarding concession criteria[1631] are key provisions.

Unpacking CAMs: Potential Transformation and Current Barriers

The Minimum Environmental Criteria (CAMs) are sets of environmental requirements defined for the various phases of the procurement process and for specific categories. They aim at identifying the most sustainable product or service meeting the public entity needs and at the same time considering its life-cycle and its market availability. The CAMs are defined within the framework of the "Plan for the Environmental Sustainability of Consumption in the Public Administration Sector" and they are adopted by Ministerial Decree of the Ministry of Environment. [1632] Their systematic and homogeneous application creates a leverage effect on the market, inducing less virtuous economic operators to invest in innovation and good practices to meet the demands of the public administration in terms of sustainable procurement.

In terms of CAMs legal status, their mandatory application has been consolidated by the legislation and in the practice through consistent case-law.[1633] As anticipated art. 57.2 of the Public Contracts Code provides for the obligation to apply, for the entire value of the tender amount, technical specifications and contract conditions contained in the specific CAM, with the possibility also to take into account suggested contract award criteria regulated by artt. 108.4 and 108.5 of the Code. To better understand the potentials and legal nature of CAMs, it is necessary to explore their set-up procedure and key characteristics.

Procedure and Categories

A detailed step-by-step procedure is envisaged under the NAP-GPP to design and review the CAMs.[1634] The Ministry of the Environment has a key role in the coordination of this process through the GPP Management Committee[1635], which is responsible for follow-up on the NAP-GPP implementation with planning duties and operational coordination functions between working groups and a GPP Standing Panel.[1636] Specific working groups are appointed for each category, composed of technical experts, public administrators, and representatives from research centres, universities, trade unions, and business associations to conduct technical and scientific evaluations and develop the criteria

[1629] Contracting authorities, when evaluating tenders on the basis of a criterion such as LCC, may request data related to the consumption of energy or other resources, the costs of collecting, disposing of and recycling waste, and the costs attributed to environmental externalities, which may include the costs of emissions of greenhouse gases and other pollutants, as well as other costs related to climate change mitigation.

[1630] "for concessions of more than five years, the maximum duration of the concession shall not exceed the period of time in which the concessionaire can reasonably be expected to recoup the investments made in the execution of the works or services, together with a return on invested capital; for the latter purpose, account shall be taken of the investments necessary to achieve the specific contractual objectives assumed by the concessionaire to meet requirements concerning, for example, quality or price for users or the pursuit of high standards of environmental sustainability".

[1631] establishes that "environmental, social or innovation criteria" may also be included. Still in the perspective of circular public procurement, the possibility of identifying the economically most advantageous offer "on the basis of the price or cost element, following a cost/effectiveness comparison criterion such as the life cycle cost" is confirmed (Art. 108, paragraph 1), as well as the admissibility of the so-called environmental variant of the life cycle cost criterion (Art. 108, paragraph 1). d. environmental criterion of life-cycle costs, which allows the contracting authority to take into account "costs attributed to environmental externalities linked to products, services or works during their life cycle, provided that their monetary value can be determined and verified" (Annex II.8, para. III)

[1632] Ministero dell'Ambiente e della Sicurezza Energetica -MASE (2023), Piano d'azione per la sostenibilità ambientale dei consumi nel settore della Pubblica amministrazione (PAN GPP, in English: NAP GPP), Ministerial Decree 3 August 2023, n.193, Gazzetta Ufficiale della Repubblica Italiana

[1633] Cutajar O, Massari A. (2024) Il Nuovo Codice Dei Contratti Pubblici I Quesiti E Le Risposte: I chiarimenti della giurisprudenza, di Anac, dei Ministeri e dell'Agenzia delle Entrate, p. 14 and 36

For case law analysis see also: Botta (2023); Maltoni (2023).

[1634] MASE (2023) NAP-GPP, section 3.7

[1635] The tasks assigned to the "Management Committee" by Article 2 of Ministerial Decree 247 of 21 September 2016 are as follows: a) to formulate proposals for Minimum Environmental Criteria and sustainability targets for certain categories of purchases to be submitted to the Minister for approval, as well as their updates; b) to ensure the planning of the activities envisaged by the GPP NAP relating to communication, training and monitoring of the implementation of the Plan; c) supporting the Committee referred to in Article 1, paragraph 1128 of Law 296 of 27 December 2006, where established.

[1636] MASE (2023) NAP-GPP, section 3.6: composed of the Ministry of Environment, Ministry of Economic Development, Ministry of Economy and Finance, Consip, ENEA, ARPA, ISPRA, Regions.

after technical consultation with qualified experts. The final package of technical criteria, integrated with methodological and operational instructions on purchasing procedures and environmental targets, is shared with the GPP Management Committee and the Standing Panel for evaluation and review. After having heard comments from the Ministry of Development and the Ministry of Economics and Finance feedback, the Ministry of the Environment enacts the CAM through an *ad hoc* Ministerial Decree.[1637]

Each set of mandatory criteria applies to a specific procurement category, constituting substantive minimum mandatory requirements, designed taking into account the EU GPP criteria.[1638] Today, the CAMs apply to 20 categories: office furniture; urban furniture; nappies; working shoes and leatherware; paper; ink cartridges; public works; cultural events; street lighting (maintenance and management); street lighting (services); Industrial washing and rental of textiles and mattresses; cleaning services and sanitization; urban waste and street cleaning; food and catering; vending machines; energy services for buildings; printers; textiles; vehicles; green spaces.[1639] Despite their technical nature, these criteria are to be seen as flexible instruments.[1640] The criteria are, indeed, updated periodically based on the maturity of the market segment, the public expenditures volume and the potential environmental impacts. In March 2023, the Directorial Decree[1641] establishing the planning of activities to define the CAMs was adopted,[1642] including CAMs that are under revision[1643] and waiting for final approval by the Ministry, and the planning the development of additional categories.[1644]

CAMs Structure

In technical terms, each set of requirements displays peculiarities adapted to specific characteristics of the relevant product or service category, nonetheless, they all share a common structure. The first section of each CAM contains general references to the relevant environmental and, when applicable social,[1645] legal sources. Guidance on how to include environmental considerations from the start of the procurement process is provided as well, whilst also acknowledging the importance of a careful assessment of the purchasing need and market analysis as a crucial reality check.[1646] In the second section, the specific criteria are unpacked in substantive terms, envisaging "basic criteria" – applicable to the contract subject matter, the selection of bidders[1647], technical specifications[1648],

[1637] Botta G. (2023)
[1638] European Commission, Green Public Procurement Criteria and Requirements
[1639] See Annex 2
[1640] Cioni, L. (2020) Criteri ambientali minimi - L'inosservanza dei criteri ambientali minimi é una causa di esclusione? 10 *Giur. It.* 2237
[1641] MASE (2022) Decreto Direttoriale, Direzione Generale Economia Circolare
[1642] As foreseen in theme 7 of the programme for the implementation of the National Strategy for the Circular Economy, with Director's Decree No. 15 of 31 March 2023, the planning of activities to define the minimum environmental criteria for the year 2023 was defined,
[1643] CAM on Workshoes and Leatherware; CAM on buildings
[1644] The categories of contracts and concessions for which the CAM will be continued or completed are
a. Refreshment services with and without the installation of vending machines for beverages, food and water, in order to promote ecodesign criteria, specific environmental technologies and management solutions that are better from an energy, environmental and ethical-social point of view;
b. Supply and rental of personal computers, servers and mobile phones, in order to adapt the common national specificities the common criteria of the "GPP training toolkit" defined at EU level.
c. Energy services for buildings and electricity supply, in order to update, taking into taking into account the evolution of the relevant markets and supply chains, the environmental criteria 4 minimum criteria of the same subject adopted by the decree of the Minister of the Environment and Protection of the Territory and the sea of 7 March 2012;
d. Local public transport services by road, school transport services by road and educational outings, educational trips; entrusting of services related to local public transport (car sharing, scooter sharing, bike sharing);
e. Service design and execution of works for the construction, maintenance and adaptation of road infrastructure
[1645] See Annex 2. Social criteria and human rights recommended under CAMs: Textiles, Office Furniture, Urban Furnitures, Workshoes and Leatherware, Food and Catering, Green Spaces, Buildings, Public Lightning.
[1646] Janssen, W. (2015) Regulating the Pre-procurement Phase: Context and Perspective, in KV Thai (ed), *International Public Procurement – Innovation and Knowledge Sharing*, Cham, Springer.
[1647] Selection of candidates: subjective qualification requirements designed to prove the candidate's technical capacity to perform the contract in a way that causes the least possible damage to the environment. These criteria are not mandatory according to the Contracts Code.
[1648] Technical specifications: defined by Annex II.5, "define the characteristics required for the works, services or supplies. These characteristics may refer to the process or method of production or performance of the requested works, supplies or services, or to a specific process for another stage of their life cycle even if these factors are not part of their substantial content, provided they are linked to the subject-

contract performance conditions[1649] – and "award criteria"[1650]. Each criterion contains, in the Verifications section, also the means of proof to demonstrate compliance. [1651]

Throughout the public procurement cycle, six phases can be identified as general entry points[1652] for the application of CAMs: sustainability considerations can be included in the *procurement planning* by conducting adverse impact assessments related to sustainability, taking into consideration life-cycle costs and organising preliminary market consultations to understand the required sustainability levels. When designing the *subject matter of the contract,* the next phase is to outline the intention to purchase sustainable items – such as environmentally-friendly products or fair-trade products- by requiring a reference to environmental and social considerations in the title and the subject matter of the contract. Furthermore, precise mandatory *technical specifications* are provided by CAMs, which even go as far as providing model clauses to be included in public procurement documents. Specific *selection criteria*, which prove a candidate's technical capacity to perform the contract and aim to avoid any possible damage to the environment and society, are also an option. However, as opposed to technical specifications, these selection criteria are not mandatory. Subsequently, contracting authorities are encouraged to adopt quality-based award criteria and to allocate additional points for environmental and social considerations.[1653] Finally, specific *contract performance conditions* constitute mandatory requirements for the contracting authorities in the execution of the contract.[1654]

CAMs Uptake and Monitoring: Potentials and Barriers

CAMs contain substantive minimum mandatory requirements for technical specifications and contract performance clauses. They are powerful steering tools for the contracting authorities, as they shape public procurement procedures in the direction of sustainable development. Notwithstanding their potential, there are barriers faced by contracting authorities, hindering their effective application. Quantitative and qualitative studies on SPP and more specifically on GPP uptake in Italy have shown a mismatch between the potential benefits of the CAMs and several practical barriers in implementation, showing lights and shadows of their effective application.[1655]

In 2018, for the first time, the Italian GPP Observatory[1656] tracking down SPP implementation with focus on the local level,[1657] conducted a quantitative study showing that only €40 billion out of €170 billion was spent by the public administration for SPP, namely less than one-fourth. The survey, collecting 1,048 responses from provincial main cities (Comuni Capoluogo) and municipalities with more than 15000 inhabitants, revealed that 29.38% of them had not applied CAMs in any procurement category, despite the legal obligation in 2016. Poor application could have been explained by need of time for public entities and the market to adapt to the new requirements. Indeed, the 2021 survey showed slightly improved results.[1658] The 2022 survey, investigating policies and tools facilitating SPP, revealed

matter of the contract and proportionate to its value and objectives." These specifications are made explicit by means of mandatory criteria pursuant to Article 57.2.

[1649] Contract performance clauses: provide indications for executing the contract or the supply in the best possible way from an environmental point of view. These clauses are made explicit through mandatory criteria pursuant to Article 57.2.

[1650] Requirements aimed at selecting products/services with better environmental performance than that guaranteed by the technical specifications, to which a technical score is to be attributed for the purposes of awarding the contract according to the offer with the best value for money. The award criteria are not compulsory, but Article 57.2 stipulates that they must be taken into account when defining the "contract award criteria".

[1651] Botta, G. (2022). The interplay between EU public procurement and human rights in global supply chains : lessons from the Italian legal context. In: European journal of public procurement markets 4 S. 51 - 67.

[1652] Cellura, T (2018)

[1653] Colombari, S. (2019) Le considerazioni ambientali nell'aggiudicazione delle concessioni e degli appalti pubblici, 1 *Urbanistica e appalti*

[1654] Cozzio M. (2021), Appalti pubblici e sostenibilità: Orientamenti UE e il modello Italiano, 6 *Giornale dir. amm.* 721.

[1655] Caranta R. & Richetto S. (2010). Sustainable procurements in Italy: of light and some shadows. In Caranta R. & Trybus M. (Eds.), (2010). The law of green and social procurement in Europe, Djof Publishing Copenhagen, European Procurement Law Series

[1656] Osservatorio Appalti Verdi, monitoraggio

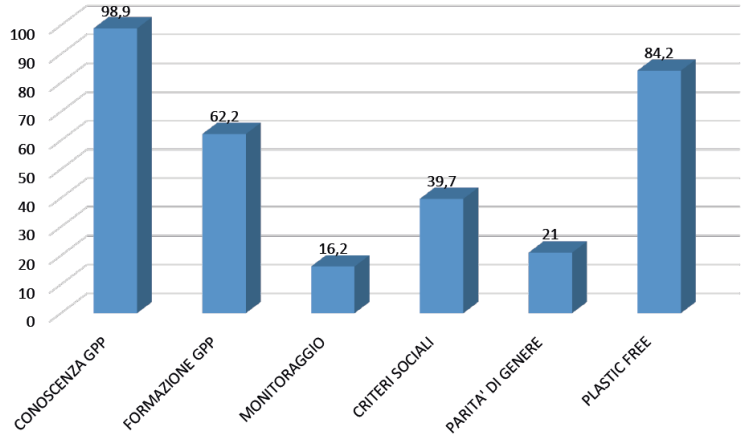
[1657] Falocco S., Mancini M. (2021) Osservatorio Appalti Verdi, I Numeri Del Green Public Procurement In Italia. Legambiente e Fondazione Ecosistemi.

[1658] Respondents 2021: 89 chief municipalities, 238 minor municipalities, 99 environmental protected areas, 40 public healthcare agencies. Respondents 2022: 89 chief municipalities, 91 environmental protected areas, 35 public healthcare agencies; 10 central purchasing bodies

that the degree of awareness on SPP by municipalities is getting higher (98.9% of respondents). This regards especially environmental aspects – for instance the adoption of plastic free policies scores 84.2%- while the implementation of social criteria is less prominent (39.7%) – particularly the application of gender equality policies results scarce (21%).

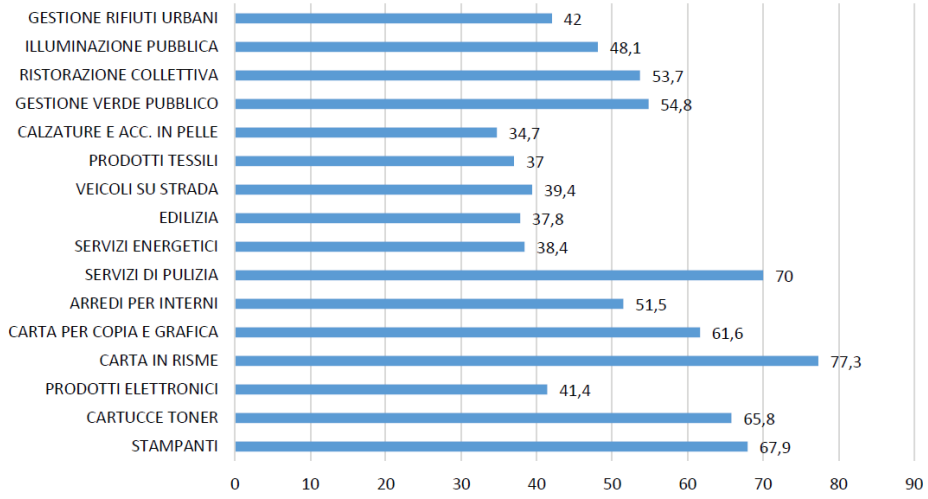
Despite the higher level of awareness, a key obstacle is having proper monitoring systems in place: only 16.2% of the respondents showed to have monitoring systems. This data demonstrates a scarce capacity to monitor the adoption of CAMs: more than 60% of municipalities with more than 15000 inhabitants out of 238 respondents replied that they do not have any monitoring system in place[1659].

