

Bridging the gap between corporate sustainability due diligence and EU public procurement

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Abstract

The link between human rights and environmental due diligence and public procurement has been recognized in soft law, and in a less consistent way in EU hard law. Particularly, it has been an issue of concern in the law-making process for the EU Corporate Sustainability Due Diligence Directive. Despite increasing attention, considerable debate remains over the inclusion of human rights and environmental due diligence in public procurement, which is still an underdeveloped topic. This article contributes to enlightening the debate and filling this gap by exploring the link between human rights and environmental due diligence and public procurement, then by analysing whether and how human rights and environmental due diligence can be incorporated into EU public procurement as a contract performance condition and comply with the requirement of the link to the subject matter of the contract.

Keywords

Human rights and environmental due diligence, socially responsible public procurement, green public procurement, sustainable criteria, contract performance conditions, link to the subject matter, UNGPs, OECD Guidelines for Multinational Enterprises on Responsible Business Conduct, Corporate Sustainability Due Diligence Directive, EU Public Procurement Directive 2014 24

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I. Introduction

Human Rights Due Diligence (HRDD) is a set of business processes to identify, avoid and account for human rights impacts companies may cause or contribute to cause.¹ While the UN Guiding Principles on Business and Human Rights (UNGPs) address it as a process that covers human rights without an explicit mention to the environment, this article embraces its broad notion known as human rights and environmental due diligence (HREDD). HREDD involves six steps carried out by enterprises that entail integrating human rights and the environment into policies and management systems, identifying, assessing and addressing human rights and environmental adverse impacts, as well as monitoring, giving transparency and communicating the entire process.²

Public procurement, on the other hand, is a process whereby the public sector buys from the market the goods, services and works it needs to accomplish its functions.³ This article is focused on the procurement of goods, particularly when they are produced through global supply chains. Public procurement accounts for 14% of the EU's GDP.⁴ Typically, it was governed only by economic objectives through the purchase of the cheapest tender. But this way of buying has gradually changed and allowed for the integration of other non-economic aims into the process, namely, social and environmental objectives.

This shift involved the emergence of the term 'sustainable public procurement'. Whilst many definitions have been given, sustainable public procurement can be understood as 'the process whereby a public entity contracts from a private entity goods, services or works it needs to cover its functions and needs in a way that considers the protection of human rights, including prevention and redress of abuses in the supply chain and the environment as a core element in its lifecycle, from early design and planning to its disposal or decommission and where such protection is transparent and accountable'.⁵

In the EU, Directive 2014/24 on public procurement endorsed non-economic objectives.⁶ There is a principle in public procurement enshrined in Article 18(2) which has 'cardinal value' like any other principle.⁷ This provision mandates Member States to take appropriate measures to ensure compliance with environmental, social and labour law obligations under Union law, national law, collective agreements or international law. Due to the emphasis on

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1. J. Bonnitcha and R. McCorquodale, 'The Concept of Due Diligence in the UN Guiding Principles on Business and Human Rights', 28 *European Journal of International Law* (2017).
 2. OECD, OECD Guidelines for Multinational Enterprises on Responsible Business Conduct, OECD (2023), <https://doi.org/10.1787/81f92357-en>.
 3. S. Arrowsmith, 'A Taxonomy of Horizontal Policies in Public Procurement', in S. Arrowsmith and P. Kunzlik (eds), *Social and Environmental Policies in EC Procurement Law: New Directives and New Directions* (Cambridge University Press, 2009), p. 108.
 4. European Commission, *Buying Social A Guide to Taking Account of Social Considerations in Public Procurement* (2nd Edition, 2021) C(2021) 3573 final, p. 6.
 5. L. Treviño-Lozano and O. Martín-Ortega, 'Sustainable Public Procurement of Infrastructure and Human Rights: Linkages and Gaps', in O. Martín-Ortega and L. Treviño-Lozano (eds), *Sustainable Public Procurement of Infrastructure and Human Rights* (Edward Elgar, 2023), p. 19.
 6. Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC [2014] OJ L 94/65.
 7. Case C-395/18 *Tim SpA – Direzione e coordinamento Vivendi SA v. Consip SpA and Ministero dell'Economia e delle Finanze*, EU:C:2020:58, para. 38.

environmental, social and labour law, it may even be referred to as ‘the principle of sustainability’.⁸

Sustainability can be considered as early as deciding ‘to buy or not to buy’.⁹ Notwithstanding that, its integration in procurement under Directive 2014/24 is mainly discretionary rather than mandatory for contracting authorities.¹⁰ When deciding to integrate sustainability, contracting authorities can do so in exclusion grounds, selection criteria, award criteria, technical specifications and contract performance conditions. However, to include sustainable criteria into any of the latter three, they must meet the link to the subject matter of the contract (LtSM).¹¹ This paper focuses on contract performance conditions.

The link between HREDD and public procurement has been recognized in soft law, mainly through the UNGPs.¹² HREDD has also been a matter of consideration in the EU’s hard law, but its linkage with public procurement has not been harmonized or consistent.¹³ Most European states’ HREDD domestic laws do not address public procurement. Yet some legal frameworks, like that of Germany and Norway consider the application of HREDD when public bodies purchase goods, services or works.

Moreover, such linkage has been part of ongoing discussions in the EU between the Commission, Council and Parliament for the adoption of a Corporate Sustainability Due Diligence Directive (CSDD Directive).¹⁴ The CSDD Directive aims to include mandatory obligations for large corporations within the EU and third-country companies to prevent, mitigate and redress adverse impacts on human rights and the environment, including climate change, in their own operations and their supply chain.

Only the EU Parliament’s Resolution with Recommendations for a CSDD Directive,¹⁵ and its amendments to the proposal for a CSDD Directive, have addressed explicitly public procurement

8. See for instance, M. Andhov, ‘Article 18(2)’, in R. Caranta and A. Sanchez-Graells (eds), *European Public Procurement Commentary on Directive 2014/24/EU* (Edward Elgar, 2021), p. 199.

9. S. Arrowsmith, *The Law of Public and Utilities Procurement Regulation in the EU and UK* (3rd Edition, Volume 2, Sweet & Maxwell, 2020), p. 706.

10. Mandatory sustainable public procurement criteria can be found in the EU sectoral legislation. Mandatory criteria, which are on the rise following the Green Deal, and their impact on procurement remain outside of the scope of this paper.

11. Pursuant to Article 58 of the Directive 2014/24, selection criteria need to be ‘related and proportionate to the subject-matter of the contract.’ The requirement cannot be interpreted to have the same meaning as award criteria, technical specifications and contract performance conditions.

