

# Sustainability through public procurement: the way forward – Reform Proposals

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## Executive Summary

Public procurement amounts to about 16 per cent of the EU Member States' GDP. A major contribution to the achievement of the Sustainable Development Goals is possible by enhancing sustainable procurement practices. The 2014 EU Public Procurement Directives (Directives 2014/23/EU, 2014/24/EU and 2014/25/EU) have largely clarified the scope for permissible sustainable procurement decisions, but the adoption of Sustainable Public Procurement (SPP) is still limited. The rules could be more permissive and thoroughly take into account all the different aspects of sustainability. Even more urgent and essential is to push for behavioural and organisational changes in the ways contracting authorities perform their buying functions to maximise positive, sustainable impacts. It is critical to change procurement management practices so that the sustainability demanded in contracts is properly verified along the entire supply chain and remedial actions are taken where non-compliance is detected.

**Solution:** We make three main proposals:

1. That the EU invest significantly in the professionalisation of contracting officials, procurement strategists and financial auditors by (a) encouraging the institution of SPP knowledge centres at the EU, national and regional levels following the model already provided by various Central Purchasing Bodies; (b) creating a network of knowledge centres working closely together in developing and disseminating best practices on SPP, including through training materials, and in collecting information and data on the adoption of SPP and the difficulties encountered in applying the relevant EU rules, and (c) providing financial and technical assistance targeted to specific SPP formation for ground-level contracting officials.
2. That the EU make it mandatory for contracting authorities to map and monitor their supply chains for risks of breaches of environmental and social rules, including those protecting human rights. That the EU take those breaches seriously, mandating the exclusion from award procedures of those found in violation and appropriate remedial actions in case of violations during contract performance. That the EU make it easier for contracting authorities to know about economic operators that have breached environmental and social rules, including those protecting human rights.

3. That the EU make the legislative environment more 'SPP friendly'. Contracting authorities must be allowed to require suppliers to have effective sustainability policies in place. A shift is needed from enabling the Member States to pursue SPP to requiring them to buy sustainably by increasing the amount of mandatory sectoral legislation and by requiring contracting authority to take into account the life-cycle costs associated with their purchases.<sup>1</sup>

**Non-solution:** Simply relying on the goodwill of individual procurement officers or policy makers without providing training and networking opportunities on SPP and information and communication tools; leaving the regulatory burden of pushing SPP forward on the shoulders of Member States.

**Instruments:** The Commission, including DG Devco in its procurement activities in Official Development Assistance (ODA), and other EU institutions should lead by example concerning the professionalisation of procurement officials and the creation of competence centres. The Commission should act as a catalyst for the network of competence centres, and adequate funds should be released to fund the actions recommended under solution point 1 above. The Commission, possibly together with OECD, should collect data on breaches of environmental and social rules, including those protecting human rights, and make that data available to contracting authorities. The other solutions under points 2 and 3 mainly require amendments to Directives 2014/23/EU, 2014/24/EU and 2014/25/EU. Ad hoc rules need to be adopted to enact further sectoral mandatory legislation.

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<sup>1</sup> At the beginning of 2020, in the leaked draft of Communication from the Commission on new Circular Economy Action Plan, the Commission clearly states that the EU public procurement reform 'has not led to sufficient uptake if Green Public Procurement (GPP) yet'. Therefore, the Commission will propose minimum mandatory green criteria and targets for public procurement in key sectors. See: <https://www.euractiv.com/section/circular-economy/news/leak-eus-new-circular-economy-plan-aims-to-halve-waste-by-2030/> Similarly in the recent Communication from the Commission titled: Sustainable Europe Investment Plan, European Green Deal Investment Plan (14 Jan 2020): 'The Commission will propose minimum mandatory green criteria or targets for public procurements in sectorial initiatives, EU funding or product-specific legislation. Such minimum criteria will 'de facto' set a common definition of what a 'green purchase' is, allowing collection of comparable data from public buyers, and setting the basis for assessing the impact of green public procurements. Public authorities across Europe will be encouraged to integrate green criteria and use labels in their procurements. The Commission will support these efforts with guidance, training activities and the dissemination of good practices. At the same time, life-cycle-costing methodologies should be applied by public buyers whenever possible. The Commission calls on all players, including industry, to develop such reliable methodologies.'

# 1. Introduction

## The state of sustainable public procurement

*Sustainable Public Procurement (SPP) is a process by which public authorities seek to achieve an appropriate balance between the three pillars of sustainable development – economic, social and environmental – when procuring goods, services or works at all stages of the project.<sup>2</sup>*

The three dimensions – economic, environmental and social – were first mentioned in the Brundtland Report of 1987. These dimensions are also at the basis of Agenda 2030 and its 17 Sustainable Development Goals (SDGs). Sustainable Public Procurement has been established as one of the targets of SDG 12 on sustainable consumption and production (target 12.7).

The notion that public procurement has the potential to be an important driver for sustainability has been discussed on many occasions and by a multitude of different stakeholders. Amongst others, in 2010 the EU Commission (further Commission) identified public procurement's pivotal role in the Europe 2020 strategy as one of the market-based instruments for the realisation of smart, sustainable and inclusive growth while ensuring the most efficient use of public funds.<sup>3</sup> The Commission argued that for public procurement to reach its potential, the EU legal framework needed modernisation.

The 2014 EU Public Procurement Directives brought numerous changes, additions and updates of previous rules.<sup>4</sup> Namely, innovation, environmental and social issues **are clearly supported**, and their importance is emphasised further, thereby lowering, to a certain extent, the regulatory risks attached to these issues under the previous regulatory regime. From the long-term perspective, the directives promote public procurement as a policy instrument; Recital 91 Directive 2014/24/EU, states:

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<sup>2</sup> Commission, 'Green and Sustainable Public Procurement' available at <[https://ec.europa.eu/environment/gpp/versus\\_en.htm](https://ec.europa.eu/environment/gpp/versus_en.htm)> accessed 19 February 2020.

<sup>3</sup> Commission, 'Europe 2020: A strategy for smart, sustainable and inclusive growth, Brussels, COM (2010) 2020 final.

<sup>4</sup> Andrecka M. (ed), 'Procurement Beyond the Price' (2017) 12 European Procurement and Public-Private Partnership Law Review [further EPPPL] 217; Sjøfjell B. and Wiesbrock A. (eds), *Sustainable Public Procurement Under EU Law* (CUP 2016); Semple A., *A Practical Guide to Public Procurement* (OUP 2015) ch. 7; Dragos D. and Neamtu B., 'Sustainable Public Procurement in the EU: Experiences and Prospects' in Lichère F., Caranta R. and Treumer S. (eds), *Modernising Public Procurement: The New Directive* (DJØF 2014) 301.

*This Directive clarifies how the contracting authorities can contribute to the protection of the environment and the promotion of sustainable development while ensuring that they can obtain the best value for money for their contracts.*

A significant part of this new policy approach pertains to what is known as ‘strategic public procurement’ (StPP), comprising green, social, and innovative public procurement. Strategic public procurement has been widely promoted since the introduction of the new 2014 regime. In its six strategic priorities for public procurement policy, the Commission strongly emphasises the importance of using StPP as a policy instrument by pointing out that it ‘should play a bigger role for central and local governments to respond to societal, environmental and economic objectives, such as the circular economy’.<sup>5</sup>

The modernised EU procurement regime provides for a broader application of environmental and social considerations in public procurement than ever before. However, as we identified in the SMART Report on [Obstacles to Sustainable Global Business - Towards EU Policy Coherence for Sustainable Development](#):

*EU law is no obstacle to sustainable public procurement, and a number of policy initiatives taken at EU, Member States and local level are leading the way. Weak— or non-existent—political will in some Member States and lack of stringent systems and insufficient enforcement of the requirements that are made, are the main obstacles to the full uptake of sustainable public procurement along with the difficulty to check global value chains.*

Consequently, while there is scope for SPP to drive positive change to have this effect, it must be used in a much more consistent manner. The Commission criticises the fact that an estimated 55 per cent of procurement procedures still apply the **lowest price** as award criterion, despite the option to use the Most Economically Advantageous Tenders (MEAT), per Article 67, Directive 2014/24/EU.