Graph 6.1: Factors facilitating SPP in Chief Municipalities. *Source: Osservatorio Appalti Verdi (2022), I Numeri del GPP in Italia*



The survey also monitored the implementation of individual CAMs, revealing unequal application among the different categories. The most adopted requirements by municipalities are: paper and cleaning services (more than 70%), followed by printers, toner cartridges and graphic paper (between 60% and 70%). By contrast, the least applied CAMs (between 30% and 40%), are those related to vehicles, energy services, textiles and footwear. Anyway, the data needs to be contextualized.[1660]

Graph 6.2: Adoption of CAM per category in Chief Municipalities (2021) in %. *Source: Osservatorio Appalti Verdi (2022), I Numeri del GPP in Italia*

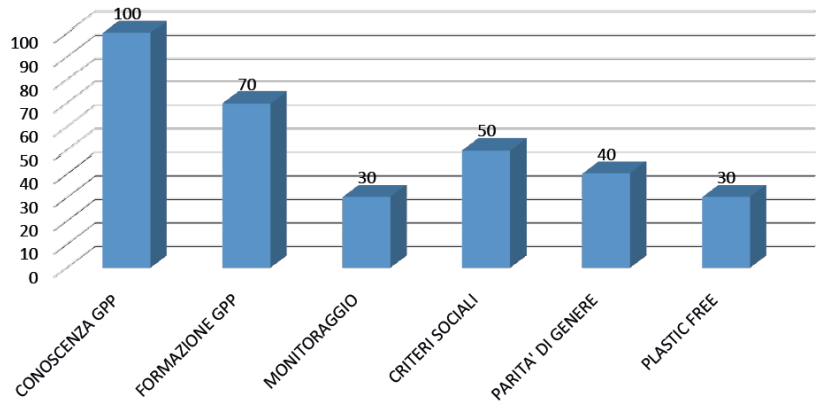


[1659] Rapporto 2021

[1660] These data need to be contextualised. A lower rate may be explained by the more recent adoption of a specific CAM. For instance, the criteria on workshoes entered into force late in 2018 and the data refers to public contracts 'awarded' in 2019. Recourse to framework agreement possibly set up by central purchasing bodies might also entail delays in adopting the CAMs as a framework agreement will set the rules for contracts to be awarded for the next three to four years.

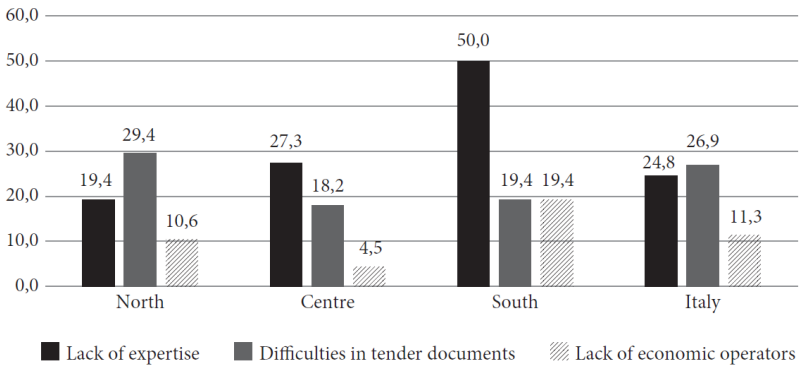
Furthermore, the GPP Observatory collected data also on central purchasing bodies' application of CAMs promoting SPP in framework agreements. The 2022 Survey reports that 8 out of the 10 aggregating entities always apply CAM in tenders related to product categories that have it. It is clear that such entities, in terms of competence and administrative capacity, best meet the objective of integrating environmental and social objectives in public tendering procedures. In terms of social aspects, the percentage on the integration of social and gender equity criteria is higher than municipalities, which require peculiar technical expertise and resources, especially for the verification of social criteria through due diligence.

Graph 6.3: Factors that facilitate SPP in Central Purchasing Bodies procurement (2021), in %. *Source: Osservatorio Appalti Verdi (2022), I Numeri del GPP in Italia*



Regarding key barriers outlined at empirical level, the national survey highlighted that challenges hindering a smooth application of CAMs are linked to three critical aspects: (1) lack of training and technical expertise; (2) difficulties in designing and managing 'green tenders'; and (3) the lack of potential economic operators available on the (local) market.

Graph 6.4: Obstacles in CAMs application in % *Source: Osservatorio Appalti Verdi (2021), I Numeri del GPP in Italia*[1661]



Other qualitative studies have revealed further challenges. Semi-structured interviews were conducted with regional and national contracting authorities for a 2022 transnational project on SPP of the Chair of Public Contracts Law and Sustainable Development of the University of Lyon.[1662] The results showed additional barriers starting from the fact that limited resources and organisational capacity are allocated to SPP within each contracting authority, even in central and regional purchasing

[1661] S Falocco et al, *I numeri del green public procurement in Italia* 51. Available at: www.legambiente.it/wp-content/uploads/2020/10/I-numeridel-Green-Public-Procurement-in-Italia_rapporto2020.pdf

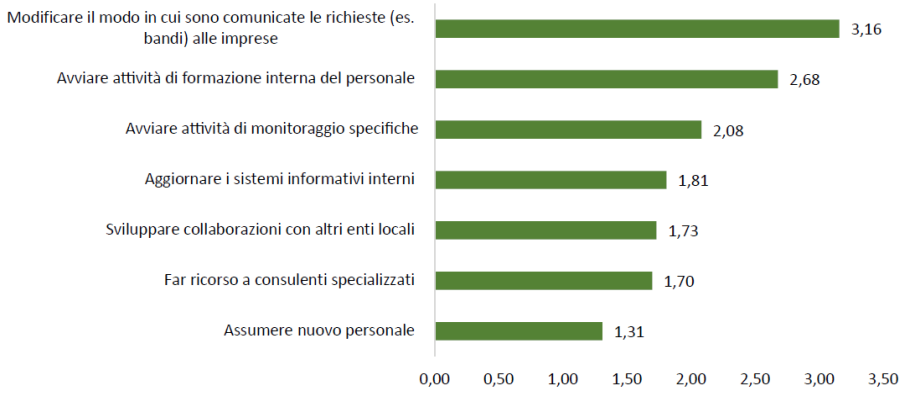
[1662] CEPDD Project, Chair of Public Contracts Law, University of Lyon 3, France, funded research project by Agence Universitaire de la Francophonie (2022). Countries involved: Canada, Quebec; Netherlands; France; Italy; Portugal; Switzerland.

bodies.[1663] Further difficulties are related to monitoring and verification of sustainability considerations, requiring additional burdens, time, and costs for these authorities. Nonetheless, an increasing number of contracting authorities gradually recognise the benefits of life-cycle costs. Including considerations on environmental and social externalities is a key to change from business-as-usual and perceiving SPP costs as investments.

A final critical aspect relates to a lack of enforcement leaving leeway to illicit practices. This is linked to marginal official national monitoring and supervision by the ANAC on the application of Article 57.2 – although the Public Contracts Code explicitly provides for it (Article 213.9). The provision of Legislative Decree No. 50 of 18 April 2016 assigned additional functions to the ANAC entrusting it with the task of monitoring the application of CAMs[1664] and the achievement of the objectives set out by the GPP NAP.[1665] The Article explicitly provides that the ANAC Observatory of Public Works, Services and Supplies Contracts, supervises compliance with the Code and monitors the application of CAMs and the achievement of the objectives set out in the NAP-GPP. In case of non-compliance, sanctions may be applied as provided by Article 213.13, which are discussed in paragraph 5.2. ANAC has set up a monitoring platform to collect data on CAMs, which, however, is closed for maintenance, postponing the official monitoring and creating a space for legal uncertainty. Further uncertainty is linked to the fact that this task has not been confirmed within the framework of the discipline of public contracts reformed by Legislative Decree No. 36 of 31 March 2023, but the aforementioned Memorandum of Understanding between the Ministry of the Environment and Energy Security and ANAC, signed on 29 October 2021 for a three-year period, remains effective until its relative expiry date, which sets out, as the first activity within the scope of the collaboration, that relating to the monitoring and supervision of the application of the CAM.[1666]

Finally, in terms of actions to face implementation barriers, the Survey 2022 evidenced a quite proactive role of public administrations and a gradual process of transformation to adapt to SPP. Data show an increased focus on reinforcing internal competences in terms of staff training and newly hired staff or support from specialised consultants; the development of forms of peer collaboration (with other local authorities); the update of information systems and the initiation of monitoring activities.

Graph 6.5: Adjustments Actions due to SPP. *Source: Osservatorio Appalti Verdi (2022), I Numeri del GPP in Italia*



[1663] R Vluggen et al 'Sustainable Public Procurement External Forces and Accountability' (2019) 11 *Sustainability* 5696; O Chiappinelli, F Gruner and G Weber, 'Green Public Procurement: Climate Provisions in Public Tenders Can Help Reduce German Carbon Emissions' (2019) 9 *DIW Weekly Report* 433.

[1664] through the central section of the Observatory of Public Contracts for Works, Services and Supplies, composed of a central section and regional sections located in the Regions and Autonomous Provinces and organised according to the special protocol of understanding signed by ANAC, the Conference of the Regions and Autonomous Provinces and the Regions and Autonomous Provinces themselves".

[1665] see in this regard paragraph 5. 4 of the new GPP NAP 2023

[1666] Botta (2023), p. 195

Human rights due diligence requirements in specific CAMs categories

Regarding human rights considerations and ethical criteria, the aforementioned "Guide for the Integration of Social Aspects in Public Procurement Activities" for all the Italian Contracting Authorities is a landmark source.[1667] It is inspired by the European Commission "Buying Social" Guide on SRPP (2011), further revised in 2021.[1668] Its purpose is to provide operational guidance to public entities on how to integrate social criteria in public procurement, considering lessons learnt and experience of other EU countries, particularly Nordic ones. Regarding B&HR, the Guide promotes the application of minimum social standards, particularly regarding working conditions, outlining that:

> "Supply chains are often very complex, fragmented and even located in countries where respect for fundamental human rights and the application of minimum standards for working conditions may not be guaranteed".

Thus, the application of social criteria and internationally recognized standards related to human rights and working conditions is recommended throughout global supply chains, to comply particularly with: the eight ILO core Conventions - Conventions No. 29, 87, 98, 100, 105, 111, 138 and 182; ILO Convention No. 155 on Health and Safety at Work; ILO Convention No. 131 on the definition of Minimum Wages; ILO Convention No. 1 on Hours of Work (Industry); ILO Convention No. 102 on Social Security (minimum standard); the "Universal Declaration of Human Rights"; Article 32 of the "Convention on the Rights of the Child"; the national legislation in force in the countries where the stages of the supply chain take place, concerning health and safety in the workplace, as well as labour legislation including those relating to wages, working hours and social security (social security and assistance).

Two innovative elements envisaged in the Guide are: (1) *minimum social criteria* to promote the application of internationally recognized standards on human rights and working conditions along the supply chains. (2) A *structured dialogue* methodology to foster cooperation and synergy between buyers and suppliers.[1669] The collaborative approach between contracting authorities, suppliers and sub-suppliers[1670] has different purposes: shedding lights on working and human rights conditions and social standards along supply chains; monitoring the application of social criteria and activating potential corrective actions in case of failure in meeting such standards. The Guide shed lights on multiple opportunities, nonetheless it is not a binding source. Indeed, its application remains voluntary, depending on a discretionary adherence by individual contracting authorities, resulting so far in isolated practices by pro-active entities.[1671]

Linking CAMs and human rights, the path towards mandatory minimum social requirements seems long, indeed only voluntary social criteria have been included in the legislation so far. Anyway, awareness on the importance of social aspects in public procurement was raised already in NAP-GPP (2013) recommending the application of the Guide approach particularly in case of high-impact sectors exposed to human rights abuses. Thus, the integration of social aspects in public tenders was suggested when purchasing product categories characterized by complex supply chains with risk "of lack of human rights protections and undignified working conditions."[1672] Also under the revised NAP GPP 2023, the protection of human rights and ethical aspects throughout the supply chains was reiterated as key

[1667] Ministry oft he Environment (2012), Guida per l'integrazione degli aspetti sociali negli appalti pubblici**,** Ministerial Decree 6 June 2012, GURI no. 159/2012

[1668] European Commission (2021) Buying Social – A Guide to Taking Account of Social Considerations in Public Procurement

[1669] Ricotta (2014)

[1670] Inspired by experiences of Northern European countries in which the structured dialogue along subcontracting chains and specialised on-the-spot verification activities, activated by special contractual clauses during the execution of sub-contracts for products from high-risk sectors, has led to a documented improvement in workers' conditions. These initiatives contribute to the process of internalising social costs, which allows a greater competitive balance in favour of companies that guarantee stable and qualitatively suitable wages and working conditions.

[1671] Cellura et al., (2021).

[1672] MITE, 2013

objective.[1673] To fulfil such aim, the NAP emphasizes the importance of transparency and traceability along the entire supply chains, conducting risk and impact assessment of goods, works, services to be procured and defining ethical and social criteria.[1674] Connecting B&HR and public procurement, the NAP GPP refers expressly to the programmatic strategy promoted by the NAP on B&HR (2024-2026) which outlines that public procurement should be pursued in full respect of human and workers' rights through the use of CAMs. As such, collaborations are envisaged with the B&HR National Contact Point of the Ministry of Economic Development. The traceability and transparency of supply chains is fundamental to verify the compliance of suppliers and sub-contractors with labour rights and human rights. Particularly in sectors at risk of violation of such rights, monitoring mechanisms are crucial to: (i) shed lights on serious violations of human rights and exploitation of workers, counteracting them and improving workers conditions; (ii) avoid social dumping leading to a loss of competitiveness of the most careful companies or economic systems that are more advanced in the recognition of workers' rights; (iii) penalise companies acting in violation of basic rights that are decisive for human dignity and the protection and social security of workers, and therefore benefit more virtuous enterprises.

Furthermore, concerning inclusive public procurement in terms of inter-generational justice and gender equality, article 47 of Decree-Law No. 77 of 31 May 2021[1675]- Decreto Semplificazioni - establishes that public contracts financed in whole or in part with the resources of the National Plan for Recovery and Resilience (PNRR) and the National Plan for Complementary Investment, should comply with specific requirements to ensure generational and gender equal opportunities, providing for selection criteria of candidates, contractual clauses and award criteria related to ethical aspects.[1676]The rule on the quota obligation, provided under art.47,[1677] has been overall criticized.[1678] In this regard, the "Guidelines for the promotion of generational and gender equal opportunities and labour inclusion of persons with disabilities" have been adopted in 2023,[1679] including reference to public procurement. The Guidelines define the social requirements and award criteria that contracting authorities must implement under the new Public Contracts Code:[1680] in details, Article 1.4 and 1.5 of Annex II.3 provides for criteria promoting youth entrepreneurship, the employment and inclusion of persons with disabilities, gender equality and the hiring of young people under 36 years of age and women.

After having depicted the overall landscape, the focus is on the integration of B&HR considerations in specific CAMs categories. Overall, voluntary social criteria have been included expressly in some selected CAMs. Such criteria range from social clauses, labour conditions and equal

[1673] Together with circular economy, GHG emissions reduction, reducing the use and emission of hazardous and polluting substances, improving the innovation and competitiveness of national enterprises

[1674] NAP 2023: inspired by (i) the promotion of decent work throughout the value chain; (ii) the dissemination of adequate living standards and community welfare; (iii) the creation of inclusive and sustainable societies.

[1675]Camera dei Deputati (2021) D.L. 77/2021 - Governance del PNRR e semplificazioni

[1676] Article 47 envisages, for the purpose of pursuing equal opportunities objectives, both generational and gender, and promoting the employment inclusion of disabled persons, the fulfilment of specific obligations, including recruitment obligations, as well as the possible assignment of an additional score to the bidder or candidate who meets certain requirements, within the scope of tender procedures relating to public investments financed, in whole or in part, with the resources of the PNRR and PNC (National Plan for Complementary Investments to the PNRR, pursuant to Article 1 of Decree-Law No. 59/2021). In particular, companies with specific staffing allocations are required to provide reports on the situation of male and female employees, compliance with the provisions of current legislation on compulsory employment and recruitment obligations, with priority given to young people, women and persons with disabilities, and other rewarding measures provided for in the public tenders.

[1677]Art 47 provides for(i) tender requirements that must be understood to be automatically included in the tender law (and thus irrespective of an express provision), such as the obligation to submit the staff situation report in the tender; (ii) clauses that must mandatorily be provided for by the contracting authority, unless expressly stated to the contrary, which, however, where not provided for, do not hetero-integrate the tender law, such as the reservation in favour of women and young people of the 30% share of the new recruitments necessary to perform the contract

(iii) bonus provisions that may be provided for on an optional basis by the individual contracting authority, concerning further rules aimed at ensuring greater employment of women and young people.

[1678] Paziani I. (2023) Lo stato dell'arte sulla parità di genere e generazionale tra vecchio e nuovo Codice dei Contratti Pubblici,

[1679] Decree 20 June 2023, Gazzetta Ufficiale Serie Generale no. 173 of 26.07.2023, the Department for Family Policies at the Presidency of the Council of Ministers adopted new "Guidelines aimed at fostering equal generational and gender opportunities, as well as the labour inclusion of persons with disabilities" for so-called reserved contracts in public procurement.