12. United Nations, UN Guiding Principles on Business and Human Rights, UN Doc. HR/PUB/11/04 (2011).

13. C.M. O’Brien et al., ‘Public Procurement and Human Rights: A Survey of Twenty Jurisdictions’, *International Learning Lab on Public Procurement and Human Rights* (2016), www.oecd.org/governance/procurement/toolbox/search/Public-Procurement-and-Human-Rights-A-Survey-of-Twenty-Jurisdictions-Final.pdf.

14. European Parliament, Parliament Resolution Recommendations for Drawing up a Directive of the European Parliament and of the Council on Corporate Due Diligence and Corporate Accountability, (2021) OJ C 474/11; 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, 23 February 2022, COM(2022) 71 final; 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, 15024/1/22 REV 1; 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 (COM(2022)0071 – C9-0050/2022–2022/0051(COD))1.

15. Article 18 of European Parliament, Parliament Resolution Recommendations for Drawing up A Directive of the European Parliament and of the Council on Corporate Due Diligence and Corporate Accountability.

and HREDD.¹⁶ Notably, the Parliament refers in the latter to the obligations of Member States established in the abovementioned Article 18(2). It further calls 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.¹⁷ This paper, therefore, responds to and contributes to the current need of the EU to review Directive 2014/24 in the context of HREDD.

While increasing attention has been given to this linkage in law-making, substantial debate remains over whether and how HREDD can be incorporated into public procurement. Little research has been undertaken on the ways in which HREDD could take place pursuant to the rules of Directive 2014/24. The underdevelopment of HREDD in public procurement extends to its inclusion as a contract performance condition that is linked to the subject matter of the contract. This article aims to fill this gap in the literature.

The LtSM has been a matter of scholarly debate, particularly regarding the inclusion of sustainable criteria. Some scholars hold that removing or loosening the LtSM may create problems for the verification of sustainable criteria;¹⁸ and allow the incorporation of unrelated additional requirements to procurement.¹⁹ Others claim that the LtSM should be revisited to allow social criteria like corporate social responsibility, which is currently prohibited.²⁰ In addition, several scholars argue that the LtSM is a concept not fit for purpose anymore, which should instead be replaced with a diligent contract design²¹ or with a lifecycle notion.²² This article addresses the LtSM, particularly because it is one of the main legal issues pertinent to the incorporation of HREDD as a requirement for contractors into EU public procurement. By doing so, this research piece contributes to enlightening the scholarly debate of the LtSM in the context of HREDD.

The first section of this article frames the concept of HREDD, which involves identifying, addressing and redressing not only on human rights adverse impacts but also on environmental ones. It also argues that HREDD and public procurement are clearly linked in soft law and, in a more inconsistent way, in EU hard law. The second section addresses HREDD as a sustainable criterion set as a contract performance condition. It further assesses whether and how HREDD meets the LtSM requirement. In the final section, this paper addresses four key challenges to be considered

16. 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.

17. Ibid.

18. A. Semple, 'The Link to the Subject Matter: A Glass Ceiling for Sustainable Public Contracts?', in B. Sjaafjell and A. Wiesbrock (eds), *Sustainable Public Procurement Under EU Law* (Cambridge University Press, 2015), p. 74.

19. ClientEarth, 'Distinguishing Technical Specifications and Award Criteria on the Basis of Role, Not Content' (2012), www.epsu.org/sites/default/files/article/files/UPDATED_role-not-contentdistinguishing-technical-specifications-and-award-criteria.pdf.

20. L. Ankersmit, 'The Contribution of EU Public Procurement Law to Corporate Social Responsibility', 26 *European Law Journal* (2020), p. 26.

21. A. Beckers, 'Using Contracts to Further Sustainability? A Contract Law Perspective on Sustainable Public Procurement', in Beate Sjaafjell and Anja Wiesbrock (eds), *Sustainable Public Procurement Under EU Law* (Cambridge University Press, 2015), p. 222.

22. M. Andhov et al., 'Sustainability Through Public Procurement: The Way Forward – Reform Proposals', (2020) https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3559393; M. Andhov et al., 'Shaping Sustainable Public Procurement Laws in the European Union: An Analysis of the Legislative Development from "How to Buy" to "What to Buy" in Current and Future EU Legislative Initiatives', (The Greens/EFA in the European Parliament, 2022), p. 59.

by the EU Commission when reviewing Directive 2014/24 in light of HREDD and its LtSM of the contract.

2. Human rights and environmental due diligence and public procurement

A. The notion of HREDD

Due diligence is a concept with a long history. It emerged in the financial world and evolved as a good corporate practice of governance to manage a company's risks.²³ However, this concept once used by enterprises to work for their business, was reshaped by John Ruggie in the tripartite framework on business and human rights 'Protect, Respect and Remedy'. In this framework, due diligence was still proposed as a risk management process used by enterprises, but a process that instead of working for their own interest would rather work for the people affected by them.²⁴

The tripartite framework was consolidated with the UNGPs, which was unanimously endorsed by the UN Human Rights Council in 2011.²⁵ The UNGPs set a comprehensive framework on the state duties to protect and corporate behaviour to respect human rights. It establishes three pillars: (i) states' obligation to protect human rights from businesses' abuse, (ii) enterprises' responsibility to respect human rights throughout all their operations and (iii) access to remedy when human rights are abused. Human rights due diligence (HRDD) was set at the core of the UNGPs' Pillar II for businesses to avoid adverse impacts on human rights.²⁶ Five of the thirty-one guiding principles describe HRDD as a set of business processes to identify, avoid and account for human rights impacts enterprises may cause or contribute to the cause.²⁷

The UNGPs, however, do not explicitly discuss the environment or climate change in the due diligence process. Yet the UN Framework is not the end of business and human rights challenges, but rather a landmark of the beginning.²⁸ Increasingly, the strong connection between human rights and the environment, including climate change, has been endorsed. The UN recently recognized that human rights implications of environmental damage are experienced by individuals and communities, particularly those in vulnerable situations.²⁹ In addition, environmental degradation,

23. O. Martín-Ortega and L. Treviño-Lozano, 'Debida Diligencia', *Enciclopedia de Sostenibilidad, Ética y Responsabilidad Empresarial en América Latina* (forthcoming); L. S. Spedding, *Due Diligence and Corporate Governance* (Butterworth-Heinemann, 2005); T. Lambooy, 'Corporate due diligence as a tool to respect human rights', 28(3) *Netherlands Quarterly of Human Rights* (2010), p. 404–448; O. Martín-Ortega, 'Human Rights Due Diligence for Corporations: From Voluntary Standards to Hard Law at Last?', 31(4) *Netherlands Quarterly of Human Rights* (2013).