Most contracting authorities do not even take the quality of the goods and services procured into account, much less sustainability aspects. Studies have stressed that in many Member States, the emphasis on price has hindered the adoption of SPP often following a general presumption that buying sustainably is more expensive. Nevertheless, an increasing number of reports that assess the price differences between sustainably produced and conventional

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<sup>5</sup> Commission’s Communication to the Institutions, ‘Making Public Procurement work in and for Europe’, COM (2017) 572, final, 8.

products prove that the majority of e.g. green products are cheaper or as competitive (**same price level**) as conventional ones, and only a small number are substantially more expensive.<sup>6</sup>

A study on construction and building in Italy found that if the MEAT was chosen as the award criteria, 87 % of tenders included green criteria, of which 39 per cent required core or comprehensive criteria. This was seen as an indication that 'if the most advantageous tender is selected, there is a high probability that purchasers will also include environmental criteria among the award criteria.'<sup>7</sup>

In 2013, Müller called for an 'implementation offensive' in Germany, which has not yet taken place.<sup>8</sup> It can be estimated that only a fraction of German municipalities, which account for around half the public procurement expenditure, adjusted their procurement approach to procure more sustainably, even though some environmental aspects, such as energy efficiency or the use of recycled paper, have found their way into most tenders. In Denmark, a study shows that relevant green requirements were used in 24% of the tenders monitored.<sup>9</sup> In the Netherlands, a recent report shows that only 27% of all public procurement procedures in 2018 in the construction sector applied sustainability in their award criteria, and when it was included it counted for 15% or less of the points 58% of the time.<sup>10</sup>

## Multidimensionality of SPP

**Multidimensionality** is at the core of the concept of sustainability. The Commission distinguishes between green public procurement (GPP) and socially responsible public procurement (SRPP). At the practical and regulatory level, however, the focus has been on the environmental aspects. Only since the 2014 procurement reform have social aspects been clearly emphasised. Social considerations have more specific national characteristics, such as the return of social value in the UK and the Netherlands, or the creation of job opportunities, accessibility for all, and the reconciliation of family and work. In international contexts, social

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<sup>6</sup> Miljøstyrelsen Undersoegelse af prisen for det offentlige groenne valg, November 2018 Denmark.

<sup>7</sup> Testa F., Grappio P., Gusmerotti N.M., Iraldo F., Frey M. 'Examining green public procurement using content analysis: Existing difficulties for procurers and useful recommendations'. *Environ. Dev. Sustain.* 2016;18:197–219. doi: 10.1007/s10668-015-9634-1.

<sup>8</sup> Müller R., Nachhaltige öffentliche Beschaffung in Deutschland - Wo bleibt die Implementierungsoffensive? *Ökologisches Wirtschaften.* (2),2013, 33.

<sup>9</sup> Monitorering af grønne indkøb i offentlige institutioner, Status på grønne indkøb gennemført i 2013. Miljøprojekt nr. 1820, 2016; summary in English available at: <https://www2.mst.dk/Udgiv/publikationer/2016/01/978-87-93435-20-9.pdf>

<sup>10</sup> Aanbestedingsinstituut, Analyse 2018 Duurzaamheid in openbare aanbestedingen, 2019.

considerations encompass issues such as respect for human rights and labour laws in the global supply chain.<sup>11</sup>

Literature and practical experiences with SPP still show a clear bias towards the environmental dimension in the EU. There are far more examples, guidelines, training and even laws regarding the integration of environmental aspects into public procurement practices than those regarding social aspects. In the last ten years, there has been a multitude of EU Directives directly addressing issues of GPP. This imbalance is even more significant if one looks at individual social aspects, such as the respect of International Labour Organization (ILO) core labour standards along international value chains. SRPP in Europe is still in its infancy.

In addition to the differentiation between the dimensions of SPP, a distinction regarding the range (e.g. domestic or international) of the intended effects of sustainability considerations in public procurement can be made. Social aspects in particular can have a domestic or a global orientation. When bidders are obliged to fulfil specific social criteria in order to win a public contract, these criteria mostly take effect in the EU or even the national context. After the reform of the EU Public Procurement Directives, many German states included provisions in their procurement regulations, obliging contractors to adhere to collective agreements, train apprentices, support women and families, or pay the minimum wage.<sup>12</sup> This, however, does not apply to international value chains of most products procured. Specific social considerations with a focus on international effects are less frequent.

The particular bias towards GPP in Europe is not a natural occurrence based on differences between GPP and SRPP, but the outcome of path dependencies and political priorities. While the 'global review' on SPP<sup>13</sup> suggests a general bias towards environmental aspects in SPP, countries in the Global South, like South Africa and Kenya, have a long history of social linkages in their public procurement. There is evidence of a North-South divide, at least when

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<sup>11</sup> Many of these principles and goals have been integrated within the public procurement arena. The Commission affirmed that SRPP should consider employment opportunities, decent work, compliance with social and labour rights, social inclusion, equal opportunities, accessibility design for all, ethical trade issues as well as more extensive voluntary compliance with corporate social responsibility. See Commission, Buying Social A Guide to Taking Account of Social Considerations in Public Procurement, Social considerations are seen in a wider context in Part 2 of the Report of the World Summit for Social Development.

<sup>12</sup> See also Sack D.S.T., Sarter K.E., Böhlke N., *Öffentliche Auftragsvergabe in Deutschland: Sozial Und Nachhaltig?* Baden-Baden: Nomos Verlagsgesellschaft MbH & Co. (2016).

<sup>13</sup> UNEP, *Global Review of Sustainable Public Procurement*, 2017.

comparing Europe and Sub-Saharan Africa, in which the bias described above is inverted towards the social dimension in the case of many countries in Sub-Saharan Africa.<sup>14</sup>

In order to use SPP as leverage to promote more sustainable production and consumption practices, such as SDG 12.7, it has to encompass the multidimensionality of sustainability. In practice, this is not always easy to implement. However, reform in two areas might significantly contribute to this overarching goal: creating strategic coherence and expanding the toolbox for SPP.

### Expanding the toolbox

In the last few years a multitude of approaches to integrate social aspects into public procurement has been developed and tested. The scope goes beyond waiting for the market to provide applicable sustainability standards. It includes different forms of self-declaration, the integration of expedient measures by producers, as well as applying multi-stakeholder approaches (e.g. working with multi-stakeholder initiatives such as Electronics Watch to monitor production conditions in the electronics industry). By expanding the toolbox, social aspects might be more easily integrated into procurement processes. Developing practices step by step, in order to integrate missing dimensions of SPP might be more successful than designing abstract, integrated concepts that demand a multidimensional understanding of SPP without showing the way for practical implementation. However, this has to go hand in hand with communicating the options and the responsibility for SRPP within the context of SPP at different political levels, or else an overall implementation of SRPP will be unlikely. Here, national governments can act as models.

In the EU, the assessment of **life-cycle costs (LCC)** in public procurement has been discussed for some time now. While not widespread, it is at least supported through tools and guidelines that help in calculating LCC, provided by government agencies or non-governmental organisations.<sup>15</sup> The assessment of adverse social effects, however, does not feature very prominently in LCC. Calls for public authorities to make use of due diligence mechanisms are barely mentioned in laws, regulations, guidelines and training on public procurement. It is not sufficient to oblige private companies to adhere to human and labour rights; public procurers

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<sup>14</sup> Stoffel T., Cravero C., La Chimia A., Quinot G., 'Multidimensionality of Sustainable Public Procurement (SPP) - Exploring Concepts and Effects in Sub-Saharan Africa and Europe'. *Sustainability* 2019, 11(22), 6352.

<sup>15</sup> Andhov M., Caranta R., Wiesbrock A., (eds), *Cost and EU Public Procurement Law: Life-Cycle Costing for Sustainability* (Routledge Publishing 2020).

also have to implement the UN Guiding Principles on Business and Human Rights (UNGP) in the procurement process itself.

The question is, what must change in order for public procurement to realise its potential for sustainability? To address these questions, we identify three groups of reform proposals, which we present in this report. In Part 1, the focus is on organisational and behavioural change, including the professionalisation of the public procurement and the creation of support structures and tools for the SPP reform. Part 2 addresses the need for management improvements such as due diligence and transparency in public supply chains; contract management, 'follow-ups' and audits; and promotion of new technologies to foster SPP on the example of Building Information Modeling (BIM) in the construction sector. Part 3 analyses the need for further regulatory improvements, in particular, removing the requirement of the 'linked to the subject matter of the contract' and increasing the number of mandatory SPP requirements.

### **Developing a coherent approach**

By developing a clear strategy to a multidimensional concept of SPP, the perception, and, with it, the way of addressing SPP practices, can be changed. The EU and subsequently the Member States should strive to support the **coherence of green and social criteria** in procurement and thus use their purchasing power more comprehensively and strategically, taking into account their potential to influence both: environmental as well as social issues.

The separation of SPP into GPP and SRPP is due to a path dependency that builds on the allegedly different nature of implementing environmental and social criteria in procurement processes, and is upheld by the argument that the procurement process is already too complex. While reducing complexity temporarily, this division might stand in the way of reaching the SDGs and generating a comprehensive and strategic view on SPP practices. SPP has to include all three dimensions of sustainability. From a normative point of view, and practical insight, the differences between social and environmental criteria in procurement are not based on inherently different characteristics, but instead on how well aspects of a product's sustainability are established in the market. At first sight, comparing the energy efficiency of electronics might be easier than comparing the avoidance of labour and human rights violations or fair wages in the same products. However, the rapid increase in the supply of clothing that has been produced in a socially responsible manner shows how quickly markets can adapt to accommodate criteria that have been brought forward by the demand side. Efforts for the

implementation of SRPP concerning international value chains and the dual focus on concepts of sustainability and strategic procurement can be used to promote more integrated approaches to the implementation of SPP in general.