[1680] Article 61, paragraph 2 of Legislative Decree No. 36/2023

pay, transparency of supply chains, due diligence processes, integrated under various procurement phases: selection criteria, technical specifications, award criteria and contract clauses. A peculiar attention to human rights requirements related to supply chains transparency and due diligence processes are to be found in the CAMs on textiles, work-shoes and leatherware, office and urban furniture, food and catering, building, public lightning, green spaces.

Table 6.5: CAM integrating Social Criteria throughout the procurement cycle

CAM integrating Social Criteria	**Phase in which social criteria have been included**
Office Furnitures	Selection phase
Building	Selection phase
Public Lightning	Selection phase
Workshoes	• Selection phase • Award criteria • Contract performance clauses
Textiles	• Selection phase • Award criteria • Contract performance clauses
Food and cantines	Award criteria
Green spaces	• Award criteria • Contract performance clauses

CAM Textiles

The set of obligations on minimum sustainability requirements in the textile sector (CAM-textiles) was updated in 2017, in 2021 and most recently in February 2023[1681] addressing not only supply and renting of textile products, but also restyling and fixing services.

Voluntary social and human rights criteria for suppliers have been included along with mandatory environmental ones, to guarantee that textiles are produced respecting decent work conditions, human rights and the UNGPs. Section E of the Ministerial Decree enucleates the core facultative social criteria. Appendix B lists the internationally recognized human rights and ILO Conventions that must be respected. The international social and environmental conventions contained in Annex X of the Public Contracts Code are mentioned together with the Universal Declaration of Human Rights and the national labour law applicable to the country where the supply chain phase is located. To effectively address human rights risks, social criteria and HRDD are recommended during selection of tenderers, contract award phase, execution of the contract.

In the selection phase, economic operators may be asked to adopt ethical management systems based on HRDD, demonstrating the following elements: company policy and management systems integrating responsible business conduct; a clear mapping of human rights risks and adverse impacts along company's operations and supply chains; specific mechanisms established to prevent and mitigate adverse impacts; the public disclosure of due diligence processes; the definition of remediation processes as grievance mechanism for potential victims, as recommended by the UNGPs. The means of verification of these capacities refer to management and traceability systems for supply chains.[1682]

In the award phase, the inclusion of human rights considerations as specific award criteria is recommended when adopting MEAT. Additional technical points can be assigned to products for which

[1681] MASE (2023), Ministerial Decree, 7 February 2023, CAM for the supply and rental of textile products and the restyling and finishing service of textile products.

[1682] Annex XVII - Means of proof of the selection criteria selection criteria - Part II: Technical capacity letter d) legislative decree 18 April 2016 no. 50, i.e. criterion 5.1.1 "Ethical management of the supply chain" of this document 14

the suppliers have demonstrated – through the adoption of specific management systems envisaging *HRDD* - that specific supply chain phases operations respected international human rights and international labour standards specified under Appendix B.[1683] Nonetheless, the points shall be assigned in a proportional way according to the number of production phases that are controlled in a transparent and proportional way and based on audits and controls executed. Different means of verification could be used by suppliers including management systems by nationally and internationally certified providers and social labels.[1684]

Further, in the execution of the contract, setting up specific contract performance conditions related to social aspects in the supply chains is allowed. Art. 100 of the Code, indeed, provides that "contract performance conditions can be related to social and environmental needs". The Decree recommends, among others, the implementation of ethical supply chain management systems and the requirement that contractors must respect human rights during the entire duration of the contract. Furthermore, for monitoring the compliance with the requirements, on-site audits, unannounced visits, desktop-audits, off-site interviews with trade unions and local NGOs can be required for different supply chain phases. The results of the audits must be communicated to the contracting authority and in the case of critical issues to the local authorities. At the end of the audit process, a comprehensive report of all actions taken must be produced.

Table 6.6: Provisions related to B&HR throughout the CAM-Textile

CAM Section	**CAM Subsection**	**Provision**
3.2 Award Criteria	3.2.7 Social characteristics of textile products: working conditions along the supply chain	Technical points are given to products for which it is demonstrated that, through an adequate and functional business management system implementing due diligence along the supply chain13, certain production steps are performed respecting internationally recognised human rights and decent human rights and decent working conditions, as set out in Appendix B. The scores are awarded proportionally to the highest number of production steps controlled.
5. Social Criteria for Product Supplies Textiles	5.1 CANDIDATE SELECTION CRITERIA 5.1.1 Ethical management of the supply chain	The bidder adopts corporate management systems aimed at implementing due diligence for the ethical management of the supply chain, to minimise the risk of violation of internationally recognised human rights and decent working conditions, as set out in Appendix B. The management system must include: a) Adoption of a company policy integrating "responsible conduct" throughout the supply chain and the adoption of an appropriate management system to conduct due diligence18 b) Identification of risks and assessment of adverse impacts throughout the supply chain

[1683] A bonus score of X is awarded in the event that the stages of processing of the finished product 'controlled' (i.e. subject to unannounced on-site inspections, off-site interviews workplace, interviews with trade unions and local NGOs to understand the local context in which workers are involved) were: packaging (cutting, sewing); dyeing, printing; finishing; and where no violation of internationally recognised human rights internationally recognised human rights or decent working conditions dignified working conditions as set out in Appendix B.

[1684] Verification: Products from fair trade are presumed to be compliant fair trade, e.g. imported and distributed by organisations accredited at national and international level (e.g. by WFTO at international level and by Equo Garantito - Assemblea Generale Italian Fair Trade General Assembly, at national level), or certified by recognised international bodies (e.g. by FLOCERT at international level and by Fairtrade Italia at national level). Similarly, products manufactured by companies that participate in multistakeholder initiatives in the sector known and/or recognised by public organisations and trade unions, international or national, which provide for the participation of trade unions recognised at least at national level in decision-making bodies, which adopt standards similar to those in Appendix B and which include the performance of unannounced on-site and off-site audits on the workplaces based on the identification of those involved in the supply chain. Compliance refers to the stages of production indicated by the tenderer, which are controlled according to these systems

		c) Establishment of mechanisms to prevent and mitigate risks of adverse impacts, through supply chain tracking; systems verification and monitoring d) Communication of due diligence processes, though public communication and sustainability reporting and communication with relevant stakeholders e) Definition of a process for remedies to manage non-compliance **Verification:** Description of the company's management system, tracking procedures, performance control mechanisms. Participation in recognised multi-stakeholder initiatives (e.g. by public organisations and trade unions) adopting standards similar to those in Appendix B, including the performance of third party audits and supplier qualification, and dialogue with all relevant stakeholders.
	5.2 CONTRACTUAL PERFORMANCE CLAUSES 5.2.1 Implementation of an ethical supply chain management system	Contractual clauses related to ethical supply chain management system are recommended for contracting authorities especially central purchasing bodies, with competent staff and resources to manage these aspects, particularly in case of framework agreements. The application of this contractual clause entails costs related to monitoring measures and audit, and will depend on the complexity of the supply chain. Verification can be carried out through on-site audits by specialised personnel, unannounced visits, off-site interviews, interviews with trade unions and local NGOs to understand the local context in which workers are involved, by an accredited compliance body or a service company
Appendix B		Internationally recognised human rights and working conditions dignified working conditions referred to in this document are those defined by: A) the "International Bill of Human Rights " B) the fundamental Conventions of the International Labour International Labour Organisation (ILO) referred to in Annex X of the Legislative Decree No. 50 of 18 April 2016 concerning forced labour, child labour, discrimination child labour, discrimination, freedom of trade union association and the right to collective bargaining, namely: o ILO Convention 87 on Freedom of Association and Protection of the Right to organisation; o ILO Convention 98 on the right to organise and to bargain collective bargaining; o ILO Convention 29 on Forced Labour; o ILO Convention 105 on the Abolition of Forced Labour; o ILO Convention 138 on Minimum Age; o ILO Convention 111 on Discrimination in Respect of Employment and employment; o ILO Convention 100 on Equal Remuneration; o ILO Convention 182 on the Worst Forms of Child Labour; C) the national labour legislation in force in the countries where stages of the supply chain take place, including

		health and safety legislation on health and safety, minimum wage and working hours. working hours. Where national laws and international sources referred to above refer to the same subject matter, the refer to the same subject, reference shall be made to the highest STANDARD in favour of workers, between that established by national laws and that of the international sources.

CAM- Workshoes and Leatherware

Similarly to the CAM-textiles, the CAM-workshoes and leatherware[1685], updated in 2018 includes human rights requirements, acknowledging the complexity and fragmentation of leather production supply chains, which may have significant impacts on workers conditions. The Decree, thus, suggests to integrate social criteria related to human rights, workers' rights and labour conditions in the bidding documents, to ensure increased traceability of raw materials and transparent processes. Similarly to textiles, voluntary human rights criteria are recommended as selection criteria, award criteria and contract clauses. A peculiarity is that a specific *mandatory* requirement on "supply chain transparency and traceability" is provided under technical specifications. It requires the supplier to identify and map the entire supply chain, with the possibility to be exposed to on-site audit.

CAM- Furniture (Office Furniture and Urban Furniture)

The *CAM-office furniture* updated by Ministerial Decree n. 254/2022[1686] refers explicitly to social criteria under contract performance conditions mandating the inclusion of a "social clause"[1687] and related verification means.[1688] This means that workers' employment should fully respect labour rights complying with national labour law, international standards and collective agreements in force for the sector. Furthermore, the successful tenderer is liable also for the compliance by the subcontractors vis-à-vis their employees with the aforementioned rules[1689] for services within the scope of the subcontract. The previous version of the CAM[1690], referred more explicitly to human rights risks especially regarding wood and timber production, recommending suppliers' compliance to principles of social responsibility and minimum social standards defined by international human rights and ILO Conventions. Furthermore, as means of verification, the economic operator must submit documentation demonstrating compliance with the rights covered by the International Conventions, for instance through SA 8000 certification or equivalent. Where suppliers do not hold such certification, they must at least demonstrate that they have followed the *structured dialogue* recommended under the aforementioned Ministerial Guide.

A different set of requirements refers to urban furniture - including design services for playgrounds, supply and installation of street furniture and outdoor furniture products and the service of ordinary and extraordinary maintenance of street furniture and outdoor furniture products. This is

[1685] Ministry of the Environment (2018), CAM on Supplies of non-PPI and PPE work footwear, leather articles and accessories, approved by Ministerial Decree 17 May 2018, n. 125/2018

[1686] Ministry of the Environment (2022), CAM on Supply, rental and life extension service of interior furniture, approved by Ministerial Decree 23 June, n. 184/2022

[1687] Ibid, Para 6.1.1

[1688] Verification of compliance with the criterion shall be carried out during the execution of the contract. The contractor and, through him, the subcontractors, transmit to the contracting authority before the start of the works the documentation of registration with the social security, insurance and accident prevention authorities3. For the purposes of payment for services rendered in the context of the contract or subcontract, the contracting station

For the purposes of payment of the services rendered in the framework of the contract or subcontract, the contracting authority shall acquire ex officio the valid single document of contributory regularity relating to the contractor and all subcontractors. The contracting authority shall request for one or more randomly selected service employees to inspect individual contracts

[1689] Article 105.9 of Legislative Decree No. 50 of 18 April 2016

[1690]Decree n. 167/2019

regulated under *CAM for urban furniture* issued by Ministerial Decree of 7 February 2023.[1691] Regarding the use of stones materials, the reference to B&HR is clear. Under technical specifications, the use of natural stone from countries where there is a high risk of violation of human rights and the right to decent work as set out in ILO Conventions No. 29, 87, 98, 100, 105, 111, 138, 182, is not permitted unless it can be demonstrated the non-violation of such rights, through the results of specific audits[1692] - based on unannounced on-site visits, interviews trade unions and local NGOs to understand the local context in which the workers are involved. Regarding verification means, indications must be provided on the type of material to be used, the sites of the quarries, describe the supply chains and indicate the locations of the plants and companies involved, in the mining or quarrying activity, and, if in countries at risk as described above, the audits performed, the results of these audits, and the results of any actions taken to achieve an improvement in working conditions.
In terms of contract performance clauses and social aspects, contract conditions related to "inclusiveness and universal design" are crucial for guaranteeing accessibility to users with disabilities and marginalized groups, including children, young people with disabilities, those accompanying them, those users for whom different physical motor needs must be considered, specific intellectual, relational and social needs, etc. Spaces, equipment and signs must be able to be used autonomously and safely by people who express many different and different ways of moving, communicating, relating, in accordance with the United Nations Convention on the Rights of Persons with Disabilities.[1693]

CAM-Food and Catering

The *CAM-food* (updated in 2020)[1694] highlights the urgency to reduce social impacts and human rights risks raising throughout all supply chain phases of food production – entailing sowing, cultivation, harvesting – especially in case of intensive cultivation. The social aspects to consider concern: the conditions of farm workers, especially seasonal workers, to avoid their exploitation; the support, indirectly, to local economies and small producers introducing zero-km and reduced supply chains; the fair compensation of catering companies and farmers; poverty conditions and food insecurity of populations, to avoid deprivation of valuable food resources; the use of fair trade products; the employment of disadvantaged or differently-abled people and the use of social agriculture processes.[1695] Human rights concerns and traceability requirements are recommended not only for exotic products (fruits, coffee, chocolate) where most requirements relate to production from fair-trade, under a recognised certification scheme or multi-stakeholder initiative. Human rights and labour exploitation risks relates also to national challenges, considering the phenomena of informal work and "*caporalato*".[1696] To fight this phenomenon and ensure that food produced through forms of exploitation is not served in public canteens, a *structured dialogue* along supply chains between buyers and suppliers is envisaged, tracing back the supply chains all the way back to the farms where the products come

[1691] MASE (2018), CAM on the contracting out of the design of playgrounds, the supply and installation of street furniture and outdoor furniture products and the contracting out of the ordinary and extraordinary maintenance service of street furniture and outdoor furniture products, approved by Ministerial Decree 20 July 2023, n. 69/2023
[1692] These audits must have been carried out no more than two years before the publication of the contract notice or the request for tender, by a conformity assessment body accredited in accordance with Regulation (EC) No 765/2008 of the European Parliament and of the Council or authorised, for the application of Community harmonisation legislation harmonisation legislation, by Member States not based on accreditation, pursuant to Article 5(2) of the same Regulation (EC) No 765/2008 of the European Parliament and of the Council, to carry out the verifications as described above, or by a service company that is not accredited, which has documented requirements of professionalism, competence and experience to be assessed on the basis of the curricula vitae of the staff that perform the company's verifications, the company's curriculum vitae, and on the basis of that company's operational organisation in third countries where the excavation activities and therefore the audits are carried out.
[1693] Presidential Decree 24 July 1996, no. 503 'Regulations containing standards for the elimination of architectural barriers in public buildings, spaces and services' and in accordance with CEN/TR 16467 guidelines.
[1694] Ministry of the Environment (2020), CAM on Catering and food supply service, approved by Ministerial Decree 10 March 2020, n. 90/2020
[1695] Law No. 141/2018
[1696] Illegal phenomenon of recruitment and exploitation of workers through intermediaries, the so-called '*caporali*'.

from, in order to verify, also on the spot, how work is managed even in labour-intensive phases as harvesting.

Finally, another set of requirements very recently adopted *CAM - Catering Services and Distribution of Water for Drinking Purposes* - in force after 1st April 2024[1697]- envisages among possible award criteria specific measures for ethically and environmentally responsible management of the service. Indeed, additional technical points are awarded to economic operators demonstrating to have in place due diligence processes throughout supply chains in reference to national collective contracts.[1698]

CAM – Buildings

CAM on buildings and public works[1699] adopted in 2022, includes the reference to social and ethical considerations, mandating for award criteria related to ESG. The reference to B&HR in such CAM is less explicit but more general related to social aspects and business ethics related to ESG considerations. Indeed, additional score is awarded to an economic operator who has undergone an assessment of the level of exposure to risks of adverse impacts on all non-financial or ESG (environmental, social, governance, safety, and business ethics). Similarly, additional score is awarded to the economic operator providing evidence of adopting criteria for selecting its suppliers and contractors, giving preference to organisations that have undergone an assessment of the level of exposure to risks of adverse impacts on all non-financial or ESG aspects.

In terms of verification, a valid certificate of conformity with this criterion issued by a conformity assessment body accredited according to UNI CEI EN ISO/IEC 17029, ISO/TS17033 and UNI/Pdr102 and to a verification and validation scheme (programme) such as Get It Fair "GIF ESG Rating scheme".