24. L. Treviño-Lozano and O. Martín-Ortega, in O. Martín-Ortega and L. Treviño-Lozano (eds), *Sustainable Public Procurement of Infrastructure and Human Rights*, p. 2–27.

25. Human Rights Council, *Human Rights and Transnational Corporations and Other Business Enterprises*, 16 June 2011, A/HRC/RES/17/4.

26. O. Martín-Ortega and C.M. O'Brien, *Public Procurement and Human Rights: Opportunities, Risks and Dilemmas for the State as Buyer* (Edward Elgar, 2019).

27. J. Bonnitcha and R. McCorquodale, 28 *European Journal of International Law* (2017).

28. L. Treviño-Lozano, 'Corporate Responsibility to Respect Human Rights: Lessons from Covid-19 beyond the UNGPs', *Cambridge Core* (2020), www.cambridge.org/core/blog/2020/04/15/corporate-responsibility-to-respect-human-rights-lessons-from-covid-19-beyond-the-ungps/.

29. UN General Assembly, *The human right to a clean, healthy and sustainable environment*, 26 July 2022, A/76/L.75

climate change, biodiversity loss, desertification and unsustainable development constitute a threat to present and future generations to effectively enjoy all human rights.³⁰

Given such close interconnection, the UN recognized the right to a clean, healthy and sustainable environment as a human right in itself.³¹ Furthermore, the UN Working Group on Business and Human Rights (UN Working Group) has acknowledged the impacts that climate change effects have on the enjoyment of human rights.³² Surya Deva, a former member of the UN Working Group, stated that climate change considerations are relevant for HRDD processes precisely because of such interlinkage between climate change and human rights.³³ Environmental adverse impacts have also their own intrinsic significance because they may be interrelated with other rights, but they may also exist independently.³⁴ With this context, this paper embraces the broad notion of due diligence that includes not only human rights but also the environment and climate change, often referred to as HREDD.³⁵

Guidance on HREDD has been provided by the OECD. In its Guidelines for Multinational Enterprises on Responsible Business Conduct, this organization sets six steps that make up its process, used by this paper as basis for its analysis. The first step involves embedding responsible business conduct into policies and management systems.³⁶ The second step covers identifying and assessing impacts on human rights and the environment associated with all enterprises' operations, products or services. This step is linked to identifying where risks are more likely to be present and most significant.³⁷ The impacts to be covered may be either caused through the business's own operations or through a third party that is 'directly linked to its operations, products or services by its business relationships'.³⁸ Notably, government contractors and product or service providers in tiers down in governments' supply chain fall into the latter. When a business has a large number of entities in their supply chains, 'it may be unreasonably difficult to conduct due diligence for adverse human rights impacts across them all'.³⁹ The enterprise should then identify general areas where the risk is 'most significant' and prioritize them.⁴⁰ The significance of the risk may be determined based on the supplier's operating context, particular operations, products or services involved, or any other relevant consideration.⁴¹

The third step of HREDD entails addressing the adverse impacts on human rights and the environment through ceasing, preventing or mitigating them.⁴² Amongst the actions that the OECD

30. Ibid.

31. Ibid.

32. Working Group on Business and Human Rights, 'Climate Change and the UNGPs', www.ohchr.org/en/special-procedures/wg-business/climate-change-and-ungps.

33. S. Deva, 'Climate Change, Human Rights and the UN Guiding Principles: Interlinkages and Red Flags' in L. Smit and I. Alogna (eds), *Human Rights Due Diligence for Climate Change Impacts: Webinar Series Report* (2021), www.bii-cl.org/categories/business-and-human-rights.

34. OECD Guidelines for Multinational Enterprises on Responsible Business Conduct, p.36.

35. O. Martin-Ortega et al. 'Towards a Business, Human Rights and the Environment Framework', 14(11) *Sustainability* (2022); O. Martin-Ortega and F. Dehbi, 'An Integrated Approach to Corporate Due Diligence from a Human Rights, Environmental, and TWAIL Perspective', 17 *Regulation and Governance* (2023).

36. OECD Guidelines for Multinational Enterprises on Responsible Business Conduct.

37. Ibid.

38. UN Guiding Principles on Business and Human Rights 17.

39. Ibid.

40. OECD Guidelines for Multinational Enterprises on Responsible Business Conduct.

41. Ibid.

42. Ibid.

recommends undertaking is to update the enterprises' policies to provide guidance on how to avoid adverse impacts.⁴³ Also, it advises developing and implementing plans that are fit for purpose to prevent and mitigate impacts.⁴⁴ Furthermore, step four involves tracking and monitoring the implementation of the previous steps to assess results to improve the process in the future.⁴⁵ Step five is about the transparency of the process.⁴⁶ It entails communicating externally how impacts are addressed, including all relevant information on the policies, processes and activities conducted to address adverse impacts, as well as the findings and outcomes.⁴⁷ Finally, step six covers providing for or cooperating in the remediation of adverse impacts that have already occurred either because the company has caused or contributed to them.⁴⁸

B. The linkage between HREDD and procurement

HREDD and public procurement are strongly connected. HREDD is an enabler of sustainable public procurement. By addressing adverse impacts on human rights and the environment, HREDD can contribute to the latter's protection. At the same time, protecting human rights and the environment is at the core of sustainable public procurement, particularly because the notion of sustainability becomes meaningless when adverse impacts are caused by businesses who are part of the government's supply chain, as it is currently happening.⁴⁹

This linkage between HREDD and procurement has been set in soft law, and to a lesser extent and in a more fragmented and inconsistent fashion in EU hard law. In soft law, HREDD is not only linked to businesses' conduct but also the state's duties when there is a 'state-business nexus'. Pillar I of the UNGPs establishes that the state-business nexus adds a further duty and leverage to states to protect business-related human rights abuses. According to the UNGPs, this nexus can take different forms. One is when companies are owned or controlled by the state or receive substantial support and services from state agencies. UNGPs' Guiding Principle 4 establishes that an additional step to be undertaken by states to 'protect' human rights is by requiring, where appropriate, HREDD. Commentary to UNGP4 explains that HREDD 'is most likely to be appropriate where