## **PART 1 ORGANISATIONAL AND BEHAVIOURAL CHANGES**

### **2. The need to change**

Although pressures from outside can trigger organisations into developing a policy on SPP, having it does not necessarily mean that it is implemented to its full potential. This problem is exacerbated by the optional nature of the provisions for SPP in the EU Public Procurement Directives. While it would be possible for Member States to transpose the EU Public Procurement Directives into national law as mandatory provisions, very few are doing so. Moreover, even in cases where mandatory provisions for SPP have been enacted, e.g. by some German states, research shows low implementation and the need for support for SPP practices.<sup>16</sup>

For SPP to reach its full potential, it has to become an integral part of the organisation. SPP must become more than a box that needs to be ticked or a small step in a more extensive process. To achieve this, public organisations, as well as people inside them, have to change and do things differently than they did before.

All organisational activities, including procurement, are based on routines. If a change is introduced in the organisation, this leads to existing habits being questioned, which in turn leads to new practices. If these new practices become embedded in the organisation, they form a new organisational routine. Many organisations, for example, have budgets for the procurement of new goods and budgets for keeping their existing products up and running. Some sustainable alternatives, such as LED light bulbs, are more expensive to purchase, **but more cost-effective in the long run** due to their energy efficiency and long life cycle. Therefore, if organisations want to switch from regular light bulbs to LED light bulbs, they need to reorganise their budgets. They need a larger budget for the initial purchase but can reduce the budget for energy costs. In the bureaucratic system of many public organisations, such a change is difficult. Organisational routines are well established and changing them is not easy, as doing so requires people to change their behaviour.

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<sup>16</sup> Stoffel T., *Socially Responsible Public Procurement (SRPP) in multi-level regulatory frameworks: Regulatory leeway and implementation in Germany and Kenya*. (Unpublished manuscript 2018).

For people to change their behaviour (and thus routines), they need to be willing and able and have the opportunity to make the change. Much research has been conducted into factors that generally help people behave as desired and perform better. The **AMO (ability, motivation and opportunity)** model by Boxall and Purcell is frequently used to examine and explain employee performance.<sup>17</sup> This model shows that a well-skilled and well-trained employee can perform better. A motivated employee will be willing to go the extra mile, but if the work environment does not provide the employee with an opportunity to do something with their motivation or skills, they will be wasted.

### 3. Ability to procure sustainably

Both sustainability in general and SPP, in particular, are considered complex concepts, requiring specific knowledge and skills. As such, both **knowledge and skills** are identified as essential drivers or conditions for the implementation of SPP and particularly GPP. Without the necessary expertise or skills, procurers are unable to procure sustainably and help SPP achieve its full potential. For example, in a procurement project suppliers were asked to provide plans for a sustainable road renovation project. Some suppliers suggested using new types of asphalt, which was thinner than regular asphalt and reused existing materials. Although the procurement team could see the sustainable alternatives to the asphalt they commonly used, it was difficult for them to identify the overall consequences of using these new materials. They were not knowledgeable enough about the new types of asphalt to determine, e.g., if the new types of asphalt would be able to withstand cold weather or rain equally or better than regular asphalt; or how much maintenance it would require compared to other types of asphalt. However, to identify the MEAT, the procurement team needed to be able to determine these parameters. A lack of knowledge can make public procurers risk-averse and choose the safer and less sustainable option. Regular asphalt might not be very sustainable, but at least it is reliable and familiar. Knowledge of sustainability thus plays an essential role in the implementation of SPP.<sup>18</sup>

Ability is also about knowing what the market has to offer or having the knowledge and skills to calculate the total costs of ownership (TCO) or life-cycle costs (LCC) of a good, work or service. Moreover, the people supervising public procurements should have knowledge and

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<sup>17</sup> Boxall P., Purcell J., *Strategy and human resource management*. (Houndsmills, Basingstoke, Hampshire, United Kingdom: Palgrave Macmillan 2011).

<sup>18</sup> Grandia J., Finding the missing link: Examining the mediating role of sustainable public procurement behaviour'. *Journal of Cleaner Production*, 124, 183-190 (2016).

skills regarding sustainability in general and SPP in particular. This includes not only managers of the public procurers but also auditors that are responsible for auditing public procurements.

For the improvement of the necessary knowledge and skills for SPP, there are many national and international SPP instruments available, such as e-learning courses, webinars, platforms, seminars and guidelines. Examples from practice include:

- The Commission's website: it provides information about SPP, as well as procurement methodologies, support, education material, best practices and learning events.<sup>19</sup> The EU-level efforts, as well as the existing resources at the national level, could be made readily available to practitioners in a simplified ready-to-use electronic form that is suggested by the present tool as a supporting instrument for a mandatory approach to SPP.
- The Greater London Authority organises a responsible procurement training scheme (including SPP) for their employees via e-learning and classroom sessions.
- Officers of the Czech Supreme Audit Office attended seminars on SPP on multiple occasions, thereby learning about SPP and familiarising themselves with the reasons behind the application of specific sustainability criteria in public tenders.
- ISO20400.org: a global web community of practice around the ISO 20400 norm and SPP in general.
- Barcelona City Council's +Sustainable City Council Programme (+SCC) educates on the implementation of their Strategic Plan for Internal Sustainability, Emblem of Guarantee of Environmental Quality for Cultural Installations and Environmental Management Systems in Municipal Bodies through the A+S Programme, coordinating the expansion of the strategy to the entire institution of 2000 buildings, with 12,000 employees organised in several departments and divisions managing decentralised budgets. There are further sectoral guidelines available in multiple languages on the +SCC website updated regularly.<sup>20</sup>

Concerning enhancing the ability of procurers and supervisor to (contribute to) the implementation of SPP, the creation of **competence centres** can be helpful. Several Member States have established public organisations that support public contracting authorities in

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<sup>19</sup> EU GPP Criteria, available online at [https://ec.europa.eu/environment/gpp/eu\\_gpp\\_criteria\\_en.htm](https://ec.europa.eu/environment/gpp/eu_gpp_criteria_en.htm)

<sup>20</sup> On central purchasing and framework agreements see <https://contractacio.gencat.cat/ca/principis/contractacio-estrategica/guies-contractacio-estrategica/>

procuring. In some cases these competence centres are aimed at increasing the ability for SPP specifically; in other cases, at increasing knowledge for public procurement in general. These competence centres support public contracting authorities by, e.g. drafting national guidelines, capacity building, or developing digital tools. While some Member States have one specific public procurement competence centre, others have multiple ones working in parallel on driving SPP. Examples from practice include:

- German Federal Environment Agency (*Umweltbundesamt*) provides a tool for the analysis of LCC, as well as guidelines regarding GPP.
- German Competence Centre for Sustainable Procurement's website (*Kompetenzstelle für Nachhaltige Beschaffung*, KNB) published a collection of cases and good practices of tenders regarding SPP.
- Dutch organisation PIANOo (an expertise centre for public procurement funded by the Ministry of Economics) offers a sustainability criteria tool that helps procurers identify potential sustainability criteria.
- In Denmark, procurers can find green criteria ready for inclusion in tender documents for many product areas and TCO tools for selected product areas on the Responsible Procurer (Den Ansvarlige Indkøber) webpage.
- Catalan strategic public procurement encompasses criteria for SPP, innovation, and special efforts for the inclusion of SMEs into the bidding process. Besides mandating sectoral GPP through the central purchasing authority,<sup>21</sup> further sustainability criteria are also readily compiled and made available for decentralised procurement.<sup>22</sup> It is coupled with extensive training activities.<sup>23</sup>
- In Sweden, the National Agency on Public Procurement provides a criteria wizard that assists public authorities in setting environmental and social requirements.<sup>24</sup>

At the supranational level, the EU can also play an essential role in driving the ability of public contracting authorities in implementing SPP. DG Grow already organises procurement experts meetings, such as the annual meeting of Procurement Experts in the Health Sector and sporadic meetings with other actors. Furthermore, various EU programs financially support EU-

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<sup>21</sup> [Ajuntament +Sostenible](http://www.ajsosteniblebcn.cat/en/networking_3910) See further [http://www.ajsosteniblebcn.cat/en/networking\\_3910](http://www.ajsosteniblebcn.cat/en/networking_3910).

<sup>22</sup> Available online at <https://contractacio.gencat.cat/ca/gestionar-contractacio/eines/>.

<sup>23</sup> An overview is available online at <https://contractacio.gencat.cat/ca/difusio/activitats-jornades/>.