CAM - Public Lightining

Public lightning is addressed by two different CAMs: CAM - public lightning (supply and design)[1700] and CAMS-public lighting (services).[1701] In terms of selection criteria, both CAMs include reference to human rights and working conditions. Indeed, the contracting authority is encouraged to apply the approach promoted under the "Guide for integration of social aspects in public procurement' (2012), and it is required to contractors to respect minimum social standards and international Conventions.[1702] In terms of supply chain management, particularly in case of production dispersed internationally, contractors must demonstrate through due diligence processes and management systems to respect the international and national legislation and standards regarding health and safety at work, minimum living wage, adequate working hours and social security. As means of verification, the tenderer may demonstrate compliance with the criterion by submitting documentation of labels[1703] demonstrating respect of the ILO Conventions along the supply chain. Alternatively, they must demonstrate to have followed the Guidelines on social aspects approach (2012), implementing a 'structured dialogue' along the supply chain also with suppliers and subcontractors, for instance through

[1697] MASE (2023), CAM on catering services and the distribution of mains water for drinking purposes, approved by Ministerial Decree 6 November 2023, n. 282/2023, in force from 1st April 2024.

[1698] as set out in the CAM criteria for catering services adopted with the Decree of the Minister of the Environment of the Protection of Land and sea 10 March 2020, sub D, letter c) point 6 "Verification of working conditions along the supply chains' (scoring an 'X');

[1699] Affidamento di servizi di progettazione e affidamento di lavori per interventi edilizi (approvato con DM 23 giugno 2022 n. 256, GURI n. 183 del 8 agosto 2022 - in vigore dal 4 dicembre 2022)

[1700] Ministry of the Environment (2017), CAM on the acquisition of light sources for public lighting, the procurement of public lighting equipment, the procurement of design services for public lighting installations, approved by Ministerial Decree 18 October 2017, n. 244/2017

[1701] Ministry of the Environment (2018), CAM on Public lighting service, approved by Ministerial Decree 28 March 2018, n. 98/2018

[1702] The eight ILO Core Conventions No. 29, 87,98, 100,105, 111, 138 and 182; ILO Convention No. 155 on health and safety at work; ILO Convention No. 131 on the definition of the "minimum wage"; ILO Convention No. 1 on working time (industry); ILO Convention No. 102 on social security (minimum standard); the "Universal Declaration of Human Rights"; Article 32 of the "Convention on the Rights of the Child".

[1703] SA 8000:2014 certification or equivalent,(e.g. BSCI certification, Social Footprint

questionnaires aimed at collecting information on working conditions. Another possibility is the adoption of organisational and management models and risk assessment provided by the Italian law.[1704]

Regarding CAM on public lighting as service, similar selection criteria apply. The operator must respect the principles of social responsibility by making commitments concerning compliance with minimum social standards and the monitoring thereof. The candidate must have applied the Guidelines adopted by the Ministerial Decree of 6 June 2012, aimed at encouraging compliance with internationally recognised social standards and defined by a number of international Conventions.

CAM - Public Green

The CAM on public green spaces issued in 2020[1705] includes reference to social criteria, particularly under contract performance conditions, referring to the "social clause". It provides that workers must be employed under contracts that fully respect the economic and regulatory treatment established by the national and territorial collective agreements in force for the sector and area in which the services are performed, including the employer's contributions to social security funds, health care and to all bilateral bodies provided for in the aforementioned collective labour agreements. The liability with the aforementioned rules is to be considered extended throughout the entire supply chain.[1706] The verification of compliance with such criterion is carried out during the execution of the contract, requiring relevant documentation to the supplier and through it to its subcontractors.

Another reference to social requirements is included under the award criteria, providing that additional technical score is awarded to tenderers who employ, for at least a minimum percentage set by the contracting authority, employees belonging to categories identified as "disadvantaged workers" (according to Ministerial Decree of 17 October 2017) fulfilling specific conditions. one of the following conditions.[1707]

Finally, with insight from practice on different Member States, the peculiar Italian experience on mandatory sustainability criteria and peculiar voluntary human rights prescribed by specific CAMs, shows interesting experimentation. As a matter of fact, the approach introduced by the Italian legislator recommending human rights criteria, *HRDD* and ethical management systems for more responsible supply chains of high risk produces, provides a potential example for inspiration and a way forward future development.

Nonetheless, data on their effective implementation are still missing as their application is at an embryonal stage. More data is available on the implementation of the mandatory green requirements, outlining potential benefits but also multiple obstacles. They regard especially monitoring and enforcement challenges, together with lack of resources and capacities of single public administrations as outlined by the *Italian GPP Observatory*. Mandatory approaches and increased harmonization at EU and national level could be a possible solution. However, the case of CAMs could provide inspiration for further developments in other MSs in this direction and at EU level for more harmonization on

[1704] Legislative Decree 231/01, together with presence of the risk assessment on the conduct referred to in Article 25quinquies of Legislative Decree 231/01 and Article 603 bis of the Criminal Code and Law 199/2016; appointment of a supervisory body, pursuant to Article 6 of Legislative Decree 23/01; storage of its annual report, containing paragraphs on audits and controls on the prevention of offences against the individual and illegal brokering and exploitation of labour (or 'caporalato').'

[1705] Ministry of the Environment (2020), CAM on Public green management service and supply of green care products, approved by Ministerial Decree 10 March 2020, n. 19/2020

[1706] Article 105.9 of Legislative Decree No. 50/2016,

[1707] Conditions include: not having been in regular paid employment for at least six months; aging between 15 and 24 years; do not have an upper secondary school diploma or a vocational school diploma (ISCED level 3) or have completed full-time training for no more than two years and have not yet obtained their first regular paid employment regularly paid employment; be over 50 years of age be an adult living alone with one or more dependants; be employed in professions or sectors characterised by a gender inequality rate of at least 25%; belong to an ethnic minority in a Member State and have the need to improve their language and vocational training or their work experience in order to increase their prospects of access to stable employment. The inclusion of the following categories could also be considered of workers: prison staff following the provisions on the subject by Decree-Law No. 78 of 1 July 2013 (Urgent Provisions on the execution of sentences); staff from reception centres for asylum seekers.

human rights criteria in public procurement. Despite the present barriers and challenges, a shift from voluntary to mandatory is gradually happening thanks to CAMs, encouraging contracting authorities to *lead by example* and to *purchase by example* and this could inspire other Member States or relevant EU proposals. To ensure a truly transformational process, further legal interpretation, continual updates and expansion to new sectors and mandatory social considerations will be necessary, taking into constant account obstacles encountered by contracting authorities. Anyway, despite human rights criteria are still voluntary, the current approach based on minimum social criteria and *structured dialogue* among buyers and suppliers represents a possible way forward that could inspire future developments and harmonization on public procurement and B&HR.

Conclusion

Starting from a snapshot on selected EU Member States practices at regulatory and policy level, the *status quo* on responsible purchasing and *B&HR-based public procurement* in the EU regional setting has been showed. Given a wide variety of measures, the EU landscape results a patchwork of multiple regulatory and policy initiatives related to the State-business nexus and mainly soft law instruments (such as National Action Plans) available to Member States. Indeed, despite the developments in EU towards regulatory measures, implementation and enforcement challenges remain a concrete obstacle for internalization at domestic level linked to the inherent *soft law* nature of B&HR instruments and the discretionary power left to the EU Member States in the transposition of the SPP legal possibilities provided by the Public Sector Directive. Thus, a full consolidation process for a B&HR based public procurement depend greatly on the willingness and pro-active approach of EU Member States and their contracting authorities in enforcing B&HR.

Focusing in depth on Member States peculiarities and experiences, two selected case-studies (Sweden and Italy) have been addressed, to showcase on existing practices for hardening the soft through public procurement and setting up B&HR-based criteria and requirements. Opportunities and limitations related to different approaches have been explored, also to inspire change and reforms in other Member States. The two case-studies present their own peculiarities in terms of different regulatory and policy frameworks and legal culture which must be acknowledged; nonetheless, they present a springboard for reflections on possible strategies and developments towards more standardized and comprehensive approaches to the inclusion of B&HR in public procurement in other countries, fostering a paradigm change within the EU setting.

7. Concluding Remarks

> *"Why should positive obligations (to protect, respect, fulfil human rights) stop at the border? One of the effects of globalization is vastly to improve communication across the world. This in turn has the effect of increasing awareness of the conditions for example under which goods are made...."*[1708]

Developed in the context of the current global economy shaped by complex, dynamic and transnational supply chains, this research has shed lights on multiple risks of human rights harms and related adverse impacts hindering responsible production and consumption patterns. In this scenario, it was outlined how the State acts as *mega-consumer* purchasing goods, works, services for public functions through public procurement procedures and public contracts. As such, public procurement leverages a significant percentage of national GDPs, being a powerful mean to influence human rights respect along global supply chains, inspiring more responsible business conduct of suppliers and alignment with international standards. As this analysis showed, human rights risks can impinge potentially all sectors of the global economy and consequently public procurement of any State, given its ubiquitous nature. In a context of legal uncertainty and ambiguity, irresponsible State purchasing may inevitably feed a vicious cycle of transnational abuses that would be perpetrated. Indeed, public procurement and human rights legal fields appear as separate islands in an unregulated and chaotic landscape, populated mainly by soft law sources, new blossoming initiatives, fragmented practice and limited case-law, requiring further clarity. State inaction in this respect result paradoxical, for different reasons, including legal, economic, reputational, instead human rights risks may become opportunities for both buyers and suppliers when addressed effectively.

The fundamental challenge inspiring the overall research was to explore spaces of intersection among the two apparently separate legal dimensions of public procurement law and human rights law, inspired by distinct primary objectives, regulatory frameworks, legal sources – unpacked at different levels throughout the entire research. One of the research goals was, indeed, to try to reconcile the two legal spheres adopting an international law perspective on the matter to clarify key roles and responsibilities of public procurement stakeholders – both the State as buyer and suppliers - towards human rights. How to bridge public procurement and human rights law? The attention has been on Business & Human rights- recently developed subfield of international law- and Socially Responsible Public Procurement, as peculiar field of Sustainable Public Procurement (SPP). So, the entry point for human rights considerations in public procurement could be found under SPP paradigm which has been increasingly consolidating in the last decades. Nonetheless, it must be outlined that the path towards more awareness on the powerful role of public procurement to reinforce respect of human rights is still long but moving ahead.

The space of intersection among these two fields, the so-called "State-business nexus" (referring to the commercial transactions among the public and private sector) according to the UNGPs, has been addressed focusing on multi-layered research questions, forming the research axes of the entire work:

- Is there an international obligation and consequent responsibility of public procurement stakeholders (public buyers and private suppliers) to prevent human rights in public procurement?

[1708] McCrudden, C., Buying Social Justice: Equality, Government Procurement & Legal Change. BUYING SOCIAL JUSTICE: EQUALITY, GOVERNMENT PROCUREMENT & LEGAL CHANGE, Oxford University Press, 2007, Oxford Legal Studies, p. 91

- Does public procurement have a legal relevance in *hardening* Business & Human Rights *soft* law mechanisms?
- How to leverage more responsible supply chains in practice throughout the public procurement process?

The results and answers collected throughout the thesis are not exhaustive and would require further expansion. However, they provide a glimpse on a potential comprehensive framework of analysis to bridge gaps between public procurement and human rights at multiple levels, aiming at reversing human rights risks into opportunities for both public and private actors involved in public procurement. Throughout the different chapters results were derived combining a horizontal research approach – focused on both the State as buyers and private suppliers – with a vertical one, going from macro-to-micro – namely zooming in from an international perspective down to a regional one (European Union) and concluding with a national focus on the matter.

Results

1. **Is there an international obligation and consequent responsibility of public procurement stakeholders (public buyers and private suppliers) to prevent human rights violations in public procurement?**

The first question constituted the starting point and core dilemma of this analysis. Preliminarily, Chapter 2 has set the stage for the overall analysis, depicting core human rights risks and opportunities along the global supply chains. Key concepts of the *public procurement system* and its internationalization were addressed, showing evidence on multiple human rights risks, adverse impacts and systemic drivers of violations that may arise in any industry and sector, thus affecting many public procurement transactions. Considering the State as *public buyer* and business as *suppliers* in public procurement, there are multiple human rights implications – such as legal obligations, reputational, policy, and economic factors – justifying action towards a more responsible public procurement. A core question of the overall thesis was to understand whether human rights obligations and attribution of international responsibility apply also to the State as buyer and business as supplier in the public procurement context. So, Part 2 has been devoted to disentangling:

- Role and responsibility towards human rights applicable to public buyers under international law (Chapter 3)
- Role and responsibility towards human rights applicable to private suppliers under international law (Chapter 4)

The aim was indeed to set-up a comprehensive framework to clarify obligations and responsibilities of public procurement stakeholders – both public buyers and private contractors, addressing the following set of subsequent questions extracted on what is the role and responsibility of public procurement stakeholders under international human rights law.

Table: Exploring Roles and Responsibilities in Public Procurement and Human Rights

1. Role
2. Responsibility

States
Business

	Applicable Law (Primary Norms)	Responsibility (Secondary Norms)
States	Human Rights obligations while purchasing?	International State Responsibility?
Business	Human Rights Due Diligence? Voluntary contract clauses	Corporate responsibility to respect human rights? Shared Responsibility?

Regarding the role and responsibility of the State as buyer, the classical obligations to *protect, respect and fulfil* human rights combined with the newly emerged field of B&HR characterized by influential soft-law instruments and a smart mix of hard and law mechanisms, constitute key legal arguments for the State to act to promote human rights also while purchasing. The interconnection between UNGPs and public purchasing has been addressed focusing on State-business transactions, unpacking the *State-Business nexus* and analysing the State Duty to Protect (Pillar I) related to public procurement. As legal grounds of justification, the UNCESCR General Comment No. 24 on State Obligations in the context of business activities has been particularly relevant, moreover UNGPs 4,5,6 provided further indication on whether the State-business nexus in its forms create obligations upon the public buyers. Reference to UNGPs 4,5,6 has also helped to bridge gaps in the International State Responsibility theory – referring to the ILC Draft Articles on the Responsibility of the State – to further clarify whether the State as buyer could be practically held internationally responsible for human rights abuses committed by its suppliers. To reply, lights were shed on multiple dilemmas on the theory of international responsibility, exploring the possible attribution of conduct of non-State actors, as private suppliers – being catalysts of international responsibility - to the State. As it was shown, the classical international state responsibility theory and ILC articles do not reply explicitly to such dilemmas, thus reflecting on multiple cases related to the State-business nexus – even if not strictly related to public procurement- was necessary. Despite the limited case-law on the matter, possible elements of governmental authority and/or the establishment of control by the State could be used as legal arguments for the attribution of responsibility of public contractors to the State, acting in capacity of contracting authority.

Addressing, then, key obligations, due diligence measures and responsibilities raising specifically upon suppliers, the focus has been on understanding in depth the "Corporate Responsibility to Respect Human Rights" and related instruments to operationalize it and thus to incentivize both public buyers to require its respect and suppliers to achieve it. Reflections have been developed on the status of suppliers as non-State international law actors, entering the debate on non-State actors as potential addressees of human rights law obligations. Despite not holding direct duties and responsibilities equal to the States in terms of "protecting, respecting and fulfilling human rights", business actors act as "catalyst of international responsibility". Peculiar attention was on understanding the human rights due diligence (HRDD) iterative process as core mechanism to operationalize the corporate responsibility to respect, addressing requirements, functions and legal consequences of its procedure. HRDD core steps and components were unpacked for their possible inclusion in procurement contracts: human rights impact assessment; integration of the findings of human rights risk identification and impact assessment into company policies and practices; and corporate human rights reporting and communication. In a complex landscape with multiple emerging sources and practices, attention has also been on private modes of regulations including corporate codes of conduct and voluntary sustainability standards, and their relevance in the public procurement context, as they could be required as labels, certifications, management systems.

To further understand accountability and liability dilemmas related to such responsibility, the attention has been on due diligence obligations and liability regimes, referring to examples of case-law and existing regulatory frameworks, which may apply of course also to suppliers in case of public procurement transactions. Thus, legal and reputational risks linked to liability regimes in B&HR constitute key incentives for the suppliers to act towards more responsible business conduct. At the same time, the inclusion of HRDD requirements in public procurement contracts could drag even more the market towards its alignment, as the risk would be being excluded from public contracts award.

2. Does public procurement have a legal relevance in hardening Business & Human Rights soft law mechanisms?

The second question inspiring the research concerned exploring, whether public procurement and public contracts could have a legal relevance in hardening Business & Human Rights soft law mechanisms, given the role and responsibility assessed in the first question. This question was specifically addressed in Chapter 5, narrowing down the research focus to the regional context of the European Union (EU). A human rights lens has been applied to regional public procurement frameworks, focusing on hardening the soft mechanisms through EU Public Procurement Law.