43. Ibid.

44. Ibid.

45. Ibid.

46. Ibid.

47. Ibid.

48. Ibid.

49. See for example British Medical Association, 'Ethical Procurement for General Practitioners and Clinical Commissioning Groups: Ensuring the Protection of Labour Rights in Medical Supply Chains', (2014), www.bma.org.uk/fairmedtrade; T. Jaekel, A. Santhakumar, and Swedwatch, Healthier Procurement: Improvements to Working Conditions for Surgical Instrument Manufacture in Pakistan, Swedwatch; Danwatch, Servants of Servers: Rights Violations and Forced Labour in the Supply Chain of ICT Equipment in European Universities, Danwatch; O. Martin-Ortega et al., 'Buying Power and Human Rights in the Supply Chain: Legal Options for Socially Responsible Public Procurement of Electronic Goods' 19(3) *The International Journal of Human Rights* (2015); G. ten Kate, 'Dutch National Policy for Socially Responsible Public Procurement', *Medium* (2015), <https://medium.com/test-publication/dutch-national-policy-for-socially-responsible-public-procurement-e14cb46d7053>; H. Diewertje, 'Natural Stone: Public Procurement and Human Rights in the Netherlands' *Stop Child Labour*, *Stop Child Labour* (2016), <https://stopchildlabour.org/33876-2/>; O. Martin-Ortega, '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', 3 *Business and Human Rights Journal* (2018); J. Landale, 'NHS to Ban Products of Slavery after PPE Concerns', *BBC* (2022), www.bbc.co.uk/news/health-61183965.

the nature of business operations or operating context poses a significant risk to human rights' or the environment, in the broad understanding of the process.

A second type of state-business nexus is when public bodies buy products, services or works from companies through public procurement.⁵⁰ Guiding Principle 6 establishes that states should 'promote' respect for human rights by business enterprises with whom they conduct 'commercial transactions', including public procurement. Commentary to Guiding Principle 6 highlights that procurement activities provide states with 'unique opportunities to promote the awareness of and respect for human rights by those enterprises, including through the terms of contracts'.⁵¹ While the UNGPs explicitly link HREDD with the first nexus (Guiding Principle 4) they do not establish such a connection with the second nexus (Guiding Principle 6).

Therefore, HREDD is not explicitly linked with public procurement in the UNGPs. However, the UN Working Group has endorsed requesting HREDD for business contractors when the state-business nexus takes place in its form of public procurement.⁵² Then, the demand of HREDD goes forward not only to 'protect' human rights in the case in which there is a nexus given by ownership, control or support of the business (Guiding Principle 4), but also to 'promote' human rights respect by business contractors when the nexus is formed by public procurement (Guiding Principle 6).

Hard law in turn, particularly in the EU, has not been consistent with the integration of HREDD in public procurement. Some countries like France⁵³ and the Netherlands have integrated due diligence obligations into their legal frameworks with specific duties for businesses to address and account for adverse impacts.⁵⁴ France included due diligence measures to identify risks of their operations and those of their suppliers on both the human rights and environment through HREDD, whereas the Netherlands has only included HRDD. However, none of these laws refer explicitly to public procurement.

Conversely, countries like Germany, Norway, Denmark and Sweden have formalized the connection between HREDD/HRDD and public procurement. The German Act on Corporate Due Diligence Obligations in Supply Chains explicitly mandates the exclusion from the award of public contracts of those companies that have been fined for breaching its human rights and environmental provisions.⁵⁵

50. C.M. O'Brien and O. Martin-Ortega, 'The Role of State as Buyer under UN Guiding Principle 6', *BHRE Research Series Policy Paper* No.4. (2017).

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

52. UN Working Group on Business and Human Rights, 'Integrating Human Rights in Public Procurement a Focus on Latin America and the Caribbean: Information of the United Nations Working Group on Business and Human Rights' (2022), https://empresasyderechoshumanos.org/wp-content/uploads/2022/04/INFORMATION-NOTE-on-PP_LAC_EN.pdf.

53. Loi no. 2017-399 du 27 Mars 2017 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre (2017), www.legifrance.gouv.fr/jorf/id/JORFTEXT000034290626/. See further S. Cossart, J. Chaplier and T. B. De Lomenie, 'The French Law on Duty of Care: A Historic Step Towards Making Globalization Work for All', 2 *Business and Human Rights Journal* (2017).

54. 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), <https://zoek.officielebekendmakingen.nl/stb-2019-401.html>.

55. Gesetz über die unternehmerischen Sorgfaltspflichten in Lieferketten (2021), Corporate Due Diligence Obligations in Supply Chains, BGBl I 2021, www.bgbl.de/xaver/bgbl/start.xav?startbk=Bundesanzeiger_BGBl&jumpTo=bgbl121s2959.pdf#_bgbl_%2F%2F*%5B%40attr_id%3D%27bgbl121s2959.pdf%27%5D_1672857385736. See further, M. Krajewski, K. Tonstad and F. Wohltmann, 'Mandatory Human Rights Due Diligence in Germany and Norway: Stepping, or Striding, in the Same Direction?' 6 *Business and Human Rights Journal* (2021).

Unlike Germany, Norway set the link between HREDD and public purchasing through its procurement legal framework. The Norwegian Public Procurement Act in paragraph 5 establishes that contractors must have 'suitable routines to promote respect for fundamental human rights in public procurement where there is a risk of violations of such rights'.⁵⁶ Besides legal developments, HRDD is also embraced by Denmark and Sweden's procurement practices. The Danish Local Government Purchasing Service (SKI) framework agreements require HRDD from suppliers on child labour, forced labour and gender.⁵⁷ Also, contract clauses concerning the responsibility of the supplier for 'sustainability due diligence' have been developed by Swedish public bodies.⁵⁸

The fragmented due diligence-related law-making at a domestic level has encouraged different playing rules in the public market for bidders and contractors across Europe. Also, it has created a complex environment with little certainty over whether and how HREDD can be incorporated into public procurement. In addition, the EU has failed to provide clarity on this matter. It has even undertaken an incoherent position about the linkage between both concepts. On the one hand, HREDD, as a special condition for the performance of a public contract, has been accepted as a virtuous practice in public procurement by the EU Commission.⁵⁹

On the other, however, the EU Commission rejected the EU Parliament's proposal to include public procurement in the CSDD Directive.⁶⁰ This proposal was set in the Resolution with Recommendations for a CSDD Directive in March 2021, and consisted of including the option for contracting authorities to request and evaluate tenderers' compliance with HREDD.⁶¹ The Parliament adopted the German domestic law's approach to HREDD in procurement. The Resolution with Recommendations for a CSDD Directive provided that obliged businesses who fail to undertake HREDD obligations, as established by the Directive, could be temporarily or indefinitely excluded from public procurement.⁶² Nevertheless, in February 2022, the EU Commission issued the proposal for a CSDD Directive with no explicit reference to public procurement.⁶³ Later in November 2022, the Council adopted its general approach. Though it did not mention any need for an explicit provision on exclusion, it highlighted that the CSDD Directive does not prejudice the application of exclusion grounds to be found in Directive 2014/24.⁶⁴ It refrained from referring to public procurement in any other instance.