<sup>24</sup> Available at <https://www.upphandlingsmyndigheten.se/en>, click on 'Requirement Wizard' in the upper right-hand corner.

wide platforms, initiatives, projects and campaigns regarding the implementation of SPP practices.<sup>25</sup> The Commission funds, amongst others, the *Procurement Forum* managed by the International Council for Local Environmental Initiatives (ICLEI), which enables communication among experts and practitioners on SPP issues, as well as specific campaigns such as the ongoing *Make ICT Fair*. The latter aims at changing supply chains through public procurement. The Commission is also financing and organising partial capacity-building through events such as the *Buying for Social Impact* initiative. Increasing and better coordinating these efforts can contribute to helping SPP reach its full potential.

Even the fact that a contracting authority is asking for sustainable alternatives in their procurements can be viewed by bidders as a new element in the public procurement procedure. Therefore, capacity-building activities in SPP should not only be aimed at the contracting authorities, but also at the bidders. The contracting authorities should educate their potential suppliers on their new sustainable approach to their purchases.

As for the on-the-ground aspect of SPP implementation, efforts can be enhanced with the use of distributed ledger technology that encompasses the EU and national guidelines on the matter in one decentralised, simple-to-use tool, as suggested in Part 3, Section 10 of this report.

#### **4. Motivation to procure sustainably**

Studies on SPP indicate that if procurers are **motivated or committed** to implement an SPP policy, they are more likely to implement it.<sup>26</sup> Commitment is considered a determining factor of where an organisation is placed on the continuum from innovator to laggard, and is the factor that explains employee behaviour the most. In the case of SPP, public procurers (and other relevant stakeholders) need to be committed to change. Commitment to change is 'a force (mindset) that binds an individual to a course of action deemed necessary for the successful implementation of a change initiative'.<sup>27</sup>

Different forces can fuel a commitment to change. First, people can become committed because they believe in the inherent benefits of the change and therefore want to support it.

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<sup>25</sup> In Czech: Společenská odpovědnost a veřejné zakázky (SRPP).

<sup>26</sup> Grandia J., Steijn B., Kuipers B., 'It is not easy being green: Increasing sustainable public procurement behaviour.' *Innovation: The European Journal of Social Science Research*, 28(3), 243-260. DOI:10.1080/13511610.2015.1024639 (2015).

<sup>27</sup> Meyer J. P., Stanley D. J., Herscovitch L., Topolnytsky L., 'Affective, continuance, and normative commitment to the organization: A meta-analysis of antecedents, correlates, and consequences.' *Journal of Vocational Behavior*, 61(1), 20-52 (2002).

This type of commitment is called 'affective commitment'. Public procurers can, for example, be affectively committed to SPP because they find the environment important and support the idea of public organisations trying to diminish the adverse effects of production and consumption via procurement. Second, people can become committed to a change because they realise that there will be costs associated with not changing. This type of commitment is called 'continuance commitment to change.' Public procurers could have continuance commitment to implement SPP because they feel that if they do not implement it, it would be bad for the reputation of their organisation or it might come up negatively during their annual performance reviews. Finally, people can be committed to implementing change due to peer pressure. This type of commitment to change is called 'normative commitment'. This means that the need to implement SPP does not personally convince people. Still, because their peers (such as other public procurers in the organisation) are doing it, they feel compelled to follow. They do not want to look bad and therefore show the desired behaviour, which in this case would be procuring sustainably. Also, rewarding those procurement officers who make an extra effort to innovate the organisation's procurement conduct and to include sustainability considerations in procurement practice might be another way to support SPP implementation. One of the examples shows that establishing a direct link between SPP performance and salaries (top-level management) could also contribute to at least some level of SPP development.

Research into SPP shows that if public procurers are effectively committed, are personally and intrinsically convinced of the need for SPP, and not out of fear of repercussions or peer pressure, they implement SPP to the greatest extent.<sup>28</sup> It is essential to know that people do not have to be committed to the change from the start; **commitment to change can occur** after mandated or coerced involvement with the change. Thus, if public procurers are required to implement SPP in their work, e.g. due to strict rules and regulations, they could become committed in the process.

## 5. Opportunity to procure sustainably

Opportunity refers to the chance a procurer or stakeholder has to include SPP in procurement projects. Even if they are all willing and able to purchase sustainably, it is useless if they do not have the opportunity to do so. This means procurers have to work in an environment that

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<sup>28</sup> Grandia J., *Implementing sustainable public procurement: An organisational change perspective*. (Erasmus University Rotterdam, 2015).

is open to SPP and is willing to provide the procurers with the chance to implement it in their procurement projects. Opportunity first refers to structural resources (eg the budgets or internal policies and routines needed to enable procurers to implement SPP). The preparatory phase of public procurement in particular is filled with routines and procedures, which are often regulated by internal documents. These internal regulations are formal organisational routines that need to allow for SPP to be included; otherwise, there is no opportunity for procurement professionals to implement it. Therefore, internal procedures can drive or hinder the opportunities that exist for SPP.<sup>29</sup>

A more general way in which organisations can create opportunities for SPP is developing an internal environmental management system (like EMAS). One of the indirect environmental aspects referred to in the EMAS Regulation is GPP.<sup>30</sup> This might incentivise the use of GPP. Concerning EMAS, many European institutions lead by example and assess themselves according to EMAS.<sup>31</sup>

The opportunity to procure sustainably is about more than structural resources. The organisational climate also needs to foster the SPP implementation. As SPP requires existing organisational routines to change, the organisation itself has to be capable of experimenting with new practices and willing to learn and see outside the box. Public procurers, e.g., have to feel safe enough to use a sustainable (and thus less traditional) alternative.

## 6. The role of leaders in enabling change

The **(top) management** of contracting authorities, including the politically elected head (if present), plays a crucial role in creating ability, opportunity and motivation in the organisation for SPP. They can (formally and informally) support the implementation of SPP, e.g. via establishing internal policies or by **including sustainability in the organisation's overall strategy**. Research shows that if sustainability, in general, is part of the organisation's overall

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<sup>29</sup> The Polish Capital City of Warsaw issued internal regulation ZARZĄDZENIE NR 1243/2015 (also mandatory for selected subordinate organisations). It sets the rules for SPP and includes compulsory consideration of social clauses in specific service categories. E.g., it is mandatory to apply the social clause (or justify why it will not be used) before the start of the procurement procedure. The Czech Ministry of Labour and Social Affairs included an SPP check-list into its pre-procurement internal routines, so that internal clients must consider, whether there are any SPP considerations applicable or not. The Dutch Ministry of Defence included a similar check-in their procurement system. The City Council of Barcelona guides and at times mandates SPP through La Llei 9/2017, de 8 de Novembre, de contractes del sector públic and accompanying Decret S1/D/2017-1271, de 24 d'abril de Contractació Pública Sostenible de l'Ajuntament de Barcelona.

<sup>30</sup> Annex I of Regulation (EC) No 1221/2009 of the European Parliament and of the Council of 25 November 2009 on the voluntary participation by organisations in a Community eco-management and audit scheme (EMAS), repealing Regulation (EC) No 761/2001 and Commission Decisions 2001/681/EC and 2006/193/EC

<sup>31</sup> EMAS in the European Institutions, available at: [https://ec.europa.eu/environment/emas/emas\\_registrations/emas\\_in\\_the\\_european\\_institutions\\_en.htm](https://ec.europa.eu/environment/emas/emas_registrations/emas_in_the_european_institutions_en.htm)

strategy, it increases the implementation of SPP. After all, if the entire organisation is heading in a more sustainable direction, then it is easier to suggest including SPP to a greater extent and linking their overall goals with their procurement performance. Some organisations have already included sustainability in their organisational strategies, and in some cases even refer to SPP as a way in which the organisation desires to use their purchasing power to contribute to societal goals. For instance, many higher education and research institutions such as universities have included sustainability in their overall strategy for the future, often including SPP. The Erasmus University Rotterdam made taking responsibility for the future one of the key goals in their strategy for 2024.<sup>32</sup> Oxford University and King's College (among others) have declared a commitment to SPP and published SPP strategies on their websites.<sup>33</sup> Spain's leading Pompeu Fabra University declared a climate emergency and, under its Planetary Wellbeing project, set ambitious organisational and academic targets for 2030.<sup>34</sup>

In addition to the formal leaders, informal leaders can also play an important role in driving ability, motivation and opportunities to implement SPP. A study showed that in many public procurement projects or departments, **change agents** were present that played a crucial role in establishing greater ability, motivation and opportunities for SPP.<sup>35</sup> A change agent is 'an internal or external individual or team responsible for initiating, sponsoring, directing, managing or implementing a specific change initiative, project or complete change program'.<sup>36</sup>

A change agent is an informal leader and therefore, does not need to be in a formal position of power. Any actor, at any level in the organisation, can become a change agent. They could, for example, be a sustainability advisor, procurement professional, council member or even the mayor of a municipality. They could also be a team. The level of the change agent or their formal power affects the degree at which they operate and the impact that their actions have. Change agents drive the ability, motivation and opportunity to procure sustainably by, e.g., building support for SPP, listening to issues, reflecting, cooperating with other stakeholders, offering their expertise or advice, educating others, and refining propositions and the overall process. The activities the change agents carry out vary. Consequently, their role within the organisation and procurement projects also varies. It seems change agents are champions of change in the first phase of organisational change, whereas in the exploration and

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<sup>32</sup> Erasmus University Rotterdam. (2019). Strategy for 2024

<sup>33</sup> University of Oxford; Kings College.