The EU, indeed, constitutes a springboard with blossoming initiatives and development of hard and soft law sources suggesting a twofold trend implying related opportunities and legal challenges for public procurement and human rights: an EU Sustainable Public Procurement (SPP) trend and an EU Business & Human Rights (B&HR) momentum. Their potential correlations require further insight. Indeed, a Sustainable Public Procurement trend has emerged particularly after the 2014 reform process of the Public Procurement Directives, creating multiple opportunities to include sustainability considerations as social and human rights criteria throughout the procurement process. Furthermore, an EU B&HR momentum is evident with the blossoming of multiple voluntary and mandatory initiatives in a dynamic and multi-faceted regulatory and policy context. The culmination of such on-going process is the cornerstone Directive on Corporate Sustainability Due Diligence (CSDDD), just adopted in April 2024, which opens the floor to multiple debates on the direct and indirect interconnection with the public procurement legal regime and its impacts. Despite some synergies between public procurement and the B&HR field can be found in the newly approved text of the Directive - Article 24 and Recital 63 - however further efforts in both legal spheres are truly needed for an effective paradigm shift.

Reflecting on multiple synergies is crucial, as regulatory frameworks on SPP and on B&HR can mutually reinforce each other towards more responsible production and consumption. By analysing the Public Sector Directive's multiple entry points for including human rights considerations – particularly requiring HRDD - throughout the procurement cycle it has been evidenced how public procurement may harden the B&HR soft law in a context of still relative uncertainty on the adoption and steps ahead of the Corporate Sustainability Due Diligence Directive. However, it must be recalled that the inclusion of HRDD and human rights criteria throughout the procurement process depends greatly on the public buyers' proactivity and discretionary choice to include those in their tenders and public contracts. Therefore, the fact that the Corporate Sustainability Due Diligence Directive would include reference to public procurement is a key opportunity for requiring to more suppliers to adhere to human rights standards. Furthermore, as it was highlighted, the presence of Supervisory Authority set up by law would ensure support to procuring entities in the monitoring process, ensuring more standardized and consistent approach to the respect of human rights when participating in public procurement transactions.

3.How to leverage more responsible supply chains in practice throughout the public procurement process?

The third step has been to understand in practice how to leverage more responsible supply chains throughout the public procurement cycle, looking at existing approaches in domestic jurisdictions – in EU - particularly when procuring goods, works, services in human rights risky sectors. So, in the final Chapter 6, the analysis continued shedding lights on the national level, to investigate selected regulatory frameworks and existing practices developed in EU Member States which could be exemplary in the process of synergy creation between public procurement and B&HR. Existing practices shed lights on

the possibility to advance such interconnection with positive impacts. Nevertheless, the efforts at the international and the regional legal level is still slow, hindered by legal frictions and limits which would require more legal justification and convergence between law and practice.
Starting from a snapshot on selected EU Member States practices at regulatory and policy level, the status quo on responsible purchasing and B&HR-based public procurement in the EU regional setting was showed. Given a wide variety of measures, the EU landscape results a patchwork of multiple regulatory and policy initiatives related to the State-business nexus and mainly soft law instruments (such as National Action Plans) available to Member States. Indeed, despite the developments in EU towards regulatory measures, implementation and enforcement challenges remain a concrete obstacle for internalization at domestic level linked to the inherent soft law nature of B&HR instruments and the discretionary power left to the EU Member States in the transposition of the SPP legal possibilities provided by the Public Sector Directive. Thus, a full consolidation process for a B&HR based public procurement depend greatly on the willingness and pro-active approach of EU Member States and their contracting authorities in enforcing B&HR.
Focusing in depth on Member States peculiarities and experiences, two selected case-studies (Sweden and Italy) have been addressed, to showcase existing practices for hardening the soft through public procurement and setting up B&HR-based criteria and HRDD requirements. Opportunities and limitations related to different approaches have been explored, also to inspire change and reforms in other Member States. The two case-studies present their own peculiarities in terms of different regulatory and policy frameworks and legal culture which must be acknowledged; nonetheless, they present a springboard for reflections on possible strategies and developments towards more standardized and comprehensive approaches to the inclusion of B&HR in public procurement in other countries, fostering a paradigm change within the EU setting to promote a more comprehensive application.

Recommendations and Research Expansion
From the overall analysis, some non-exhaustive recommendations for possible reforms towards bridging public procurement and B&HR legal fields at policy and regulatory level can be extracted:

- Overall, more space should be devoted to the State-business nexus under B&HR sources and public procurement regulatory frameworks. In a context of legal unclarity, international soft law sources as the UNGPs can play a key role in providing directions for interpretation. Reinforcing the "State-business nexus" section under the UNGPs or developing a UN General Comment on the matter could be a powerful opportunity to provide guidance and clarifications on roles and responsibilities of public buyers and suppliers.
- States should be fully aware of the legal risks and responsibility consequences in terms of International State Responsibility. Elements of governmental authority and/or the establishment of control by the State could be used as legal arguments for the attribution of responsibility of public contractors to the State, acting in capacity of contracting authority. Thus, further clarity by the ILC on the matter would be essential, also to further guide case-law interpretation by Courts.
- Legal and reputational risks linked to liability regimes in B&HR constitute key incentives for the suppliers to act towards more responsible business conduct. At the same time, the inclusion of B&HR requirements in public procurement contracts and procedures could drag the market even more towards the alignment to such standards, as the risk would be being excluded from public contracts award. Thus, setting up clear liability regimes for suppliers and including as

sanction the exclusion from public tenders in case of non-compliance are key recommendations for effective measures towards more B&HR based public procurement

- Given the existing patchwork of fragmented practices and emerging soft and hard law sources in different fields, it is crucial to foster synergies between policy and regulatory initiatives in the two fields of public procurement and human rights, as opportunity to maximize the State duty to protect human rights and at the same time the corporate responsibility to respect human rights. Particularly in EU, the SPP trend and B&HR momentum must be surfed, creating essential links and open dialogue among the Public Procurement Directives and the Corporate Sustainability Due Diligence Directive. The Public Procurement Directives should include direct reference to human rights and B&HR based criteria and HRDD which are currently missing.
- Extraterritoriality aspects of EU legislations are pivotal as potential extraterritorial reach of public procurement legislations could enhance the EU standards on human rights and HRDD throughout global supply chains worldwide
- National legislations in EU Member States related to B&HR should include clear reference to public procurement and particularly to exclusion grounds for non-compliance to B&HR. At the same time, national public procurement codes should include further reference to human rights under social considerations. Given the limitations of the LtSM and the discretionary approach of SPP by public entities, it is crucial to create incentives for pro-active approaches of procuring entities and to further support them in monitoring and training.
- A smart mix of hard and soft, as mandated by John Ruggie in B&HR, would be recommended also in public procurement, particularly to consolidate and mainstream B&HR based public procurement. Regulation is not enough, pro-active approach from procuring entities plays an essential role too, especially in the current transitionary phase where the EU CSDDD is still under approval As in the case of Sweden and Italy, setting up clear criteria and human rights-based requirements for procurement categories at high-risk and standardize collaborative approaches at national level is a key.
- In a transitionary context where newly fields of law are consolidating and initiatives are blossoming, further support to both public entities and suppliers in the direction of B&HR based public procurement is needed, particularly for what concerns monitoring systems. Indeed, as evidenced in the two selected case-studies (Sweden, Italy), monitoring the respect of human rights requirements by suppliers is an ongoing challenge which would require further investment. Taking the case of the CSDDD, potential opportunity to strengthen synergies between B&HR and public procurement would be the establishment of Supervisory Authorities and a European Network of Supervisory Authorities that would be an important driver in terms of monitoring on human rights related matters. This could be a helpful starting point, whose potentials must not be missed.

In conclusion, the study has provided a non-exhaustive analysis given the limits of the research which could be expanded further in different directions:

- The *State-business nexus* could be unpacked further, developing a comprehensive framework of analysis on roles and responsibility of States and suppliers, and related application in regional and national contexts, with attention to UNGP 4 (State-owned enterprises) and 5 (privatization), expanding further arguments from regulations, policy and case-law.

- Reflections on the attribution of International State Responsibility and related arguments on the notions of control could be extended further through comparative analysis with the International Organizations Responsibility and related impacts of their procurement activities.
- Further updates on the EU regional framework would be needed in lights of the adoption and transposition of the CSDDD, to examine its impacts on public procurement after its adoption.
- The study could be expanded to other regional areas outside EU, to explore peculiarities and state of play in different regional jurisdictions
- Collecting data and developing in-depth analysis on further domestic jurisdictions could help to craft a more precise current state of play, assessing more in-depth challenges and opportunities. Standardizing a B&HR based public procurement approach would be recommended but a one-size fits all approach would not work: focusing on the Member States experiences is crucial, to understand the peculiarities of each public procurement system and human rights context for more effective responses.

Annex 1

Matrix on SRPP and B&*HR-based public procurement* in selected EU Member States[1709]

[1709] The matrix includes data collection and analysis, combining the following:

- UNEP (2022) Survey on Sustainable Public Procurement status
- NAPs on B&HR document analysis
- DIHR (2016) Survey on B&HR and Public Procurement

The selected countries in the cross-examination include: Belgium, Check Republic, Denmark, Finland, France, Germany, Ireland, Italy, Lithuania, Netherlands, Poland, Slovenia, Spain, Sweden.

EU Member State	Regulatory Framework: Laws/regulations inclusive of SPP provisions	SRPP Prioritized Objectives and Provisions	Policy Level: Dedicated SPP policies/ action plans and overarching thematic policies	B&HR: State-business nexus (B&HR NAP and initiatives)
Belgium	*Public Procurement Act* (2016) and *Concession Contracts Act* (2016). Amended in 2022 by Act of May 18, 2022. In 2022, the Public Procurement Act and the Concession Contracts Act were amended to include SPP provisions. In addition, there are a number of legal instruments supporting SPP: • Circular (May 16, 2014): Integration of Sustainable Development, including Social Clauses and Measures favouring SMEs in Public Contracts Awarded by Federal Contracting Authorities • Royal Decree (July 13, 2014) on Energy Efficiency Requirements in Certain Public Contracts for the Acquisition of Products, Services, and Buildings • Circular 307e (April 21, 2017): Acquisition of Passenger Vehicles for Use by State Agencies and Certain Public Organizations	*UNEP SPP Global Review Questionnaire (2022):* Selected SRPP prioritized objectives: • Promoting compliance with ILO standards and decent work • Promoting fair trade • Promoting gender equality • Promoting inclusive and equitable quality education, and lifelong • learning opportunities for all • Promoting opportunities for social economy enterprises • Promoting SMEs • Promoting transparency and accountability and combating • corruption • Protecting against human rights abuses • Protecting and promoting groups at risk	The *Federal Sustainable Development Plan (2021)* and the *Federal Purchasing Policy (2023)* include SPP considerations.	NAP on B&HR: adopted State-business nexus section: Yes • **Action point 13**: **Strengthen and monitor the respect for human rights in public procurement:** this is the main action point on public procurement, and covers specific plans for the federal governments as well as all three Belgian regions (Wallonia, Government of Bruxelles, Flemish region). • **Federal government engagements:** - Examination by the Working Group on SPP of the Interdepartmental Commission for Sustainable Development on strengthening and optimizing the integration of human rights respect into the purchasing policy of the public authorities through stakeholder consultations. - The transposition of the EU public procurement directives (Directives 2014/24/EU and 2014/25/EU). Monitoring activities of the transposition of the EU public procurement directives, paying particular attention to the application of award criteria and application of price as the sole award criterion. - Government analysis on best way to verify and monitor compliance with the criteria set out in the procurement procedure in several sensitive sectors, particularly with production in so-called "risk" countries, in order to ensure that the requirements relating to respect for human rights set out in the specifications have been complied with - The Working Group on SPP analyzed case studies on monitoring compliance with ILO clauses and human rights in supply chains in order to test, through pilot projects, whether such an initiative is feasible in Belgium. Implementation and follow-up of this initiative will be carried out in cooperation with the relevant federal, regional and local administrations.
Check Republic	*Public Procurement Act n.134/2016* (2016) transposes Directive 2014/24/EU.	SRPP key provisions and initiatives:	A national overarching policy on SPP is missing.	**NAP on B&HR: Adopted**

	SPP key provisions: • Art. 6.4 on Public Procurement Principles: the contracting authority is obliged, when proceeding under this Act, namely preparing tender specifications, evaluating bids and selecting suppliers, to comply with the principles of socially and environmentally responsible procurement and innovations, if allowed by the nature and purpose of a public contract. • Section 37(1)(d): requirements relating to the environment and social consequences of a public contract may be applied to participants in the award procedure. *Act No. 543/2020*: introduces a new legal obligation effective from 1st January 2021 making mandatory for every public contracting authority to consider possible environmental, social and also innovative potential of their every tender. Other relevant Acts: Czech Republic has transposed several EU Directives regarding energy, energy labels and eco-design which stipulates that large scale procurement should prioritize high energy-efficiency standard (A standard and higher).	*Public Procurement Act n.134/2016* allows, and supports in several places, SRPP. Contracting authorities may attain desirable societal objectives in several ways, most frequently through contract performance conditions, or by using quality evaluation criterion. *Art 28.p* defines SRPP as "a procedure under this Act during which the contracting authority is obliged to take into account, for example, job opportunities, social inclusion, decent working conditions and other socially relevant aspects related to a public contract". Supporting guidance in SRPP to public administration and regional authorities: Resolution No. 531/2017 dated 24 July 2017[1710] on Guidelines for the Application of Responsible Public Procurement and Commissioning Applied by the Public Administration and Local Authorities.[1711] The resolution requires to monitor development, and once per two years, present to the government an evaluation of the benefits brought by application of the Guidelines[1712]	Some public organisations and ministries have their own individual SPP policy. Relevant sources: • Decision of the government 465/2010: Rules for implementing of environmental requirements in public procurement of state administration and self-administration.[1713] • Information on SPP and green procurement and its rules is provided in a dedicated website.[1714]	**State-business nexus section: Yes** (public procurement pp. 22-24) "Human rights protection can be encouraged in public procurement after weighing up the nature of a public contract and the deliverable; specific human rights requirements must reflect these aspects accordingly. In practice, human rights protection requirements can be factored into the conditions for participation in award procedure or into rules for the evaluation of bids and must be verifiable, for example, in the form of a label. (Section 94 of Act No 134/2016) It is always advisable to reflect these requirements in the contract between the contracting authority and the supplier" **Inititatives:** • A number of local government authorities are involved in voluntary initiatives for SRPP contracts, such as Fairtrade Town. • Guidance on a responsible approach to public procurement and purchasing has been adopted incorporating human rights issues **Planned measures:** Ministry of Regional Development incorporate information on the social and human rights context of public contracts – and on basic opportunities to take these issues into account – into training courses for contracting authorities.
Denmark	*Danish Public Procurement Act*, Act No. 1564 of 15 December 2015. The Act entered into force on 1 January 2016, paving the way for the State and municipalities to	Guidelines for Responsible Procurement in the Public Sector, developed in collaboration with municipalities and other relevant parties.[1715]	In 2020, a dedicated SPP policy was adopted: *Green Procurement for a Green Future - Strategy for Green Public Procurement* (revised in 2022).	**NAP on B&HR: Adopted** **State-business nexus: Yes** (pp. 10-13, 29) • *Recommendations from the Council for CSR to the Danish Government on the state duty to protect* (2011)

[1710] Check Republic Government (2017) Resolution on Guidelines for the Application of Responsible Public Procurement Commissioning Applied by the Public Administration and Local Authorities https://sovz.cz/wp-content/uploads/2017/11/resolution-no.-531.pdf

[1711] https://sovz.cz/wp-content/uploads/2017/11/guidelines.pdf

[1712] Check Republic Government (2018) Report on the Evaluation of the Benefits Brought by the Application of the Rules on Responsible Public Procurement https://sovz.cz/wp-content/uploads/2019/06/2018_report-on responsible-public-procurement-in-the-czech-republic.pdf

[1713] http://www.portal-vz.cz/getmedia/29bc482b-42b6-4b8b-acb6-f301217ca2b1/usneseni-vlady-465