56. Norway is bound by the provisions of the Public Sector Directive under the European Economic Area (EEA) Agreement Annex XVI. Lov om offentlige anskaffelser (2016), <https://lovdata.no/dokument/NL/lov/2016-06-17-73>.

57. European Commission, Directorate-General for Justice and Consumers, F. Torres-Cortés et al., *Study on Due Diligence Requirements Through the Supply Chain: Final Report*, (2020), p. 173.

58. For terms to be launched, see Swedish Regions' Secretariat for Sustainable Procurement and Adda Central Purchasing Body, 'Sustainability Due Diligence', www.sustainabilityduediligence.com/en.

59. 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.

60. See further about the Parliament's resolution in the next section. European Parliament, *Parliament Resolution Recommendations for Drawing up A Directive of the European Parliament and of the Council on Corporate Due Diligence and Corporate Accountability*; 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*.

61. European Parliament, *Parliament Resolution Recommendations for Drawing up a Directive of the European Parliament and of the Council on Corporate Due Diligence and Corporate Accountability*.

62. *Ibid.*, Article 18.

63. 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*.

64. 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*.

After the debate on the proposal, the EU Parliament adopted its amended text in early June 2023. The amended text calls for harmonization and explicitly includes the need to assess the application of HREDD in public procurement. 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.⁶⁵

At the time of writing, the final document is being negotiated in the triologue between the Commission, Council and Parliament.

3. Human rights and environmental due diligence as a contract performance condition

A. Setting HREDD as a contract performance condition

In this section we argue that HREDD is a sustainable criterion that can be set as a contract performance condition in the procurement process. Sustainable criteria allow public procurement to achieve goals other than economic ones, namely environmental and/or social, through two different approaches. One ensures compliance with existing laws regarding economic and/or social obligations; the other introduces environmental and/or social conditions beyond regulatory compliance.⁶⁶ HREDD obligations could be inserted through both. The first approach is mainly based on Article 18(2) of Directive 2014/24, which only contemplates legal compliance –without referring to considerations beyond what the law mandates. In this first approach, HREDD conditions in public procurement could equal the potential forthcoming obligations of the CSDD Directive. In such case, HREDD conditions would only apply to those tenderers and contractors who fall into the CSDD Directive's scope. For example, tenderers and contractors with more than 500 employees on average and a net worldwide turnover of more than EUR 150 million.⁶⁷

The EU Parliament called in its amendments to the CSDD Directive for a review by the Commission of the Directive 2014/24 with reference to Article 18, thus the first approach. However, the focus of this paper is on the second approach of sustainable criteria, namely on the integration of HREDD conditions beyond the law. The main reason for this focus is that there is a need to first undertake an assessment on whether – or not – HREDD could be set as a contract performance condition and meet the LtSM requirement regardless of possible future obligations to businesses in a potential forthcoming CSDD Directive. Once this possibility is uncovered,

65. 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.

66. For different types of compliance for SPP, see P. Telles and G. Skovgaard Ølykke, 'Sustainable Procurement: A Compliance Perspective of EU Public Procurement Law', 12(3) *European Procurement & Public Private Partnership Law Review* (2017).

67. This was the scope established in Article 2 of the 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.

further research could assess the ways in which the enforcement of this regulation would apply to obliged and non-obliged tenderers. This applicability would depend on the scope that such CSDD Directive and its transposition in the EU Member States establish.

There are three main ways in which sustainable criteria, entailing the second approach, can be included throughout the performance of a contract: as technical specifications (Article 42) when establishing the characteristics of a product; as contract award criteria (Article 67) when assessing and determining the tenderer who will be awarded the contract; and as contract performance conditions (Article 70) when setting conditions to be complied with by the successful tenderer during the contract performance. Sustainable criteria in any of these forms are allowed as long as they meet the LtSM requirement. This paper focuses on contract performance conditions because they are the most flexible criteria for including sustainability goals in public procurement.⁶⁸ In addition, the inclusion of HREDD as a contract performance condition has been accepted and endorsed as a virtuous procurement practice by the EU Commission.⁶⁹ Also, it has started to develop in procurement practice, and several countries like Norway and Sweden have implemented HREDD through templates to be incorporated into public contracts on a voluntary basis.⁷⁰ Yet this emerging practice does not actually address the ways in which HREDD falls within the LtSM of the contract.

B. Meeting the link to the subject matter of the contract

In this section we demonstrate that demanding the exercise of HREDD from contractors, as a contract performance condition, can meet the LtSM.

Contracting authorities can request special conditions relating to economic, innovation, environmental, social and labour considerations for the performance of the contract. HREDD as a contract performance condition can be set when they want to buy supplies in which environmental, social and labour impacts are identified, avoided and accounted for by their contractors and in their supply chain. To that end, such a condition must have a LtSM of the contract.

The definition of the LtSM has been developed through case law. It was first introduced in the *Concordia Bus* case with regard to environmental award criteria.⁷¹ The CJEU established that award criteria other than purely economic, in this case environmental, are allowed in the determination of the most advantageous tender (MEAT) as long as they are linked to the subject matter of the contract.⁷² Accordingly, for a contract on urban bus transport services ‘the level of nitrogen oxide emissions and the noise level of the buses’ were determined to fall within the LtSM.⁷³

68. O. Martin-Ortega, ‘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’, 3 *Business and Human Rights Journal* (2018), p. 88.

69. 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.

70. See DFO, *Contract performance clauses for safeguarding basic human rights in the supply chain* <https://anskaffelser.no/en/verktoy/maler/contract-performance-clauses-safeguarding-basic-human-rights-supply-chain>.

71. Case C-513/99 *Concordia Bus Finland Oy Ab, formerly Stagecoach Finland Oy Ab v. Helsingin kaupunki and HKL-Bussiliikenne*, EU:C:2002:495.