<sup>34</sup> Pompeu Fabra University. 2019. Climate emergency.

<sup>35</sup> Grandia J., 'The role of change agents in sustainable public procurement projects.' *Public Money and Management*, 35(2), 119-126 (2015).

<sup>36</sup> Caldwell R., 'Models of change agency: A fourfold classification.' *British Journal of Management*, 14(2), 131-142 (2003).

institutionalisation phase, they act more as advisors. Therefore, the role and activities of change agents should not be considered as fixed, but as evolving. This allows change agents to match their activities to the needs of key actors and thereby increase the degree to which their actions are successful. For instance, the Public Procurement Unit in Jičín, Czechia (Unit) played the role of the change agent within the Town Council. The Unit conducted *'pilot tenders'* to test sustainable aspects in practice. The Unit gained support for SPP from the top-level management and organised a training seminar on SPP to inspire the Town Council and its subordinate organisations (such as schools and sports facilities). The actions of the Unit as an SPP change agent even led to the inclusion of SPP into the city's Long Term Strategic Plan, and has been further developed since then.<sup>37</sup>

Change agents appear to make conscious decisions regarding which projects to participate in, and how much time and energy they will invest in projects in light of their goal of increasing SPP at the organisational level. This is often the case because being a change agent is not their formal job. It is often rather the opposite, where they try to *'sell'* the notion of SPP out of personal motivation and passion for the subject, without getting any praise for doing so. Given the importance that many organisations attach to SPP, it is therefore crucial that organisations appreciate (and even reward) those employees that are willing to act as change agents and help procurers (and the overall organisation) become more willing and able to implement SPP and create opportunities for them to do this.

Although the own organisation and supervisors must support change agents, external support can strongly help change agents in their attempts to drive SPP. This support can, e.g., come from the international, national, or regional networks, NGOs and SPP fora, events or workshops for procurement professionals, networks and support structures. Some NGOs promote SPP regulations and practices and work on digital tools and capacity building. Examples of actors that can support change agents include:

- ICLEI: an NGO aimed at influencing sustainable policy, driving local action, building networks and supporting the development of SPP and SPP policies.
- Electronics Watch: an NGO aimed at helping public procurers monitor IT supply chains.
- FEMNET: a German NGO that supports local governments with pilot projects in SPP and develops SPP guidelines.

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<sup>37</sup> Jičín Town Case Study

- Social Value UK: a British NGO aimed at maximising social value through procurement by organising conferences, workshops and training programmes.
- Big Buyers Initiative: a project that brings several EU contracting authorities together to collaborate on finding sustainable solutions in procurement for defined goods and services (such as electric vehicles, circular constructions and zero-emission construction sites).

## **PART 2 Planning and managing contracts sustainably**

### **7. Promoting sustainability through due diligence in public supply chains**

Public authorities share supply chains with the private sector. Consequently, they also share the risks of being involved in environmental degradation and in human rights abuses of those who produce goods or provide services.<sup>38</sup> Attention to public supply chains and the role and responsibilities of public buyers towards those in their supply chain is, however, only recent.<sup>39</sup>

Reforming public procurement requires the implementation of the environmental as well as the social aspects of sustainability, and the SMART Proposal on the reform of the EU Company Law Directive suggests sustainability due diligence, including due diligence on environmental issues, on human rights and other social issues, and on governance such as anti-corruption.<sup>40</sup> All supply chains are exposed to sustainability, and public authorities should account for the impact that their purchasing practices have, just as the private sector should. SMART therefore proposes that full sustainability due diligence, including elements of the human rights due diligence, as described in the **UN Guiding Principles on Business and Human Rights** (UNGPs), and the broader due diligence set out in the OECD Guidelines for Multinational Enterprise, should also be integrated in the framework of administrative law. This serves to avoid overreliance on the changes made in business law; it makes the EU regulatory framework for public and private market actors coherent, and it contributes to supporting and enforcing the changes proposed for EU business law.

<sup>38</sup> Martin-Ortega O., 'Modern Slavery and Human Rights Risks in Global Supply Chains: The Role of Public Buyers', *Global Policy*, vol. 8 (4), 2017, 512-52.

<sup>39</sup> Martin-Ortega O., Methven O'Brien C., 'Advancing Respect for Labour Rights Globally through Public Procurement', *Politics and Governance*, vol. 5 (4), 2017, 69-79.

<sup>40</sup> Sjøfjell, B. et al, 'Securing the future of European business: SMART reform proposals', Sections 6.4 and 7.2.3.

While international commitments regarding human rights in public supply chains are increasing, there are few examples of public buyers developing due diligence processes for supply chains,<sup>41</sup> reflecting also the developments in the private sector, where human rights due diligence has proven to be challenging.<sup>42</sup> Setting a level playing field for business, also in the context of public procurement, will contribute to mainstream and standardising requirements for due diligence. Care should be taken in formulating the procurement requirements so that they are not perceived as too rigid, which might result in an insufficient number of bids presented for the required product, service and/or works.

The due diligence experience with reference to human rights is analysed below with a suggestion that it is strengthened and scaled up to include all aspects of sustainability.

### **Global commitments on human rights in the public supply chain**

The UNGPs have contributed to opening up public supply chains to scrutiny. United Nations Guiding Principles 4 to 6 extend the state duty to protect to the instances when the state functions as a commercial actor. Guiding Principle 5 requires states to exercise adequate oversight when contracting with or legislating for companies that provide services that may impact upon the enjoyment of human rights. Guiding Principle 6 requires them to promote respect for human rights by business enterprises with which they conduct commercial transactions, including through public procurement.

The EU has committed to implementing the UNGPs and improving the coherence of EU policies relevant to business and human rights.<sup>43</sup> Parallel to this commitment, the EU has adopted a **Strategy towards the Eradication of Trafficking in Human Beings**. One of the main approaches of the strategy is disrupting the business model that trafficking in human beings depends on.<sup>44</sup> Discouraging the demand for all forms of exploitation, including through the responsible management of global value chains, is critical in this respect, and public procurement can play an important role in this.<sup>45</sup> In addition to this, the EU has committed to

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<sup>41</sup> See Part II of Martin-Ortega O. and Methven O'Brien C., (eds), *Public Procurement and Human Rights: Opportunities, Risks and Dilemmas for the State as Buyer* (Edward Elgar, 2019) for examples of different countries and sectors.

<sup>42</sup> Sjøfjell et al. (n 40).

<sup>43</sup> Commission Communication on CSR (2011), para 4.8.2.

<sup>44</sup> Commission Communication on 'Reporting on the follow-up to the EU Strategy towards the Eradication of trafficking in human beings and identifying further concrete action,' 2017.

<sup>45</sup> The current EU Public Procurement Directives however only mentions human trafficking (child labour and other forms of human trafficking) as a ground of exclusion from participating in the procurement process when economic operator has been the subject of a conviction by final judgment (Art. 57 (f)).

promoting responsible supply chains and responsible business practices of EU companies in developing countries.<sup>46</sup>

## **Developing human rights due diligence in supply chains**

To exercise due diligence in human rights, buyers need to assess the risks to human rights of their activities, design adequate responses to mitigate and prevent such risks, remediate the harm if this occurs, and publicly report on their progress. The following sections explore examples of these steps in the UK and Sweden.

### ***Assessments of risks***

To be able to take action to prevent and mitigate negative impacts on human rights in the supply chain, it is crucial to understand what are the specific risks workers and others are exposed to. The first step is for public buyers to become familiar with their own supply chains and identify the products and services that present higher risks for the people producing or providing them. Public authorities often have a large number of suppliers operating across a broad range of spending categories, with greatly varying degrees of risk. Supply chain mapping helps build a picture of the supply chain, locating assembly plants, component factories, and sources of raw materials. This provides an overall viewpoint from which the risks can be identified – by industry, by source country, or both – and where improvements need to be made the most, allowing risks to be investigated and mitigated in order of rank. A risk-based approach to supply chain assessment and action is the most effective way to apply limited resources to human rights due diligence. It allows resources to be concentrated and targeted at those spending categories – product groups and source countries – where human rights abuses are most likely to occur. Treating suppliers in these spending categories as a priority will deliver a better return (impact) and reduce the organisation's level of risk exposure. Attempting to address issues across the entire supply base and in all supply chains, from their origins, is unrealistic and cannot go beyond a superficial, cursory impact on the problem in general.<sup>47</sup>

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<sup>46</sup> Commission Communication, Next steps for a sustainable European future European action for sustainability (2016).