[1714] http://www1.cenia.cz/www/zelene-nakupovani

[1715] www.csr-indkob.dk

	be able to integrate social and environmental considerations into their procurement exercises			"Encourages responsible public procurement by requiring government contractors to perform due diligence on human rights in relation to the products or services covered by the contract, including regularly supervising the contractual requirements;" • Promotion of human rights in commercial transactions: The Government has committed itself to promoting responsibility in public procurement through several initiatives, among other by publishing a set of common Guidelines for responsible procurement in the public sector in collaboration with municipalities and other relevant parties. The guidelines are a practical tool to determine when and how CSR can be applied in connection with public procurement.
Finland	Public Procurement Act (2016) Other relevant legislations: • Act on Consideration for the Energy • Environmental Impact of Vehicles in Public Procurement (2017) Act on Environmental and Energy Efficiency Requirements for the Procurement of Vehicles and Transport Services (2021)	*UNEP SPP Global Review Questionnaire (2022):* Selected SRPP prioritized objectives: • Promoting compliance with ILO standards and decent work • Promoting transparency and accountability and combating Corruption • Protecting and promoting groups at risk In its Resolution on CSR, the Finnish Government encourages public procurers to take social aspects into consideration. For the promotion of human rights, the procurement act allows consideration of aspects related to employment, working conditions, the position of vulnerable individuals and corporate social responsibility in connection with public procurement. The Ministry of Employment and the Economy has published a Guide to SRPP, with practical examples gathered from procurement units, explaining how social aspects can be taken into consideration in each stage of the procurement process.	National Public Procurement Strategy (2020) Overarching and thematic policies inclusive of SPP provisions • Strategic Programme to Promote a Circular Economy (2020) • Sustainable Development Strategy (2022)	NAP on B&HR: Adopted State-business nexus: Yes (pp. 20-21) "Key aims for the action plan are the legislative report, definition of the due diligence obligation, and the application of social criteria in public procurement" **Social criteria in public procurement** "As a State, Finland actively works to ensure that human rights are respected in international arenas. In Finland, the Constitution provides strong protection for the realisation of human rights. The working group has written down objectives for Finland's international activities, but improvements are also proposed for the state's operations as a public procurer …" **Follow-up measures by 2015** (by the Ministry of Finance, Ministry of Employment and the Economy): -References to Section 49 of the Act on Public Contracts and to the Guide to SRPP be added to the procurement guidelines for ministries; and - the responsibility themes in the state procurement manual be updated; - in connection with the reform of the public procurement online notification service, a field be added to the sections containing procurement data to indicate whether social aspects have been taken into consideration in the procurement - A report will be made on the product groups that pose the highest risk for human rights violations. The report would

		In addition, the Ministry maintains the CSRkompassi.fi with information and material for taking social aspects into consideration in long production chains related to public procurement.		increase the awareness related to responsible procurement and help target the consideration of the social aspect for the product groups that pose the highest risk
France	The new *French Public Procurement Code (Ordinance 2018-1074)* entered into force on April 1, 2019, integrating public procurement and concession contract rules into a single code. SPP key provisions: • Public procurement must contribute to the achievement of sustainable development objectives, in accordance with Law N° 2021-1104 of 22 August 2021 • Article 45 of Ordinance 2015-899[1716]: public contracts may not be awarded to economic operators that have been found guilty of fraud, corruption or the trafficking or exploitation of human beings • Article 59 of Decree 2016-360[1717] obliges public purchasers to reject bids that do not comply with applicable laws, particularly in the social and environmental fields. • Article 53 and 60 Ordinance: Purchasers can reject tenders that are abnormally low because they do not respect applicable environmental, social and labour obligations established by French law, European law, collective agreements or by international environmental, social and labour law provisions • Article 62 and 133: This also applies to subcontractors Other legislations relevant for SPP: • Law on the Social and Solidarity Economy (2014) • Energy Transition Law for a Green Growth (2015)	*UNEP SPP Global Review Questionnaire (2022):* Selected SRPP prioritized objectives: • Promoting compliance with ILO standards and decent work • Promoting fair trade • Promoting gender equality • Promoting opportunities for social economy enterprises • Promoting SMEs • Protecting against human rights abuses • Protecting and promoting groups at risk Under Article 15 of Decree 2016-360, contracting authorities may choose to include general administrative terms and conditions in public contracts. These terms and conditions cover general rather than specific provisions (performance of services, payment, auditing of services, presentation of subcontractors, deadlines, penalties, general conditions, etc.). Article 6 of these terms covers the protection of labour and working conditions, and states that contract holders must respect the working conditions set down in the labour laws and regulations of the country in which workers are hired or, otherwise, ILO's eight fundamental conventions where these have not been incorporated into the country's laws and regulations.	*National Action Plan for Sustainable Procurement (PNAD)* has been adopted for 2022-2025. This national strategy includes all public and private purchasers, this roadmap sets common objectives and provides for the deployment of tools and support programs for all buyers. The National Plan for Sustainable Purchasing 2015-2020 (the 2015-2020 Inter-ministerial Exemplary Administration Plan). It promotes initiatives social and societal impacts as part of their focus on social and environmental responsibility. This national action plan encourages those making purchases for the State or local government to introduce social and environmental clauses in public contracts. To this end, it sets specific targets for social and environmental provisions Overarching and thematic policies inclusive of SPP provisions • National Strategy to Combat Imported Deforestation (2018) • National Low-Carbon Strategy (2022)	**NAP on B&HR: Adopted** **State-business nexus: Yes** (pp. 23-25) Legislative measure on CSR including public procurement: Article 13 of the Law on Social and Solidarity Economy (SSE Act) seeks to ensure that more public purchases are made from socially responsible businesses (many of which are part of the SSE) and that better use is made of social clauses in procurement contracts **Measures underway:** • The State and local government are committed to promoting and respecting the UNGPs in all of their activities—as lawmakers, employers and producers. • The State is committed to ensuring that businesses in which it holds shares respect human rights and the environment. • France ensures that the UNGPs and other established international texts are respected in public procurement guides, public procurement policies and training for purchasers

[1716] Ordinance no. 2015-899 dated 23 July 2015 that sets the general framework for public work, service and supply contracts, as well as defence and security contracts covered by Directive 2009/81/EC
[1717] Order no. 2016-360 dated 25 March 2016, that applies to all contracts falling within the scope of Ordinance n° 2015-899 except defence and security contracts;

	• Law for the Reconquest of Biodiversity, Nature, and Landscapes (2016) • Public Order Code (2018) • Anti-Waste Law and Circular Economy (2020) • Law for balanced commercial relations in the agricultural and food sector and for healthy, sustainable and accessible food for all (2020) • Circular from the Prime Minister Sustainable Public Services (2020) • General Administrative Clauses (2021) • Climate and Resilience Law (2021) • Digital and Environment Law (2021)			
Germany	Regulation on the Award of Public Contracts (2016) and the Act against Restraints of Competition (2016) Mandatory SPP in public procurement: The National Programme on Sustainability[1718] (2015) is mandatory for all federal authorities.	Part IV of the *Restraints of Competition Act* (2016) lays particular emphasis on observance of the law, especially taxation, labour and social legislation (sections 97(3) and 128(1) of the Act). The legal framework enables procurement bodies to make greater use of public contracting to underpin the pursuit of strategic goals such as social standards, environmental protection and innovation.	Dedicated SPP policies in place: • the German Sustainability Strategy updated in 2017[1719]: it incorporates the government's Programme of Measures on Sustainability • National Programme on Sustainability, 2010 and 2015.[1720] • General administrative provision for the procurement of energy-efficient products and services (2nd amendment) (2013). SPP provisions in overarching and/or thematic national policies: • Law to promote circular economy and ensuring the environmentally friendly management of waste (2012). • National Programme on Sustainable Consumption (2016).	**NAP on B&HR: Adopted** **State-business nexus:** Yes (pp. 21-22) Germany has fully transformed into domestic law its obligations to protect human rights under international agreements. This applies, for example, to the prohibitions of child labour and forced labour that are imposed by the ILO core conventions. If enterprises break the law in Germany in either of these respects, they can be disqualified from receiving public contracts. Measures implemented by the Federal Government to promote sustainable public procurement by federal, state and local authorities and institutions: • Since 2010, the federal, state and local authorities have been cooperating in the framework of the *Alliance for Sustainable Procurement*, chaired by the Federal Government. Its purpose is to contribute to a significant increase in the percentage of sustainable goods and services among the purchases made by public bodies. The Alliance enables the main public procuring bodies to share their experience and is intended to contribute to more widespread application of

[1718] https://www.bundesregierung.de/Content/DE/_Anlagen/2015/03/2015-03-30-massnahmenprogramm-nachhaltigkeit.pdf?__blob=-publicationFile&v=3
[1719] (Deutsche Nachhaltigkeitsstrategie Neuauflage 2016)
[1720] http://www.bundesregierung.de/Content/DE/_Anlagen/Nachhaltigkeit-wiederhergestellt/2010-12-06-massnahmenprogramm-nachhaltigkeit-der-bundesregierung.pdf?__blob=publicationFile. (2010)
https://www.bundesregierung.de/Content/DE/_Anlagen/2015/03/2015-03-30-massnahmenprogramm-nachhaltigkeit.pdf?__blob=publicationFile&v=3. (2015)

			• German Resource Efficiency Programme (2016).	uniform national and international standards by all three tiers of government – federal, state and local. • Since 2012, the *Centre of Excellence for Sustainable Procurement* at the Procurement Office of the Federal Ministry of the Interior has been assisting public contracting bodies in applying procurement criteria. In 2014, the Centre of Excellence, along with the BITKOM association of German digital goods and service firms, drew up an initial sectoral agreement in the form of a *Declaration on Social Sustainability for IT*, which provides for adherence to the ILO core labour standards in procurement procedures. Other sectoral agreements on critical product categories are planned. • Other Federal Government initiatives and support measures are to be found in the Programme of Sustainability Measures, into which Federal Government targets for sustainable procurement have been incorporated. • "Kompass Nachhaltigkeit" (Sustainability Compass), an information platform funded by the Federal Government, provides an overview of sustainability standard systems and supplementary requirements and assists public contracting bodies in incorporating a sustainability dimension into their procurement procedures. • The "Fair Procurement Network" of municipalities, which is part of the service agency Communities in One World, provides advice to municipalities and familiarises local authorities on sustainable procurement through specialised promoters. An information and dialogue campaign entitled "Deutschland Fairgleicht" informs municipal decision-makers and contracting bodies and raises their awareness of sustainable procurement. **Planned actions:** • "The Federal Government will examine whether and to what extent binding minimum requirements for the corporate exercise of human rights due diligence can be enshrined in procurement law in a future revision. It will draw up a phased plan indicating how this aim can be achieved. • The expertise of the Centre of Excellence for Sustainable Procurement in matters of human rights, including the application of the ILO core conventions to procurement procedures, and in the implementation of the UN Guiding Principles will be used to

				expand the knowledge of procurement staff in the context of training courses."
Ireland	Public procurement in Ireland is governed by EU and National law and National Guidelines. The key regulatory frameworks: • S.I. No. 294/2016 Award of Public • Authority Contracts Regulation; S.I. No. 286/2016 Award of Contracts by Utility Undertakings Regulation. Other relevant sources: • Circular 10/14: Initiatives to assist SMEs in Public Procurement (2014) • Circular 20/2019: Promoting the Use of Environmental and Social Considerations (2019)	*UNEP SPP Global Review Questionnaire (2022):* Selected SRPP prioritized objectives: • Promoting opportunities for social economy enterprises • Promoting SMEs • Protecting and promoting groups at risk The Office of Government Procurement is committed to ensuring that human rights related matters are reflected in public procurement and embedded in national public procurement policy The 2014 EU Directives on Public Procurement transposed into Irish law contain specific provisions excluding tenderers who are guilty of certain human rights infringements from participation in public procurement. Extensive general guidance on legal procurement requirements is available to public authorities on the Irish portal for public procurement.	Dedicated SPP policies in place: • Green Tenders, An Action Plan for Green Public Procurement (2012) published by the Department of the Environment, Climate and Communications (DECC) which is responsible for the SPP policy. • Green Public Procurement Guidance (2014, updated in 2021) by the Environmental Protection Agency (EPA) which is responsible for monitoring implementation of SPP by government departments. • Circular 20/2019 - Climate Action Plan 2019 by the Department of Public Expenditure and Reform (DPER) • Strategic Procurement Advisory Group (SPAG), chaired by the Office of Government Procurement (OGP). This group meets three times a year, facilitating implementation of Circular 20/2019 and other relevant policies. Additionally, an Environmental Subgroup of the SPAG meets quarterly to allow more in-depth, technical discussion of the green aspects of Circular 20/2019 and Green Tenders, as well as other relevant policy such as in the area of the circular economy.	**NAP on B&HR: Yes** **State-business nexus: Yes** (pp.15)

			In accordance with Circular 20/2019, all government departments must incorporate green procurement into their planning and reporting cycles SPP provisions in overarching and/or thematic national policies: • The Sustainable Development Goals: National Implementation Plan 2018-2020 • Climate Action Plan 2019 • Waste Action Plan for a Circular Economy 2020 • Whole of Government Circular Economy Strategy 2022-2023 • National Implementation Plan for the Sustainable Development Goals 2022-2024	
Italy	Public Contracts Code - Legislative Decree No. 50/2016 (2016) and updated in 2023.	*UNEP SPP Global Review Questionnaire (2022):* Selected SRPP prioritized objectives: • Promoting compliance with ILO standards and decent work • Promoting fair trade • Promoting gender equality • Promoting SMEs • Protecting against human rights abuses • Protecting and promoting groups at risk Italy fully adheres to the principle of SRPP and is committed to ensuring that respect for human rights is taken into account at all procurement stages.[1721]	Dedicated SPP policies in place: • National Action Plan on Green Public Procurement - National Action Plan for the environmental sustainability of consumption in the Public Administration (2008, review in 2013 and 2023). The Ministry of Ecologic Transition sets the NAP on GPP on sustainability and green public procurement to be implemented by Italian public administrations. The Plan implements GPP considerations in public procurement and identifies the product categories that are	**NAP on B&HR: Adopted (2016-2021; 2022-2026)** **State-business nexus: Yes** (pp.15, 48) • In the framework of the BHR NAP 2016-2021, in the field of public procurement ANAC has provided operational guidance to administrations to introduce social and environmental criteria in contractual activities of public administrations through the Guidelines on the MEAT.[1726] • In the framework of the PNRR, the role of the Public Contracts Database and the Single Transparency Platform managed by ANAC is set to gain importance also to facilitating the involvement of civil society in the control on legality and life cycle approach in public procurement through available digital tools. • The Ministry of Infrastructure and Transport publishes on its website calls for tenders for public infrastructure contracts, as well as the notice of award. In line with Global Standard

[1721] BHR NAP
[1726] Guidelines 2 of 2 May 2018 https://www.anticorruzione.it/-/linee-guida-n.-2

		The Code, transposing EU Directives 23, 24 and 25/2014, outlines a regulatory framework for social and environmental responsibility in the management of public procurement, including the possibility of introducing criteria relating also to human rights within the contract life cycle (definition of the subject of the contract, criteria for selection of candidates, technical specifications, award criteria and contract performance clauses). Basic principles are aimed at guaranteeing access to and the conduct of decent work, respect for social and labour rights, as far as SMEs' participation in public contracts. Key sources: • "Guide for the integration of social aspects in public procurement"[1722], adopted by the aforementioned Ministry by Ministerial Decree of June 6, 2012, as part of the National Action Plan on Green Public Procurement (PANGPP) • Guidelines for the implementation of gender and generational equality considerations in public procurement procedures (2023)[1723] developed by the Council of Ministers, the Ministry of Infrastructure and Sustainable Mobility and the Ministry of Labor and Social Policies,	regulated by the minimum environmental criteria set by Ministerial Decree. Such Minimum Environmental Criteria are mandatory for every public procurement procedure of any amount. The documents including the environmental criteria (mandatory and awarding) are developed over a variable period ranging from one to three years with the help of several stakeholders such as universities, research organizations, trade association, public administrations and the latest draft of the document is evaluated by a special committee before it is signed by the Ministry. • "Guide for the integration of social aspects in public procurement" , adopted by the aforementioned Ministry by Ministerial Decree of June 6, 2012, as part of the National Action Plan on Green Public Procurement (PANGPP) • The Recovery and Resilience National Plan 2021 (PNRR) defines actions to be taken at both the national and local level to overcome the economic and social impact of the COVID-19 pandemic using	of Contracting 5 (C5) and other supranational best practices, "Opencantieri" project has been set up: it is an online platform that includes open, complete and updated information on public infrastructure processes. • Contracts related to infrastructure development owe their standards of integrity and transparency also to Consip, the national Central Purchasing Body (CPB) at the Ministry of Economy and Finance (MEF). Its mission is to make the use of public resources more efficient and transparent, while at the same time providing tools and expertise to public administrations and strengthening competition among businesses. Consip has granted a greater and easier access to data and information on its activities, providing useful tools to clearly understand and correctly interpret data, as well as a geo-referencing system that, using interactive maps, allows to consult data on purchases. In order to make the sharing of data and information understandable and systematic, Consip published its second Sustainability Report, with the aim of describing its mandate and contribution to the national public procurement system. In order to ensure a clear and complete accounting of its actions, the Report was drafted according to GRI standards. It describes Consip's operations and performance in terms of environmental, economic and social sustainability, noting how this approach has contributed to the achievement of some SDGs. • The raising of standards of integrity and transparency in the development of infrastructures is also guaranteed through the dissemination of Legality Protocols: these are voluntary agreements between the Prefecture or other Public Security Authorities and public or private companies involved in the management of public works, which have proved particularly useful in combating criminal infiltration. The role of such protocols has recently been strengthened through regulatory interventions (Decree Law No. 76/2020 converted into Law No. 120/2020, added to Legislative Decree No. 159/2011 – Antimafia Code – Art. 83-bis on the