72. Ibid para. 43–44; 55–59; 69.

73. Ibid para. 65.

The limits to the LtSM were further established by *EVN Wienstrom* and *Max Havelaar*.⁷⁴ The *EVN Wienstrom* case addressed environmental award criteria again. In a public contract for the supply of electricity, the MEAT was to be determined based on the impact of the services on the environment.⁷⁵ An award criterion weighting 45% of the tender consisted of 'the amount of energy that can be supplied from renewable energy sources in excess' of the expected annual consumption.⁷⁶ This criterion was not related to the amount to be supplied to the contracting authority but *exclusively* to the 'amount of electricity that the tenderers have supplied, or will supply, to other customers'.⁷⁷ Therefore, the amount of renewable energy to be supplied to customers outside of the public contract was found not to be linked to the subject matter.⁷⁸ Particularly, the award criterion failed to be linked to the subject matter because it would have constituted unjustified discrimination against tenderers who were able to meet the requirement only in the supply of the amount of energy to the contracting authority, but not for supply in excess.⁷⁹ In *Max Havelaar*, the CJEU interpreted the concept of LtSM more broadly than in previous case law. It highlighted that award criteria – in this case, organic production and fair trade conditions – meet the LtSM even if they do not alter the material substance of supplies.⁸⁰ Therefore, award criteria do not need to relate to 'an intrinsic characteristic of a product'.⁸¹

While the introduction and development of LtSM have focused on award criteria, EU soft law has extended its applicability to contract performance conditions.⁸² Indeed, through the Green Paper, the EU stressed the importance of the LtSM for contract performance conditions to ensure that the purchase itself remains central to the process in which taxpayers' money is used.⁸³ Also, it highlighted that the LtSM supports the obtention of the best possible offer for contracting authorities with efficient use of public monies.⁸⁴ 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' (tendered product).⁸⁵

The Directive 2014/24 embraced the scope of the LtSM provided in *Max Havelaar* case law. Its Article 67 provides that award criteria are deemed to be linked to the subject matter if they relate to the supplies 'to be provided under that contract in any respect and at any stage of their life cycle, including factors involved in'. These factors cover 'the specific process of production, provision or trading of those' supplies. Or they entail 'a specific process for another stage of their life cycle', even when they do not form part of the material substance of the tendered product. Article 70, requiring contract performance conditions to be linked to the subject matter, does not establish another definition of the LtSM for contract performance conditions. However, the scope originally developed through case law and later established within Article 67 equally applies to contract performance conditions.

74. Case C-448/01 *EVN AG and Wienstrom GmbH v. Republik Österreich*, EU:C:2003:651; Case C-368/10 *Commission v. Netherlands*, EU:C:2012:284.

75. Case C-448/01 *EVN AG and Wienstrom*, para. 15.

76. *Ibid.* para. 18.

77. *Ibid.* para. 67.

78. *Ibid.* para. 68.

79. *Ibid.* para. 69.

80. Case C-368/10 *Commission v. Netherlands*, para. 90–91.

81. *Ibid.*

82. European Commission, 'Green Paper on the Modernisation of EU Public Procurement Policy Towards a More Efficient European Procurement Market' (2011), p. 37.

83. *Ibid.*, p. 39.

84. *Ibid.*

85. *Ibid.*

These developments on the LtSM applicable to contract performance conditions, however, do not address a key question for HREDD. Whether LtSM refers to the supply (what is bought), the supplier (from whom, including those in lower tiers of the supply chain) or both. Some scholars argue that the LtSM is about the supplies to be provided under the contract and their production processes; as long as the processes relate to the supplies.⁸⁶ In contrast, the EU definition from the Green Paper suggests that the LtSM covers the ‘tasks necessary for the production of the goods’.⁸⁷ Tasks necessary for production inevitably relate to the person who performs them, thus, the supplier. Yet the EU makes it clear that not all the tasks that the supplier undertakes are linked to the subject matter, but only those that are needed to produce the tendered products.⁸⁸ Considering *Max Havelaar*, these tasks are not only the ones needed for production but also those needed at any other stage in the process of the lifecycle of the tendered products.⁸⁹

Based on the applicability of conditions on supplies and suppliers in the use of labels as contract performance conditions, we argue that LtSM covers both supplies and suppliers. In the *EVN Wienstrom* case the CJEU established that the requirement is not linked to the subject matter when it refers *exclusively* to supplier’s conducts outside the public contract. Therefore, conditions that concern suppliers’ conduct and supplies within the public contract can be indeed linked to the subject matter,⁹⁰ particularly because *EVN Wienstrom* does not explicitly preclude requirements that refer to supplies and suppliers. Consequently, these requirements may well refer to both and meet the LtSM. Labels are allowed under Article 43 of the Directive 2014/24, and they also enlighten the extent to which supplies and suppliers are linked to the subject matter. Certain labels, like Fairtrade, are widely used by EU public buyers as contract performance conditions, particularly when buying textiles and food.⁹¹

The Fairtrade label regards the supplier/producer to the extent of the production processes it has in place to produce a certain type of product. Indeed, the label’s certification entails an audit of the producers and of a type of product. According to Fairtrade’s website ‘Certification means that an independent auditor will check your supply chain to ensure compliance with Fairtrade Standards. After you’ve passed, you’ll officially become certified.’⁹² Hence, the Fairtrade label pertains to

86. M. Andhov et al., ‘Sustainability Through Public Procurement: The Way Forward – Reform Proposals’, (2020) https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3559393; M. Andhov et al. ‘Shaping Sustainable Public Procurement Laws in the European Union: An Analysis of the Legislative Development from ‘How to Buy’ to ‘What to Buy’ in Current and Future EU Legislative Initiatives’ (The Greens/EFA in the European Parliament, 2022) p. 38.

87. European Commission, ‘Green Paper on the Modernisation of EU Public Procurement Policy’, p. 39.

88. *Ibid.*

89. Further references to ‘production of products’ in this article are made with its broad understanding covering production and process for any other stage in the lifecycle of products.

90. Case C-448/01 *EVN AG and Wienstrom* para. 72.

91. See Germany Kiel: Occupational clothing, special workwear and accessories 2022/S 102-282604, Contract Notice Supplies, <https://ted.europa.eu/udl?uri=TED:NOTICE:282604-2022:TEXT:EN:HTML&src=0>; Netherlands Tillburg: Catering equipment 2019/S 142-349489, Contract award notice, <https://ted.europa.eu/udl?uri=TED:NOTICE:349489-2019:TEXT:EN:HTML&src=0&act=nav>; UK-Aberystwyth: Miscellaneous food products and dried goods, 2019/S 106-258274, Contract notice, <https://ted.europa.eu/udl?uri=TED:NOTICE:258274-2019:TEXT:EN:HTML&src=0&act=nav>. Additionally, Commission GPP criteria for food provides for the use of different labels for fair trade, see European Commission, Commission Staff Working Document EU green public procurement criteria for food, catering services and vending machines, SWD(2019) 366 final.

92. Fair Trade, Get Certified, www.fairtrade.net/act/get-certified#:~:text=Certification%20means%20that%20an%20independent,%2Din%2Dclass%20certification%20practice.

the conditions or standards that producers must adhere to while producing a type of product, conforming to the Fairtrade benchmarks.