<sup>47</sup> Martin-Ortega O. and Davies A., *Protecting Human Rights in the Supply Chain. A Guide for Public Procurement Practitioners*, 2017 (Chartered Institute of Procurement and Supply).

### Assessing risks and systematising data: an example from Sweden

SKL Kommentus Central Purchasing Body (SKI) is a subsidiary to SKL Kommentus AB, a limited company owned by the Swedish Association of Local Authorities and Regions (SALAR). Members of SALAR are Sweden's 290 municipalities and 21 regions.

As part of the company's resource management for public procurements, SKI identifies products and services that present higher risks for people producing or providing them. This **assessment**, conducted by a sustainability strategist, is part of a larger master document (excel spreadsheet), which guides the procurement. If the product or service present risks in the global supply chain, the sustainability strategist assigned to the procurement conducts human rights due diligence. For this due diligence, SKI has developed a process including a Word template, and the aim is to eventually transform this template into software to be shared with SKI's customers, i.e. the 290 municipalities and 21 regions.

SKI's human rights due diligence starts with a **mapping of supply chains** divided into final production (assembly plant), component manufacturing, and raw material sourcing. For this mapping, SKI turns to suppliers for input. In case the product to be procured is part of an existing contract, the supplier may have already provided information as part of the monitoring of the contract (eg Tier 1 suppliers or sourcing countries). If this is not the case, SKI may request the supplier to provide supply chain mapping and risk assessment. This request is administered through the software Worldfavor. In many instances, though, verified information is lacking, and in those cases SKI uses publicly available sources to make assumptions – with regard to raw materials, for example.

In the next step of the human rights due diligence, SKI identifies negative impact based on publicly available information such as MVO Nederland CSR Risk Check, Business & Human Rights Resource Centre, International Trade Union Confederation Global Rights Index, Freedom House's Freedom in the World Report, the US Department of State's Country Reports on Human Rights, Human Rights Watch and Amnesty International's country reports and the US Department of State's Trafficking in Persons Report. The analysis is guided by industry and geography. It takes into account the rights listed in the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights and ILO's core conventions. The last point is critical since human rights due diligence must go beyond traditional workers' rights. SKI also pays attention to vulnerable groups, such as migrant workers and indigenous peoples.

The negative impacts, or the risks, are then ranked according to their severity, and it is this severity assessment that steers the development of award criteria and contract clauses. SKI has also started to use ‘**dialogue issues**’ in the monitoring of contracts. If human rights due diligence highlights a particular risk, this risk is then transformed into a dialogue issue. A recent example is forced labour in the medical glove industry.

#### [Assessing risks and systematising data: an example from the UK](#)

In 2018, the London Universities Purchasing Consortium (LUPC) piloted a system for risk assessment, data systematising and supplier engagement called *Equiano*<sup>48</sup> to develop one of the key elements of due diligence: engaging with suppliers to demand better working practices and monitor working conditions in supply chains. The rationale behind Equiano was creating a public sector-focused system. Industry and commerce, anxious to protect brand reputations as well as boost sales, are known to spend heavily on this activity. The cost of auditing far-off factories and mitigating risks to human rights in complex supply chains is considerable at a time when public authorities face challenging cuts to service budgets. Equiano is designed and built by the public sector, for the public sector, capturing data from suppliers that helps identify the highest-risk areas of spending where targeted risk mitigation can offer the best return from limited resources.

The institutions and local authorities that took part in Equiano were: Institute of Cancer Research, Goldsmith University of London, Cardiff University, Swansea University, Birmingham City Council, Telford & Wrekin Council and LUPC. These contracting authorities invited their suppliers to log on to Equiano and to enter available information about their supply chain, including data about tiers of supply, from raw material to final assembly and distribution. The team engaged with suppliers throughout the process, encouraging them to assess their risks and the responses to such risks. Equiano used the contract management application GatekeeperTM as its operating platform, collecting information from suppliers to help managers determine the dangers of human rights abuses in their supply chains. It supports public procurement professionals, and other managers identify possible risk hotspots – specifically, those suppliers that require further investigation to mitigate the risks of human rights abuses, such as modern slavery or human trafficking, occurring in public supply chains.

In the final stage, the Equiano team prepared individual reports for participants, outlining the finding of each particular supplier of theirs as well as recommended follow-up actions aimed at

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<sup>48</sup>. The project was developed in collaboration with the Business, Human Rights and the Environment Research Group (BHRE) at the University of Greenwich, UK, and the Local Government Association (LGA).

moving towards greater transparency in the supply chains and, most importantly, towards protecting and improving labour conditions. As expected, some sectors are exposed to a higher risk of modern slavery and additional human rights abuses than others. The list is not exhaustive, but the Equiano team identified high-risk suppliers to be those that operate in sectors such as cleaning, security, construction and estates maintenance, IT equipment and electronics, graduation gowns and laboratory consumables (including gloves) and chemicals. Higher risk sectors are usually characterised by low-skilled labour, and hazardous conditions in which the work is performed or the products are produced.

The pilot project took five months, from April to August 2018, and was divided into three stages. Stage 1 was for LUPC and BHRE to appoint the interns, select the participant local authorities and LUPC members, select the higher-risk categories and invite suppliers to submit data. Stage 2 was gathering, processing and analysing information and risk identification. Stage 3 was risk prioritisation, preparation of each report with key recommendations, a summary of lessons learned, and recommendations for the system's improvement.

Following the pilot, the team determined the necessary improvements and the best way to implement in the wider public sector. The project gained attention in the industry and is now in transition to be a collaborative project with another consortium in the UK, the Scottish Advanced Procurement of Universities and Colleagues (APUC). The questionnaire, which is the way information is obtained from suppliers, is under continuous supervision. The interaction of the Equiano team with suppliers went beyond enquiring and collecting data. They interacted with suppliers, encouraging them to assess their risks and responses to them, creating a critical mass of awareness and action among these public sector suppliers, who now better understand the risks they need to work in collaboration with their customers to mitigate, prevent and remediate.

### ***Adequate responses to mitigate and prevent risks including remediating harm – the case for contract management***

When a contracting authority enters into a contract with a supplier, the arrangement must be managed to ensure that the supplier **meets its contractual obligations**. Not managing contracts may lead to dishonest tenderers promising more than they intend to deliver. In contrast, serious and honest tenderers may not win procurements due to their higher costs for complying with requirements. As a consequence, contracting authorities run the risk of not

getting what they pay for, while also rewarding dishonest behaviour and discouraging honest suppliers from participating in procurement processes.

Monitoring of contract requirements is often the only way to determine whether conditions are complied with. End users in the public sector, such as preschool teachers, can rarely detect hazardous substances in toys and other material they use in activities with children. The same argument is relevant for the detection of breaches of ILO's core conventions in the supply chain. A contracting authority cannot assure that taxpayer money is not channelled to suppliers and sub-suppliers who are in breach of human rights unless the contract performance is monitored. Performance management may also help with the implementation of anti-corruption and anti-fraud measures taken in the field of public procurement.

In Sweden, smaller contracting authorities that lack the means to monitor their suppliers accurately benefit from more resourceful organisations moving ahead with performance management. It is furthermore likely that a single point of contact benefits suppliers.

#### Centralised contract management: examples from Sweden

Sweden's 21 regions are responsible for ensuring that all citizens have access to good and well-functioning healthcare, dental care and public transport. The regions procure goods and services worth approximately €14 billion per year. Many of these goods are produced in countries where safe labour and living conditions and environmental impacts are disregarded. To tackle this, the regions have adopted a joint supplier code of conduct and joint requirements for compliance. The regions also collaborate nationally to promote sustainable supply chains throughout eight risk areas: pharmaceuticals, food, instruments, gloves and surgical articles, IT, textiles, bandages and medical technology. The primary responsibility for these eight risk areas is divided between the regions, while a National Office for Sustainable Procurement coordinates the work.

In terms of contract management, the regions coordinate monitoring nationally. This does not mean that follow-ups are limited to direct suppliers, where one rarely finds the highest risk of adverse impact. They apply to all tiers in the supply chain, and it is the responsibility of suppliers to identify where in the supply chain the most severe risks of adverse impact can be found, and then prioritise efforts accordingly. The regions are also quick to respond to well-known issues in the supply chain, and in 2019 they conducted audits focusing on forced labour at three medical glove factories in Malaysia.



To increase leverage and to exchange information and best practices, the regions also cooperate with other public buyers in Sweden and beyond. In 2015, a letter of intent was signed with SKI (mentioned above) and Sykehusinnkjøp (healthcare procurements) in Norway in order to harmonise demands on suppliers, jointly inform suppliers, and share results from audits. The regions also collaborate with the International Working Group for Ethical Public Procurement, launched by the British Medical Association to take advantage of the strength and learning present in collaborative approaches.

As an answer to the Swedish regions' collaboration, and the fact that municipalities also lack resources and competence to follow up on social criteria used in public contracts, SKI started offering a similar support function to all 290 Swedish municipalities in 2011. The support function is a sustainability check called *Hållbarhetskollen*, which provides follow-up via audits in the supply chain on social requirements related to human rights, workers' rights, anti-corruption and environmental issues connected to manufacturing.