[1722] The Guide aims to provide operational guidance on how to take social aspects into account in the definition of public tenders relating to supply, service and works contracts. It considers experiences of integrating social criteria in public procurement developed by different EU countries

[1723] Linee guida volte a favorire le pari opportunità generazionali e di genere , nonché l'inclusione lavorativa delle persone con disabilità http://www.lavorosi.it/fileadmin/user_upload/PRASSI_2023/gazzetta-ufficiale-dpcm-20-giugno-2023-linee-guida-parita-di-genere-disabili-codice-contratti-pubblici-16-23.pdf

			the Next Generation EU funds, setting out six missions to be implemented at national level.[1724] • Decree 31 May 2021, n. 77 provides for the mandatory inclusion of gender equality and generation equality considerations in every procurement procedure which falls within the scope of the PNRR and the National Plan for Complementary Investments. • Guidelines for the implementation of gender and generational equality considerations in public procurement procedures (2023)[1725] developed by the Council of Ministers, the Ministry of Infrastructure and Sustainable Mobility and the Ministry of Labor and Social Policies,	subject of "legality protocols"), which give contracting stations the possibility to assess in notices, calls for tenders or letters of invitation that failure to comply with the legality protocols as a cause for exclusion from the tender or termination of the contract. • In order to raise the level of transparency and encourage virtuous mechanisms of larger control over public procurement by citizens and civil society, the ANAC has made available through an Open Data portal all information contained in the National Database of Public Contracts. These data concern both tender procedures and execution of contracts. In addition, ANAC has made available on its website a platform for the processing of these data by citizens and users. • In addition, ANAC is working with other stakeholders in the project "Measuring the risk of corruption at territorial level and promoting transparency" (funded by the National Operational Programme Governance and Institutional Capacity 2014-2020 – ERDF, ASSE 3 – Specific Objective 3.1 Action 3.1.4), to identify quantitative indicators of the effectiveness of anti-corruption measures implemented by the administrations (so-called contrast indicators). The project also intends to create inter-institutional collaboration networks to guarantee transparency in every sector of the Public Administration. The intent is to raise awareness of the private sector, academia and civil society on the need to overcome the current approach, based on exclusively subjective corruption indicators, and to promote a further approach to measuring corruption, based on reliable data in line with the principle of "leading by example". As suggested by the OECD "investing in improving data quality to enhance risk assessments can provide a context for organizations to address broader issues along the value chain, improving the use of data within decision-making processes" (OECD, 2019)." (p.48)
Lithuania	Public Procurement Law (1996, last amendment in 2022)	*UNEP SPP Global Review Questionnaire (2022):* Selected SRPP prioritized objectives:	Dedicated SPP policies in place: • Resolution on determination and implementation of green	**NAP on B&HR: Adopted** **State-business nexus: No**

[1724] digitalization, innovation, competitiveness, culture and innovation; green revolution and ecologic transition; infrastructures for sustainable mobility; education and research; inclusion and cohesion: health.
[1725] Linee guida volte a favorire le pari opportunità generazionali e di genere , nonché l'inclusione lavorativa delle persone con disabilità http://www.lavorosi.it/fileadmin/user_upload/PRASSI_2023/gazzetta-ufficiale-dpcm-20-giugno-2023-linee-guida-parita-di-genere-disabili-codice-contratti-pubblici-16-23.pdf

	Relevant laws for SPP: • Law on Alternative Fuels (2021)	• Promoting opportunities for social economy enterprises • Promoting SMEs • Protecting and promoting groups at risk	public procurement objectives (2010 and 2021) • Action plan for the implementation of green procurement (2021-2025) • Dissemination and communication strategy of green public procurement SPP provisions in overarching and/or thematic national policies: • National Environmental Strategy (2015) • National Progress Plan for 2021-2030	
Netherlands	Public Procurement Act (2012)	*UNEP SPP Global Review Questionnaire (2022):* Selected SRPP prioritized objectives: • Promoting compliance with ILO standards and decent work • Promoting fair trade • Promoting gender equality • Protecting against human rights abuses • Protecting and promoting groups at risk National Plan for Socially Responsible Procurement (2021)	• National Plan on SPP 2021-2025 (issued by the Ministry of Infrastructure and Water Management) • SPP Manifesto 2022-2025[1727] is one of the milestones as set out in the National Action Plan SPP 2021-2025. The Manifesto aims to tackle urgent societal issues, to reduce carbon footprint and to lead by example. The six SPP themes, linked to the UN SDG's, are: Social Return, Diversity & Inclusion, International Supply Chain Responsibility, Environment and Biodiversity, Circular Economy and Climate. Emphasis is given to the role of procurement's internal client, i.e. SPP needs to be embedded throughout the whole organisation.	**NAP on B&HR: Adopted** **State-business nexus: Yes** (pp.9, 17, 18) "Under the social conditions of national sustainable procurement policy, companies supplying the government with goods and services are required to respect human rights. These social conditions have been included in all central government EU contract award procedures since 1 January 2013, and the municipal, provincial and water authorities are being encouraged to apply them, too. Suppliers can fulfil these conditions in various ways – by joining a reliable multi-stakeholder supply chain initiative (quality mark or certification institute) or, if they have any doubts, carrying out a risk analysis. The consultations showed that sustainable procurement policy is not regarded as effective in implementing social and human rights criteria. Companies are often unaware of risks. Government suppliers should perform a risk analysis to show that they respect human rights in accordance with the UNGPs. I n its 2014 evaluation of the sustainable procurement policy social conditions, the Ministry of the Interior and Kingdom Relations will examine whether this policy is in line with the OECD Guidelines and the UNGPs, and whether central government policy can also be applied by the municipal, provincial and water authorities."

[1727] Signed by all Dutch ministries, a third of the Dutch provinces, some 50 Dutch municipalities, all Dutch regional water authorities and several other parties

			The Manifesto has binding nature: all participating parties commit themselves to creating an SPP plan based on the above six themes, and to publishing their actions plans, monitoring and reporting progress on a yearly basis • A SPP Committee composed of Ministries[1728] coordinate their SPP actions.	
Poland	The Public Procurement Law (2019) entered into force on January 1, 2021 (Journal of Laws of 2021, items 1129 and 1598). SPP provisions were included, aimed at supporting the implementation of social policy objectives within the framework of public procurement, inter alia: • Article 17(1)) on public procurement principles: addition of the principle of economic efficiency, namely awarding a contract ensuring both the best quality of the subject-matter of the contract given the funds which the contracting body may allocate to its performance, as well as the best relation of expenditures to effects, including those of social, environmental and economic nature; • Article 83: obligation to conduct a needs and requirements analysis before launching the procedure. The contracting body should also indicate the possibility of considering the social, environmental or innovative aspects of the contract; • Article 21: introduction of a legal basis for the creation of the state purchasing policy as a tool for implementing the state economic policy, including in particular the purchase of innovative or sustainable products and services, taking into	*UNEP SPP Global Review Questionnaire (2022):* Selected SRPP prioritized objectives: • Promoting opportunities for social economy enterprises • Promoting SMEs • Protecting and promoting groups at risk SRPP provisions: One of the objectives of the new Public Procurement Law was to enable contracting institutions to make better use of public procurement to support social policy objectives, i.a., by introducing a social requirement for employment under a contract of employment. Key provisions are: • Article 94: the contracting authority may stipulate in the contract notice that only economic operators with the status of a sheltered workshops, social cooperatives and other economic operators with main purpose of social and professional integration of socially marginalised	• National Action Plan on Sustainable Public Procurement (2010-2012; 2013-2016; 2017-2020) • Resolution No 6 of the Council of Ministers of 11 January 2022 on the adoption of the State Purchasing Policy (Official Journal, item 125) As recommended under the National Action Plans on SPP, the Public Procurement Office carries out educational activities, trainings and conferences aimed at promoting social issues in public procurement and it updates on regular basis special criteria on green and social procurement on its website.[1730] SPP provisions in overarching and/or thematic national policies: • Sustainable Development Strategy 2020 (with 2030 perspective)	**NAP on B&HR: Adopted** (2017-2020; 2021-2024) **State-business nexus: Yes** (pp. 17,18) Under the NAP, it is recalled that, according to Recommendations of the Council of Ministers on the consideration by the government administration of social aspects in public procurement, the heads of government administration units are obliged to analyse the possibility of applying social clauses in all public procurement proceedings- including in contracts that do not comply with the provisions of the Public Procurement Law. **Follow-up measures:** • Plans are in store to identify and issue a catalogue of good practices and to develop model documents. • As part of planned educational activities, the Public Procurement Office intends to present to the Polish contracting authorities, among other things, the possibility of including in the procurement procedure public symbols of a social nature based on the criteria of respecting human rights in the production of goods subject to a public contract. • With respect to reporting information on SPP, the contracting authority will, under the new rules for drawing up annual reports on contracts awarded, include detailed information on social contracts awarded in the new Part VIII of the annual report form (Contracts to which the provisions of the law taking into account social aspects apply). This

[1728] The Ministries of Infrastructure and Water Management, the Interior and Kingdom Relations, Economic Affairs and Climate Policy, Foreign Affairs, Social Affairs and Employment, Education, Culture and Science and Agriculture, Nature and Food Quality

[1730] https://www.uzp.gov.pl/baza-wiedzy/zrownowazone-zamowienia-publiczne

	account, among others, CSR and the use of social aspects.	persons[1729], provided that the percentage of employment of persons belonging to one or more of the aforesaid categories is not less than 30% of the persons employed by the economic operator or in its unit, that will perform the contract, • Article95: the contracting authority shall specify in the contract notice or procurement documents for service or construction works the contract performance requirements related to employment by the economic operator or subcontractor under an employment contract of persons performing activities within the contract performance, specified by the contracting body, if the performance of these activities involves the performance of the work in a manner specified in Article 22 § 1 of the Act of 26 June 1974 – the Labour Code. The regulation in question is aimed at limiting the avoidance by entrepreneurs of the use of employment contracts in favour of civil law contracts in cases where the use of the former is required by law. Strengthening the implementation of the provisions of the Labour Law in respect of public contracts performance by obliging the contracting body to establish employment based on an employment relationship, if there are premises for it indicated in the Labour Code, entails an improvement in terms of quality and stability of employment, • Article 96: provides for the possibility for the contracting authority to specify in the contract notice or procurement documents contract performance requirements, which	• The National Energy and Climate Plan for 2021-2023 • Productivity Strategy 2030	will help obtain comprehensive data on the inclusion of social aspects in public procurement GOOD PRACTICE CATALOGUE FOR FOREIGN MISSIONS IN THE FIELD OF BUSINESS AND HUMAN RIGHTS Recommendations • In the implementation of public procurement, actively apply the provisions of the 'Public Procurement Law' relating to the adherence to social aspects; • In the implementation of public procurement, take into account the so-called sustainable procurement criteria in order to integrate requirements, specifications and criteria ensuring environmental protection, social progress, and support for economic development;

[1729] "in particular persons with disabilities, the unemployed, jobseekers, who do not remain in employment or do not perform gainful employment, to-be self-reliant persons, persons deprived of liberty or released from prisons, persons with mental disorders, homeless persons, persons who have obtained refugee status or subsidiary protection in the Republic of Poland, persons under the age of 30 and over 50 years of age with job-seeker status, without employment and persons who are members of disadvantaged minorities, in particular members of national and ethnic minorities pursuant to the regulations on national and ethnic minorities and on regional language or persons who are members of groups that are otherwise socially marginalised"

		may include, among others, aspects related to employment of the unemployed, jobseekers, who do not remain in employment or do not perform other gainful employment, to-be self-reliant persons, adolescents, persons with disabilities or persons from other groups indicated in the provisions on social employment. These requirements may also cover other social aspects such as the promotion of decent work, respect for human rights and labour law, support for social inclusion (including of persons with disabilities), the social economy and SMEs, the promotion of equal opportunities and the principle of 'accessible and designed for all', including sustainable criteria along with consideration of fair and ethical trade, • Article 104: provides for the possibility of direct reference by the contracting body to a specific label in the description of the subject-matter of the contract, the description of the contract award criteria or in the contract performance requirements in order to highlight the specific characteristics of the contract (including social ones). Labels by means of which contracting bodies may specify requirements connected with the pursuit of social objectives in the description of the subject-matter of the contract, the contract award criteria and the contract performance requirements , in the criteria on which their award to certain products and services is based, refer, inter alia, to compliance with social and economic rights, such as guaranteeing adequate remuneration for work, protecting women's rights and combating discrimination against them (equal pay, participation in decision-making), prohibition of forced labour and non-use of child labour, freedom of		

		association, health and safety at work, contribution to the development of local communities. • Article 100 concerns the requirement to draft the description of the subject-matter of the contract taking into account accessibility requirements for persons with disabilities and design for all users, unless this is not justified by the nature of the subject-matter of the contract, • Article 108(1), concerns the obligation to exclude from public procurement procedures economic operators who have been the subjects of a conviction for trafficking in human beings, • Article 224(3) which provides that one of the elements that the contracting body shall examine in the event that the offered price or cost, or their essential components, appear to be abnormally low in relation to the subject-matter of the contract or raise doubts of the contracting body as to performance of the subject-matter of the contract, is the compliance of the tender with labour law and social security provisions applicable in the place where the contract is performed. At the same time, the value of labour costs used by the economic operator for determining the price shall not be lower than the minimum wage for work specified under the provisions on minimum wage, • Article 242, which indicates that non-price contract award criteria used by the contracting body to select the MEAT may be quality criteria, including functional characteristics such as accessibility for persons with disabilities or responding to user needs, as well as social aspects, including the social and occupational integration of disadvantaged persons		

Slovenia	• Public Procurement Act 2015, entered into force on 1 April 2016 • Decree on Green Public Procurement (2011, Revised in 2018 and 2021) The Public Procurement Act, puts special emphasis on the various aspects of social and environmental policies. As one of the fundamental principles of public procurement, the Act includes the horizontal social clause, which requires economic operators, when implementing public contracts, to observe obligations under EU environmental, social and labour law, regulations in force in Member States, collective agreements and international law. In the amended Public Procurement Act (ZJN-3A), which took effect on 1 November 2018, when the contracting authority is informed that the court, by a final decision, determines violations of labour, environmental or social law on the part of the contractor or any of the subcontractors, or when the contracting authority is informed that, during the implementation of the contract, the competent state authority determined, on the part of the contractor or any of the subcontractors, at least two violations related to wages, working hours, rest periods, work on the basis of civil-law contracts despite evident elements of employment relationship or illegal employment for which, by a final decision or multiple final decisions, a fine for a minor offence has been imposed. The Act also specifically stipulates that the contracting authority must take into consideration the principles of socially responsible public procurement by including measures related to social aspects. Social inclusion is also promoted by the possibility of reserved contracts, whereby the contracting authority may reserve the right of participation in public procurement procedures for certain economic operators, e.g. sheltered workshops, job centres and social enterprises employing disadvantaged workers.	*UNEP SPP Global Review Questionnaire (2022):* Selected SRPP prioritized objectives: • Promoting SMEs • Promoting transparency and accountability and combating • corruption • Protecting against human rights abuses With regard to social public procurement, the Public Procurement Act (2015) follows the European Union legislation in this area and gives special and significant emphasis to social and environmental policy aspects. The Public Procurement Act, provides for solutions to make public procurement simpler, more flexible and more efficient, and places a greater emphasis on some aspects of social and environmental policies Such amendments introduce principles relating to the environment and social integration, as well as ensuring respect for rights arising from the legislation in force, thus promoting, in the context of public procurement, the social and environmental responsibility of enterprises and helping them to consolidate their standing in the market.	In addition to the Public Procurement Act (2015), the field of GPP has been regulated at the national level since 2011 by the Green Public Procurement Decree. Since January 1, 2018, it has been replaced by the revised Green Public Procurement Decree. The GPP Decree itself sets out the environmental aspects that contracting authorities must take into account and the goals to be achieved for each individual subject in each public procurement procedure (stated in Article 6(2) of the GPP Decree). National Energy and Climate Plan (2020)	**NAP on B&HR: Adopted** **State-business nexus: Yes** (pp. 10, 22, 26-28) **Planned Measures:** • Slovenia will promote the achievement of the goals set by labour, social and environmental policies, also through the instrument of public procurement, and strive for accelerated and effective implementation of regulatory provisions. (pg. 28) • Slovenia will implement awareness-raising activities and training in the inclusion of social and environmental aspects in public procurement procedures and will continue to provide a single point of contact, the so-called Helpdesk, which will offer professional assistance to contracting authorities and economic operators participating or interested in public procurement procedures. (pg. 28) • The single point of contact has already been established and has been functional at the Public Procurement Directorate at the Ministry of Public Administration of the Republic of Slovenia since 15 September 2016. (pg. 28-29) • Slovenia will continue to update its structures in the field of green public procurement and keep adapting them to technological advances and the situation in the market. (pg. 29)