Moreover, this label regards the supplies/products to the extent of their type and not their individual unit. The Fairtrade label also describes that 'Following a successful certification for a producer organization, a three-year certification cycle starts. During this time, up to two confirmation audits normally take place (...) in addition to the regular audits Flocert conducts unannounced audits at any time if there are indications of additional risk (...)'.⁹³ A producer of coffee and bananas might get certified only regarding bananas. Once it obtains the certification, the bananas produced by this producer over the following three years will bear the Fairtrade label. The label, therefore, is not due to scrutiny and certification of each unit of bananas, but due to the endorsement of the producer and its production methods regarding this type of product. Therefore, a public buyer that calls for a tender of 100 Fairtrade bananas will not have assured that each unit of those 100 bananas was audited. Rather it will have the assurance that the supplier's production methods for all bananas, including the 100 it is buying, comply with the Fairtrade standard.

Following this reasoning on labels, the conditions under which the contractor and its suppliers produce a type of tendered product can meet the LtSM of the contract. Those conditions, which do comply with the LtSM, might well be human rights and environmental adverse impacts, as required by HREDD. Therefore, demanding the exercise of HREDD can meet the core notion of the LtSM of the contract.

Yet to meet the LtSM requirement, HREDD's scope of application would need to be narrowed down. HREDD'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 HREDD would need to be limited only to the specific tasks the contractor and its suppliers undertake to produce the type of tendered product. Limiting the scope of HREDD might legally fall within the limits of the LtSM. However, four main challenges would need to be considered by the EU Commission when answering the Parliament's call and reviewing Directive 2014/24 regarding this matter.

4. Four challenges for HREDD in complying with the LtSM

The first challenge revolves around the first step of HREDD because it covers the contractor's general policies on human rights and the environment. These policies are in essence corporate social responsibility policies, which are explicitly prohibited by Directive 2014/24 due to their lack of LtSM of the contract.⁹⁴

According to the OECD, HREDD's first step is fulfilled when an enterprise devises, adopts and disseminates policies that: include the enterprises' commitments to respect human rights and the environment; are embedded into the enterprises' oversight bodies; and are incorporated into the engagement with suppliers and other business relationships.⁹⁵ Some practical actions of the latter are through the incorporation of conditions in contracts with suppliers and suppliers' pre-qualification processes.⁹⁶ Notwithstanding the prohibition of requiring contractors to have

93. Fair Trade, How Fair Trade Certification works, www.fairtrade.net/about/certification.

94. 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).

95. OECD Guidelines for Multinational Enterprises on Responsible Business Conduct.

96. Ibid.

general CSR policies, HREDD could still meet the LtSM as long as requirements to have human rights and environmental 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 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.

The following is an example of practical actions of HREDD's step one mentioned above, consisting of the contractor's engagement with suppliers through contractual conditions. Contractor X is a textile retailer that sells gowns, police uniforms and firemen uniforms. Gowns are supplied by supplier A, and police and firemen uniforms by supplier B. A public buyer calls for a tender for 500 police uniforms. A requirement to be complied with by contractor X consisting of including environmental and human rights conditions in all its contracts with suppliers A and B would fall into the Directive 2014/24's prohibition. Thus, it would fail to be linked to the subject matter. This is because, as supported by the Advocate General's Opinion in *Max Havelaar*, '(t)he contracting authority cannot therefore require that potential tenders have only fair trade products in their product range(...)'.⁹⁷ In this example, contractor X cannot be required to have these conditions in all of its products – gowns, police and firemen uniforms – but only on the type of tendered product: police uniforms.

Likewise, if these conditions are imposed over all contracts signed between contractor X and supplier B, they will also fail to meet the LtSM. This is because supplier B supplies contractor X with the tendered product – police uniforms – but also with firemen uniforms. To be LtSM these conditions would need to be limited to the contracts that contractor X has with the suppliers involved in the production of the tendered product – supplier B – and only in relation to the supply by them of the type of tendered product: police uniforms. Similar to this first HREDD step, steps two to six would need to be constrained to the contractor's type of tendered products and only to the suppliers linked to those products in the supply chain.

The second challenge regards the limitation that the LtSM has over HREDD'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 HREDD, particularly regarding the undertaking of prioritization by contractors with a large number of entities in their supply chain.

With the LtSM the contractor cannot be required to prioritize, and effectively may be prevented from prioritizing, other types of products and suppliers that might have a higher risk of abuse than the type of tendered products. In the abovementioned example, if gowns have a higher risk of abuse than police uniforms – due to their manufacturing process, for example – contractor X would be impeded in prioritizing these items over police uniforms. Also, the contractor would be unable to prioritize other suppliers over those related to the production of the tendered products, for

97. Opinion of Advocate General Kokott in Case C-368/10 *European Commission v. Kingdom of the Netherlands*, EU: C:2011:840, para. 88.

instance, other suppliers over which the contractor might have bigger leverage. In the same above-mentioned case, even when supplier A had a greater risk of abuse than supplier B – because of its geographic location, for example – contractor X would not be able to prioritize supplier A over B. The contractor would only be required to identify, assess, address, track, monitor and communicate the adverse impacts over the tendered products and linked suppliers, therefore police uniforms and supplier B exclusively.

The third challenge is about off-the-shelf tendered products. These are products that either have already been produced and are ‘ready to go’ or where one or more stages of their production process – raw material extraction, assembly, manufacture, packaging and/or transportation – have already taken place prior to the tender. It has been established that the LtSM can be met when the contract performance conditions regard the supplier/producer to the extent of the production processes it has in place to produce a certain type of product. Off-the-shelf products are problematic because the products would have already been produced, in whole or in part, without HREDD.

In the Fairtrade label case, the certification of the producer’s production process is conducted prior to the production of the tendered products. Consequently, the certified supplier can then guarantee that the tendered products were produced under certain social or environmental conditions. In contrast, in the case of HREDD, the adverse impact assessment would take place after the tendered products were produced. The contractor would then only be able to address adverse impacts in the future production of the type of tendered products. Therefore, it would not be able to guarantee that the supplier’s production processes of the type of tendered product had in place measures to cease or mitigate adverse impacts, for example. This trade-off might be a challenge for LtSM which would need to be addressed by the EU Commission in its revision. An alternative would need to be provided to those contractors that do not have HREDD, are selling off-the-shelf products and are willing to conduct HREDD solely for the execution of a public contract.