*Hållbarhetskollen's* audits are based on nine risk areas: construction and property; vehicles and transport; IT and telecom; offices; schools and leisure; food, furniture and furnishings; cleaning materials and chemicals; health and social care; professional clothing and shoes. Within these nine risk areas, municipalities can submit contracts that they want to be audited to *Hållbarhetskollen*. The audits are then performed in three steps:

1. The supplier responds to a digital *self-assessment questionnaire*, where the supplier describes its routines and attaches verifying documentation.

*Hållbarhetskollen* evaluates suppliers based on six routine requirements (policy commitment, communicating the policy commitment, division of responsibility, risk analysis, monitoring compliance, managing deviations), which are based on the UNGPs. These requirements have been developed together with the regions' National Secretariat for Public Procurement.

2. An auditor conducts an *office audit* at the supplier's head office, where the auditor verifies the self-assessment and performs a more thorough analysis. The result of the self-assessment guides the content and focus of the audit. If the supplier fails in any of the routine requirements, this is a deviation. The deviations can usually be attributed to deficiencies in the division of responsibilities and a lack of understanding of sustainability requirements.
3. An auditor conducts a *factory audit* at the supplier's or sub-supplier's factory in order to monitor the production of a product in the contract. A factory audit is carried out when there are deficiencies in the supplier's routines and their implementation, as this increases the risk that the social requirements are not met in the supply chain. In a factory audit, the auditor assesses the production conditions concerning the contractual obligations, including Article 32 of the UN Convention on the Rights of the Child, ILO's eight core conventions, and national legislation on health and safety at work. The deviations that occur during a factory audit correspond directly to the compliance requirements set in the agreement. Differences in health and safety are the most common.

*Hållbarhetskollen* administers the self-assessments and audits, including engaging auditors, publishing audit reports and ensuring that suppliers take corrective actions. The municipalities are then able to access this information through a digital platform.

At its start, *Hållbarhetskollen* was financed through an annual membership fee. For larger municipalities, the fee was approximately €5000, while smaller municipalities paid far less. However, since 2018 SKI has provided the service free of charge for municipalities and regions. Most follow-ups are one-day *office audits* at the supplier's head office and cost an average of €2300. The cost of a factory audit depends on the location of the factory and the scope and complexity of the audit, and can vary from €5000 to €30,000.

## Publicly report on progress

Recent years have seen a proliferation of regulatory instruments establishing obligations for corporations to scrutinise their supply chain and report on the risks their commercial activities and relationships pose to human rights and the actions taken to address such risks. A plethora of non-financial reporting obligations and specific duties to develop due diligence in the supply chain now exists in different jurisdictions to address the challenges that the current system of global production of goods poses to the rights of those who work in their supply chains or are otherwise affected by it.

Recently, a series of domestic norms have been adopted that develop corporate non-financial reporting and due diligence. The EU has led this trend with its regulations on timber and conflict mineral imports (2010 and 2017 respectively), the Non-Financial Reporting Directive (2014), and current efforts to establish EU wide mandatory due diligence regulation.<sup>49</sup>

### [The UK example: the obligation to report on efforts to combat slavery and human trafficking](#)

The UK's Modern Slavery Act (MSA) establishes obligations on commercial organisations to report annually on their efforts to understand their supply chain and business practices, prevent labour abuses from occurring, and deal with cases where they do occur in its Section 54 (Transparency in Supply Chains). This provision seeks to use **transparency** as a tool to encourage informed business and procurement decision-making and to increase consumer choice by disclosing correct information. It also aims to drive organisations to understand the risks and impacts in their supply chains better. Public buyers in the UK have taken into consideration the way their purchasing practices impact not only those in their communities, but also beyond, in their supply chains, and how the adoption of the MSA has specifically influenced this development. The passing of the MSA has so far only brought an amendment to the Public Contracts Regulation, establishing the conviction for an offence under the MSA as grounds for exclusion of an economic operator from participation in a procurement procedure.<sup>50</sup>

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<sup>49</sup> Martin-Ortega O., Hoekstra J., 'Reporting as a Means to Protect and Promote Human Rights? The EU-Non Financial Reporting Directive', *European Law Review*, vol. 44 no. 5, 2019, 622-645.

<sup>50</sup> Reg. 57(1a) inserted (18.4.2016) by The Public Procurement (Amendments, Repeals and Revocations) Regulations 2016 (S.I. 2016/275), reg. 1(1), Sch. 2 para. 14(2) (with reg. 5).

Public buyers were not the original target of the MSA; however, when the government issued its Guidance on Section 54 it clarified that *“it does not matter if [the organisation] pursues primarily charitable or educational aims or purely public functions”*<sup>51</sup>

This has opened the door to the interpretation that Higher Education Institutions (HEIs) are included among the entities that have to report.<sup>52</sup> Other public contractors have also understood that it is their responsibility to report, and have done so voluntarily. This reinforces the idea that beyond a compliance process, the MSA has brought an opportunity to reflect on institutions’ social impact; in some institutions, the act of reporting, while limited in itself, has started a more substantial process.<sup>53</sup>

The first three years of reporting by public authorities entail a steep learning curve in how to open up supply chains and develop due diligence in their supply chains. Public buyers had no previous experience of this kind of non-financial disclosure and exercising human rights due diligence. Equally, no specific guidance for the public sector had been produced. Therefore, public buyers have had to attempt the process of reporting with little knowledge and understanding of the problem itself, their legal requirements and their social expectations.

The *Slavery and Human Trafficking Statement*, which needs to be published annually, is intended to be a live document based on a process of discovery, commitment and acknowledgement of responsibility within each institution. It is an **organic document** that should reflect a process of due diligence, which deepens every year. The statement is not the outcome. The statement is the vehicle to commence, strengthen and own a sound due diligence process, one that allows institutions to become familiar with the risks their activities pose to human rights. It enables them to modify their practices to prevent such risks, establish procedures to react to violations, mitigate their impact, and when possible, remediate them.<sup>54</sup>

The new requirement under the MSA should be greeted as an opportunity to review existing policies and enhance social and ethical commitments. Public buyers cannot elude their new legal responsibilities towards their supply chains, and their obligations to identify and prevent human rights risks associated with their purchasing decisions are only likely to increase in the future. While reporting is not the panacea and transparency on its own cannot bring meaningful change to current abuses in GSCs, section 54 of the MSA has proved a catalyst for a broader

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<sup>51</sup> UK Home Office, *Transparency in Supply Chains etc: A practical guide* (2014, updated 2017, 8).

<sup>52</sup> Martin-Ortega O. (n. 38).

<sup>53</sup> *Idid*.

<sup>54</sup> Martin-Ortega O. and Davies A. (n. 47).

process of understanding the human rights risks attached to the institution's commercial relationships. Further reporting practice will allow public buyers to develop their due diligence processes and learn the right questions to ask their suppliers and provide the correct answers to their stakeholders.

In order to make reporting an effective tool for change in policy and practice within institutions, thereby rendering these a key element in the efforts to protect human rights in the supply chain, it is necessary to have clear obligations and clear guidance. The UK Government is now considering an extending the requirement to report to public buyers after an independent review recommended it in 2019.

## **8. Promotion of new technologies to foster SPP – the example of BIM in the construction sector**

Information and Communications Technology (ICT) is no longer a specific sector, but the foundation of all modern innovative economic systems. Such changes should also apply to the public procurement market, since, as the Commission acknowledged, public procurement matters now more than ever,<sup>55</sup> and Europeans expect a fair return on their taxes in the form of high-quality public services and increased investment in smart and sustainable cities with squares and playgrounds and high-quality infrastructure.<sup>56</sup> One technology the Building Information Modelling holds the promise of making our buildings more sustainable:

- a) from an environmental perspective (through improved design processes, better and earlier design decisions on the building's energy impact better, and Environmental Impact Assessment tools)
- b) from a social perspective (through better design, avoidance of disputes, and better response to specific clients' needs), and
- c) from an economic perspective (through tools that can better calculate the LCC of a built asset).

The construction sector is the slowest to go digital, but at the same time it is the sector that most needs digitalisation. This is crucial as the data shows that in the last ten years, in majority of Member States, the most significant amount of public money was spent on public works

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<sup>55</sup> Commission's Communication to the Institutions, 'A Digital Single Market Strategy for Europe', COM (2015) 192, final.

<sup>56</sup> Commission's Communication (n.5).

(e.g. €113 billion in Germany, €4 billion in Denmark, and €30 billion in Romania).<sup>57</sup> Many of the challenges in the construction sector – poor commercial interfaces, breakdowns in supply chain communications, inefficient work processes – are due to information problems and can be solved through information technology. Furthermore, the construction sector, including its clients, is highly fragmented both in terms of process as well as knowledge management. It relies on ad-hoc improvements from one project to another rather than on systemic reform proposals for improvements.