	In Slovenia, green public procurement has been mandatory since 2011; the amended Act stipulates in what cases green public procurement is mandatory, which environmental aspects must be taken into consideration by contracting authorities when publishing calls for applications, and which objectives must be achieved by the contracting authority regarding every public contract. In public procurement, special attention is also devoted to the subcontracting chain, the transparency of which must be ensured by the main contractor. [1731]			
Spain	• Royal Legislative Decree 3/2011 of 14 November, 2011, revised in 2017. In 2017 a new Public Procurement Law in Spain was passed. This law established a wider range of possibilities in including human rights concerns in public procurement and includes more social aspects compared to its predecessor, but it does not allow for complete exclusion of businesses responsible for human rights abuses from public procurement procedures. Voluntary non-economic awarding criteria like social labels, suppliers with vulnerable workers (unemployed young workers, disabled, black or indigenous people), suppliers with gender policies, with women as majority shareholders or certain percentage of female workers, or SMEs with technological innovation Law 9/2017 of 8 November of Public Procurement Contracts by which Spanish Legal Framework is aligned to Directives of the European Parliament and Council 2014/23/UE and 2014/24/UE of 26 February 2014. (article 145) Set within the contract contractors' obligations to respect human rights within all actions related to the contract like having their own human rights policy or develop one within 30 days from the signing of the contract; or compliance with minimum labour non-trafficking or ethical	*UNEP SPP Global Review Questionnaire (2017):* Selected SRPP prioritized objectives: • Community engagement/development • Diversity and equality • Elimination of access barriers to disabled people (physical access to buildings, alternative communication formats, etc.) • Fair or ethical trade • Human rights • Human trafficking • Local content / local producers • Micro, small and medium enterprises • Occupational health and safety • Skills and training opportunities • Social, sheltered or set-aside enterprises8 • Workers rights (ILO core labour conventions)	• Green Public Procurement Plan of the National Administration (2008) SPP provisions in overarching and/or thematic national policies: • Law on Sustainable Economy, 2011. • Sustainable Development Strategy, 2007 • Action Plan of the Spanish Strategy on Disability 2014-2020, 2014. • Spanish Strategy of Social Responsibility by Companies 2014-2020, 2014. • National Reform Programme, 2014.	**NAP on B&HR: adopted** **State-business nexus: Yes** **UNGP 5 Measures:** "The Public Administrations will exercise an adequate supervision of the possible impact on human rights when contracting the services of companies, both within and outside of Spanish territory. This supervision must take into account the criteria of the specialized institutions, in accordance with the application of the Spanish CSR Strategy." **UNGP 6 Measures:** "The Government will examine how to apply criteria aligned with the Guiding Principles in relation to Royal Legislative Decree 3/2011, of November 14, which approves the revised text of the Public Sector Contracts Law, the Law 16 24/2011 , of 1 August, of contracts of the public sector in the fields of defense and security, and other regulations in force in the same field.." "The Government will ensure strict respect for human rights by companies in commercial transactions with other companies, establishing the necessary measures so as to: not discriminate against SMEs; respect the provisions of the Treaty of the EU on non-discrimination; equal treatment and transparency: and no administrative charges are to be added to contracting authorities or companies."

[1731] NAP on B&HR , p. 26-27

	standards Law 9/2017 of 8 November of Public Procurement Contracts by which Spanish Legal Framework is aligned to Directives of the European Parliament and Council 2014/23/UE and 2014/24/UE of 26 February 2014. (article 202) Set within the contract monitoring and verification mechanisms of human rights or social obligations and penalties in case of breach Law 9/2017 of 8 November of Public Procurement Contracts by which Spanish Legal Framework is aligned to Directives of the European Parliament and Council 2014/23/UE and 2014/24/UE of 26 February 2014. (article 202)			
Sweden	• Act nº 1091 on public procurement, 2007.2 • Act nº 1092 on procurement in the water, energy, transport and postal services, 2007.3 SPP Provisions: Mandatory exclusion criteria like non-payment of social security or tax contributions, or abnormally low tenders when they result in non-compliance with environmental, social or labour legal provisions European Union: Directive 2014/24/EU of the European Parliament and of The Council of 26 February 2014 on Public Procurement and Repealing Directive 2004/18/EC (100, article 69) Sweden: The Public Procurement Act 2016:1145 (p.102) Voluntary exclusion criteria like suppliers that have violated environmental or social obligations Sweden: The Public Procurement Act 2016:1145 (chapter 16 section 9) Set within the contract contractors' obligations to respect human rights within all actions related to the contract like having their own human rights policy or develop one within 30 days from the signing of the contract; or compliance with minimum labour non-trafficking or ethical	*UNEP SPP Global Review Questionnaire (2022):* Selected SRPP prioritized objectives: • Diversity and equality • Elimination of access barriers to disabled people • Fair or ethical trade • Micro, small and medium enterprises • Occupational health and safety • Workers rights (ILO core labour conventions)	Since 2007 • In 2007 the Government launched a National action plan for GPP 2007-2009.6 Many activities are still ongoing even though the plan is officially closed. • In June 2016 the Swedish government launched a new national strategy for public procurement7 that relates to all aspects of sustainability (environmental, social-economic and innovation-related aspects).[1732] Social initiatives: • web-based tool (the CSR-compasse) that enable contracting authorities to apply social requirements throughout the supply chain. • The Swedish regions and counties have developed together with the former Miljöstyrningsrådet a tool	**NAP on B&HR: Adopted** **State-business nexus: Yes** (pp.27, 28) "The EU has adopted new procurement directives: a Directive on public procurement, a Directive on procurement by entities operating in the water, energy, transport and postal services sectors, and a Directive on the award of concession contracts. The recitals of the Directives expressly state that the contracting authorities or entities in their contracts can require suppliers, in the performance of the contract, to comply in substance with the provisions of the basic International Labour Organisation (ILO) Conventions. Such conditions might also be intended to favour the implementation of measures for the promotion of equality of women and men at work, the increased participation of women in the labour market and the reconciliation of work and private life, the protection of the environment or the recruitment of more disadvantaged persons than are required under national legislation. Furthermore, the new directives prescribe that the contracting authorities or entities exclude tenderers who have been found guilty in a definitive judgment of crimes including child labour and other forms of human trafficking in accordance with Directive 2011/36/EU. The Directives are to be transposed into national law by April 2016."

[1732] Nine goals in the new public procurement strategy: Procurement must become a strategic tool; Efficient public procurement; A variety of suppliers and good competition; Public procurement must follows the rule of law; Public procurement must enable innovation and alternative solutions; Public procurement must be environmentally-friendly; Public procurement must contribute to a socially sustainable society.

	standards. Sweden: The Public Procurement Act 2016:1145 (chapter 17) Other relevant legislations: • Act nº 846 on environmental requirements for procurement of cars and some public transport services, 2011.4 • Regulation nº480 concerning the purchasing of energy efficient goods, services and buildings, 2014.5 • Ordinance nº 907 on environmental management in government agencies, 20091		called Uppföljningsportalen and consists of a database where contracts that include social requirements are registered and where suppliers can leave information of how the social demands made by the purchasers are fulfilled.	

Annex 2

Sweden's Regions and County Councils' Code of Conduct for Suppliers[1733]

Code of Conduct for Suppliers

The Swedish County Councils are responsible for providing equal access to good healthcare, dental care and public transport, for all residents. It is important for us to conduct our operations in a way that supports sustainable development. In accordance with this, we work to ensure that goods and services procured are manufactured under sustainable and responsible conditions.

We expect suppliers to comply with this Code of Conduct and that they do their utmost to live up to its requirements within their own organisations and in the supply chain. This should take place through dialogue, transparency and open cooperation between the Swedish County Councils and suppliers – benefitting both parties.

Goods and services that are supplied to the Swedish County Councils should be produced under conditions that are in accordance with:

- The United Nations Universal Declaration of Human Rights (1948)
- The Eight Fundamental Conventions of the International Labour Organisation, no. 29, 87, 98, 100, 105, 111, 138 and 182
- The United Nations Convention on the Rights of the Child, Article 32
- The labour protection and labour environment legislation in force in the country of production
- The labour law, including legislation on minimum wages, and the social welfare protection regulations in force in the country of production
- The environmental protection legislation that is in force in the country of production
- The United Nations Convention against Corruption

The United Nations Universal Declaration of Human Rights (1948)

The supplier shall support and respect human rights

The supplier has a responsibility to respect and support human rights both within its own operations and in the supply chain.

The supplier shall ensure that it does not participate, directly or indirectly, in violations of human rights. This also includes situations when the supplier fails to pose questions on violations of human rights or benefits from violations that are carried out by a third party. The supplier shall have routines in place to evaluate risks of participating in violations of human rights through its operations.

International Labour Organisation (ILO), Eight Conventions on Fundamental Principles and Rights at Work and the United Nations' (UN) Convention on the Rights of the Child (CRC)

Child labour is prohibited (ILO no. 138 and 182, UN CRC article 32) 2

Child labour refers to all economic activity which is carried out by a person of compulsory school going age or younger. No employee may be under the age of 15 (or 14 if national legislation allows for this), or younger than the minimum age of employment, if this age exceeds 15 years. Youth between the ages of 15 and 18 may work with non-hazardous operations, under the precondition that they have reached the legal age of employment and have completed compulsory national education. If child labour is

[1733] http://www.xn--hllbarupphandling-8qb.se/images/GuidelinesContractualTerms.pdf Appendix 1, p. 19

detected, the supplier shall act based upon the best interests of the child and find suitable solutions in consultation with the child and the family of the child.

Forced labour is prohibited (ILO no. 29 and 105)

Forced labour refers to labour or services exacted under the menace of any penalty and for which the said person has not offered himself voluntarily. Forced labour, including slave labour, bonded labour or involuntary prison labour shall not take place. All labour shall be voluntary, and the employee shall have the right to terminate employment following a reasonable term of notice.

Discrimination and harassment is prohibited (ILO no. 100 and 111)

Discrimination refers to any distinction, which is not based on the merits or qualities of a particular job, but involves differential treatment based upon biased grounds. The supplier shall support diversity and equal opportunities in employment. Discrimination on the basis of race, sex, marital status, pregnancy, religion, social or ethnic origin, nationality, physical ability, political opinion, union membership or sexual orientation may not take place. Harassment refers to instances when employees are subject to harsh or inhuman treatment, including sexual harassment or other forms of psychological or physical punishment. Harassment may not take place.

Freedom of Association and Collective Bargaining (ILO no. 87 and 98)

Freedom of association and collective bargaining refers to formalised and/or non-formalised forms of cooperation in order to support and defend employees' interests at the workplace and in the relationship between employers and employees. The supplier is expected to recognise and respect the rights of employees (and employers) to organise, to join organisations in which they themselves choose to participate, as well as the right to collective bargaining. In countries where freedom of association is limited or under development, the supplier shall support instances where employees may meet management in order to discuss wage and labour conditions without the risk of negative sanctions.

Legislation

The supplier must fulfil local laws and regulations in the countries in which they operate.

Wages and hours of work

Wages shall be paid directly to the employee within the agreed upon timeframe and in full. The supplier shall support the payment of living wages to employees, and under no circumstances support the payment of less than the national or locally stipulated minimum wage. Overtime compensation shall be paid and clearly specified in wage statements. Employees shall have at least one day of rest per week. Working hours shall not exceed legal limits or a maximum of 60 hours per week, including overtime. Leave, including vacation, holidays, sick leave and parental leave shall be compensated in accordance with national legislation.

Safe and Hygienic Working Environment (ILO no. 155 and 170)

A safe and hygienic working environment refers to the employee, when she/he is present in an area that the employer has direct or indirect control over, being guaranteed to be free from or protected from conditions which can constitute a hazard for the employee's physical and or psychological health. The employee working within the operations of the supplier shall be provided a safe and healthy working environment where preventative measures shall be taken which reduce injury and risks to health.

Employees shall receive training on the potential health risks that the work can entail, including fire safety, hazardous operations and first aid. The employer shall, to the extent that it is possible, provide relevant protective equipment and ensure that information on health and safety is readily available at

the workplace. Emergency exits shall be clearly marked, illuminated and may not be blocked. Evacuation exercises and the testing of fire alarms shall be conducted on a regular basis.

Environment

Suppliers shall conduct their operations responsibly in relation to the environment and comply with local and national environmental legislation. Through a structured and systematic approach or the identification, measurement and follow-up of its environmental impact, the supplier shall aim to continually improve its environmental performance and minimise the use of resources and the 21 production of waste. The supplier shall aim towards employing a life-cycle perspective concerning environmental impact from products and services and shall place environmental requirements on subcontractors.

UN Convention against Corruption

The supplier shall not directly or indirectly offer undue payment or other forms of compensation to any person or organisation with the aim of obtaining, maintaining or directing business operations or receive other undue advantages within the framework of its operations. The supplier shall not directly or indirectly request or accept any form of undue payment or other forms of compensation from a third party which can affect the objectivity of business decisions.

Compliance

Transparency in the supply chain is required in order to guarantee compliance with the Code of Conduct. In order to assess compliance, the Swedish County Councils will conduct reviews, request documentation, conduct on-site audits, review and approve action plans and monitor the implementation of these plans. Suppliers are encouraged to take relevant measures in order for the content of this Code of Conduct to be implemented in their own operations, as well as in the supply chain.

Updates

This Code of Conduct will be updated as and when necessary. For more information on the Swedish County Councils' commitments, see our website at www.hållbarupphandling.se.

Reporting Violations

Violations of the Code of Conduct can be reported in one of the following ways:

Email: coc.lsf@sll.se

Post: Nationella Kansliet Hållbar Upphandling, Stockholm

Annex 3

Snapshot on Minimum Mandatory Sustainability Criteria (CAMs) Categories

Category	Description	Normative framework (Ministerial Decree)	Voluntary social criteria
Office Forniture	CAM on supply, rental and life extension service of interior furniture	• CAM approved by DM 254/2022.	YES
Urban Forniture	CAM on design services for playgrounds, supply and installation of street furniture and outdoor furniture products and the entrusting of the service of ordinary and extraordinary maintenance of street furniture and outdoor furniture products	• CAM approved by DM 69/2023	YES
Nappies	CAM on supplies of incontinence aids	• CAM approved by DM 16/2015	
Workshoes And Leatherware	CAM on supplies of non-PPI and PPE work footwear, leather articles and accessories	• CAM approved by DM 125/2018	YES
Paper	CAM on purchase of copy and graphic paper	• CAM approved by DM 102/2013	
Ink Cartridges	CAM on toner cartridges and inkjet cartridges and for the contracting of the integrated service for the collection of used cartridges, preparation for reuse and supply of toner and inkjet cartridges	• CAM approved by DM 261/2019 • Explicatory document: Circolare esplicativa (2019)	
Buildings	CAM on design services and contracting of works for building interventions	• CAM approved by DM n. 256/2022	YES
Cultural Events	CAM on events organization and implementation	• CAM approved by DM n. 459/2022	
Street Lighting (maintenance and management) CAM-	CAM on light sources for public lighting, the procurement of public lighting equipment, the procurement of design services for public lighting installations	• CAM approved by DM 244/2017	YES
Street Lighting (Service)		• CAM approved by DM 98/2018	YES
Industrial washing and textile and		• CAM approved by DM n. 2/2020	

mattress rental service			
Cleaning and Sanitization Services	CAM on cleaning and sanitizing services for buildings and environments for civil, sanitary and cleaning products	• CAM approved by DM 42/2021 • Corrective Decree 2021	
Urban Waste	CAM on urban waste collection and transport service, street cleaning and sweeping service, supply of related vehicles and of containers and bags for the collection of urban waste	• CAM approved by DM 255/2022	
Food and Catering	CAM on Catering and food supply service	• CAM approved by DM n. 65/2020, in G.U. n.90 del 4 aprile 2020) • Supporting document: Relazione di accompagnamento	YES
Refreshment Services and vending machines	CAM on catering services and the distribution of mains water for drinking purposes	• CAM approved by DM n. 282/2023 (in force from 1st April 2024)	
Energy Services for Buildings	CAM on energy services for buildings, lighting and motive power service, heating/cooling service	• CAM approved by DM N. 74/2012.	
Printers	CAM on procurement of the managed printing service, procurement of the rental service of printers and multifunctional office equipment and the purchase or leasing of printers and multifunctional office equipment	• CAM approved by DM 261/2019	
Textiles	CAM on supply and rental of textile products and for the restyling and finishing service of textile products	• CAM, including protective masks and individual protective equipment approved by DM 30 giugno 2021 • Updated by DM N.70/2023	YES
Vehicles	CAM on purchase, leasing, renting, hiring of vehicles for road transport and public land transport services, special road passenger transport services	• CAM approved by DM 157/2021	
Green Spaces	CAM on public green management service and supply of green care products	• CAM approved by DM n. 63/2020, in G.U. n.90 del 4 aprile 2020	YES

8. Reference List

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