Besides, the issue of off-the-shelf tendered products becomes even more problematic when the contractor’s supply chain has changed. This is the case in which the tendered products have been produced and are ready to be delivered to the contracting authority. However, the suppliers that are related to these products have changed. The contractor would not be able to conduct HREDD over the same suppliers that participated in the production process of the tendered products, because it no longer has such a commercial relationship with them. This might be the case for sectors or tendered products with very dynamic and changing supply chains. For example, the textile industry is strongly impacted by fashion trends and fluctuations in seasonal demands that lead to frequent alterations in product designs, materials and production volumes.⁹⁸ This might lead to a change of suppliers.

In the given example, it would be the case in which police uniforms have already been produced by supplier B, but this supplier no longer supplies police uniforms to contractor X. Instead, contractor X now is being supplied with police uniforms by supplier C or has no longer a supplier of police uniforms because it does not sell this type of product anymore. The latter might be the case of products that get quickly out of date and stop being produced like a certain model of an IT product or vehicle. The question that arises is whether contractor X would still be able to comply with a HREDD process and meet the LtSM when selling to a public body police uniforms produced by

98. M. A. Kabir, ‘How Textile Supply Chain Management is Different from Other Industry?’, www.linkedin.com/pulse/how-textile-supply-chain-management-different-from-kabir-csca-/; L. Pang, ‘Maintaining Quality in Dynamic Clothing and Footwear Supply Chains’, *SGS* (2022), www.sgs.com/en-gb/news/2022/07/maintaining-quality-in-dynamic-clothing-and-footwear-supply-chains.

supplier B. In a strict interpretation of LtSM, it would not because contractor X would be impeded from conducting HREDD over supplier B, which is the supplier that produced the tendered police uniforms. This issue could be frequently faced in some sectors or products; thus, it would need to be addressed by the EU Commission too. An alternative would need to be given to contractors that have not conducted HREDD, are selling off-the-shelf products with a modified supply chain and are willing to comply with HREDD conditions to execute the contract.

Finally, step six 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 not by each tendered unit. 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. But it can be difficult to establish this connection when this supplier also produces other products besides the tendered ones.

In the abovementioned example, supplier B supplies police uniforms and firemen uniforms for contractor X. At the same time, supplier B also produces another type of textiles namely army uniforms, curtains and hats. Police uniforms are the tendered products and supplier B is found to be guilty of pollution of a river for inadequate waste disposal and of salary retention of five of its workers. It would be hard to determine the extent to which these adverse impacts occurred as a result of the production of police uniforms and not because of the production of hats or any of the other products. Adverse impacts resulting from the production of other than police uniforms would not be LtSM. An alternative that can simplify this issue could be that adverse impacts caused, by a supplier that is part of the supply chain of the tendered product, during the execution of a public contract are deemed as LtSM unless the contractor or the supplier can prove the contrary. However, clarity would need to be given on the means of proof that are valid for such purpose. Additionally, the consequences for the contractor when adverse impacts on its supply chain were caused during and as a result of the execution of the contract but are identified after the contract has ended would need to be well-defined. All these issues would need to be considered in the review of the EU Commission of the Directive 2014/24 in relation to HREDD.

5. Concluding remarks

This paper has established there is a strong link between HREDD and public procurement. Besides being set in soft law, this connection has been also considered in EU hard law. However, its consideration has been fragmented and inconsistent. In particular, the EU Commission has lacked coherence in such linkage by endorsing it on the one hand as a virtuous practice and rejecting it in the current law-making process for a CSDD Directive. This trend is followed at a domestic level too. EU countries have integrated HREDD through different requirements: some include public procurement, like Germany, and some others do not, like France. Consequently, an environment has been created in the public market with different playing rules for bidders and contractors across Europe.

This paper contributes to the scholarly debate on the definition, limits and applicability of LtSM. The latter has been mostly developed within environmental award criteria; however,

its notion is also applicable to environmental and social contract performance conditions. Through a comparison with Fairtrade labels, this paper argues that both suppliers and supplies are linked to the subject matter of the contract. The former meets the LtSM to the extent of the production processes it has in place to produce a certain type of product, whereas the latter meets the LtSM to the extent of their type of product and not their unit. Notwithstanding that, this paper endorses other scholars' views on the need to review and provide for clear rules that define and set the limits of the LtSM, particularly to facilitate the application of HREDD.

Moreover, this paper further informs the debate on whether and how HREDD can be included in public procurement. Given three premises, HREDD can be set as a contract performance condition and meet the core notion of the LtSM. First, the conditions under which the contractor and its suppliers undertake the needed tasks to produce the type of tendered product are LtSM of the contract. Secondly, these conditions can be related to identifying and addressing human rights and environmental adverse impacts. Thirdly, HREDD covers these conditions through a process in which a contractor identifies, assesses, addresses, tracks and monitors, communicates and redresses such negative impacts. The scope of the six steps of HREDD, however, would need to be limited only to the specific tasks the contractor and its suppliers undertake to produce the type of tendered product. Notably, HREDD as a contract performance condition would be easier to comply with by a contractor that already undertakes HREDD within all its operations, products and supply chains, than by a contractor that has no HREDD process at all prior to the tender.

Notwithstanding the possibility of HREDD inclusion as a contract performance condition, compliance with the LtSM poses four main challenges. First, the scope of application of step one of the HREDD process. This step entails requirements over the contractor's general policies that do not meet the LtSM and thus prohibited by Directive 2014/24. This challenge can be overcome by narrowing down HREDD's scope of application. Secondly, the limits imposed by the LtSM over prioritization within the first steps of HREDD would need to be acknowledged. Further impacts of the LtSM on the effectiveness of HREDD would need to be assessed.

Thirdly, off-the-shelf products, including those in which the supply chain has changed need to be addressed. An alternative would need to be given to contractors that have not conducted HREDD, are selling off-the-shelf products with a modified supply chain and are willing to comply with HREDD as a condition to execute the contract. Finally, imposing remediation of human rights and environmental adverse impacts on a contractor is a topic yet to be further developed. Notwithstanding, this paper calls for attention to some of the main difficulties that can emerge when requesting this sixth step of HREDD as a contract performance condition. One key problem is to establish the cause-consequence connection between the production of the type of tendered products and the adverse impacts caused. To facilitate implementation, this article suggests that adverse impacts caused, by a supplier that is part of the supply chain of the tendered product, during the execution of a public contract should be deemed as linked to the subject matter unless the contractor or the supplier can prove the contrary. Yet the cause-consequence connection together with the valid means of proof would need to be further set and clarified within the legal framework. Likewise, the potential case in which adverse impacts are caused during the execution of the public contract but found out later once the contract has ended would need to be a matter of consideration of the EU Commission.

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