The industry and the Commission began acknowledging that Building Information Modelling (BIM), combined with more collaborative types of contracts, has the potential to solve the above-mentioned challenges. BIM is one of the technologies that hold the promise of digitising the construction sector. Building Information Modelling is a disruptive digital tool that provides all the stakeholders in a construction project with a digital representation of a building's characteristics throughout its entire life cycle, thereby holding out the promise not only of significant efficiency gains, but also sustainable progress.

Many Member States have already taken irreversible steps towards digitising their construction sector. They are bringing BIM into the public works sector by making this technology mandatory for high value public-funded construction projects. Meanwhile, the EU is following through the actions of the EU Task Group. The EU BIM Task Group has already published a Handbook, which contains: '*common principles for public procurers and policymakers to consider when introducing BIM to their public works or strategies*'<sup>58</sup>

The Handbook also provides a central reference point for the introduction of BIM by the EU public sector, and equips government and public sector construction clients with the knowledge to provide the necessary leadership to its industrial supply chain.<sup>59</sup>

The variety of ways in which BIM can be defined shows its many facets. BIM is a technology or a digital representation of a building. Still, it is a process that applies to all aspects of the building construction – from the design to the estimations, the supply chain, the delivery of goods during the build process, the resource allocation, and to the contract performance. It has been already widely acknowledged that BIM can bring a variety of improvements to the construction sector. Inter alia, BIM may improve design and ease of access to project information, coordinate construction documents in order that they remain up-to-date

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<sup>57</sup> See for all Member States here: <https://opentender.eu/dk/dashboards/market-analysis>

<sup>58</sup> EUBIM Task Group Handbook.

<sup>59</sup> Ibid.

throughout the project, shorten construction times and introduce long-term efficiencies. In BIM, models are intended to facilitate the re-use of processes and information, allowing for improved access to information throughout a building's life. The Commission forecasts that the broader adoption of BIM will unlock 15–25% savings to the global infrastructure market by 2025.<sup>60</sup>

A somewhat recent topic in literature, however, deals with the benefits that BIM can bring in terms of sustainability, whether we refer to the social aspect of the concept of sustainability, or its economic or environmental component.

### **BIM and social sustainability**

The multidimensionality of the concept of social sustainability leads to different goals being achieved in different contexts. In the construction context, BIM's main potential relates to the goal of '*accessibility for all*' since this technology allows for improved design tools and better adaptation to the client's needs. Early involvement of the supply chain, as well as a collaborative construction process, also entails a better adjustment of the future asset to the specific sustainability goals pursued by contracting authorities.

The technology's prospects as far as increased accountability can also help the monitoring and enforcement of labour policies on public contracts, namely, protection of human rights and labour rights during contract performance.

Another vital component of BIM's social sustainability advantages refers to its change of paradigm in the construction sector, from an adversarial reality into an industry driven by partnerships and collaboration. The implementation of BIM transforms conventional fragmented practice into a better collaborative effort that strengthens the working relationship among project participants, including stakeholders. It influences the standard way of collaboration, including the roles of different participants. One of the most challenging values in the construction industry is trust, and this is precisely what BIM tackles. It allows past and future stakeholders and participants in a construction project to stay in contact and, most importantly, to be transparent and accountable in a rapid and cost-effective way.<sup>61</sup> By tackling the adversarial culture that is typical of the construction project, BIM makes it more socially sustainable. With BIM, one is not only able to deliver an asset that is better adapted to the client's needs – BIM also helps to avoid disputes during and after the construction of the asset

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<sup>60</sup> Ibid.

<sup>61</sup> Ahmad M., 'Collaboration Impact on the Performance in Construction Projects: Case Study Selangor Malaysia', IJSART - Volume 4 Issue 1 – January 2018.

since it acts both as a forecasting tool for later claims and a rapid response system to prevent, manage and resolve disputes.<sup>62</sup>

### **BIM and environmental sustainability**

The construction industry's energy use represents about 40% of total energy consumption.<sup>63</sup> It is argued that buildings are the most significant source of carbon emissions and energy consumption around the globe. A reduction in the construction industry's energy consumption is, therefore, essential to the achievement of future emissions goals.

The most effective decisions related to sustainable design of a building facility are made in the early design and pre-construction stages. Traditional Computer Aided Design (CAD) planning environments do not support the possibility of such early decisions, but BIM can.<sup>64</sup> Key to the reduction of carbon emissions is the ability to perform complex performance analysis focusing on environmentally low-impact design. The energy aspects of buildings depend on the early design process, since better design decisions can reduce the energy consumed by a building by 80% (by optimising orientation, building shape, insulation and ventilation in the design process<sup>65</sup>). This is precisely BIM's potential.

Empirical studies have recognised two primary ways of using BIM with energy modelling: (i) as a design tool that employs an iterative design process in conjunction with (ii) feedback from the energy model to develop energy-efficient design iterations.<sup>66</sup> In other words, BIM helps at the pre-construction phase as well as throughout the use of the asset.<sup>67</sup>

The potential of BIM for sustainability goals goes further since it also allows clients to take more economically sustainable goals through better Life-Cycle Calculation methods. Studies show that the creation of an artefact embedding Life-Cycle Calculation with 5D BIM technology has great potential.<sup>68</sup> Such Life-Cycle Calculation tools could also be combined with Environmental Impact Assessment (EIA) tools. Once the interoperability issues are overcome, the impact that these technologies can have on sustainable building cannot be underrated.

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<sup>62</sup> Mosey D., *Collaborative Construction Procurement and Improved Value*, (Wiley Blackwell, 2019).

<sup>63</sup> Commission Report: 'Building Information Modelling (BIM) standardization', 2017.

<sup>64</sup> Ibid.

<sup>65</sup> Dummenahally N., 'Building Information Modeling for Green and Energy Efficient Buildings Design', *International Journal of Innovative Research in Science, Engineering and Technology*, Vol. 5, Special Issue 9, May 2016.

<sup>66</sup> Ibid.

<sup>67</sup> Ibid.

<sup>68</sup> Kehily D., Underwood J., 'Embedding Life Cycle Costing In 5d Bim' *Journal of Information Technology in Construction* - ISSN 1874-4753, 2017.

The EU Public Procurement Directives allow contracting authorities to use BIM technology, but do not go further. Article 22 (4) under the Directive 2014/24/EU reads that:

*Member States may require the use of specific electronic tools, such as building information modelling tools or similar.*

But it does not add any further detail. The soft law instruments and policy papers drafted by the Commission, such as the BIM Handbook mentioned earlier, are also welcome, but are nevertheless insufficient. It would, therefore, be recommendable for the Commission to push for the use of BIM in the public works sector through enforceable acts or, at least, help raise awareness of BIM's potential for reaching sustainable goals amongst contracting authorities.

## **PART 3 REGULATORY IMPROVEMENTS**

### **9. Giving effect to Article 18(2) Directive 2014/24/EU**

The Commission did question the voluntary structure of the Directives in its 2010 Green Paper during the lead-up to the 2014 EU Public Procurement Directives. The Commission confirmed that the public procurement rules at the time focused on 'how to buy' and did not impede the discretion of contracting authorities to depict 'what to buy'.<sup>69</sup> This Green Paper aimed to inquire from relevant stakeholders if this structure should change in light of the need to achieve the Europe 2020 objectives. At the time, the majority of respondents were in favour of clarifying and expanding possibilities rather than introducing mandatory requirements due to, amongst other things, a feared heightening of administrative burdens and loss of discretion.

Despite the outcome of the consultation discussed above, Article 18(2) Directive 2014/24/EU does contain a mandatory requirement related to sustainability and public policy objectives. This provision was introduced as a tool to 'ensure ethical sourcing, fight social dumping and force compliance with environmental laws in the context of public procurement'.<sup>70</sup> Article 18(2) states 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*

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<sup>69</sup> Commission, Green Paper on the modernisation of EU public procurement policy towards a more efficient European Procurement Market, Brussels, 27.1.2011, COM (2011) 15 final, 34.

<sup>70</sup> Andhov M., 'Contracting Authorities and Strategic Goals of Public Procurement – A Relationship Defined by Discretion?', in Bogojević S., Groussot X., Hettne J., *Discretion in EU Public Procurement Law*, Hart Publishing: Oxford, 2018, 128.

*agreements or by the international environmental, social and labour law provisions listed in Annex X.*

Currently, it is unclear what ‘shall’ means and ‘appropriate measures’ entails, thereby hampering its potential effect in practice. Furthermore, it is unclear if contracting authorities are currently equipped to enforce this provision as they would face substantial obstacles should, for instance, the entire supply chain of a product need to be held to the standards of this provision.<sup>71</sup>

Article 57 Directive 2014/24/EU allows – but does not direct – contracting authorities to exclude any economic operator from participation in a public procurement procedure if the authority can demonstrate by any appropriate means that a violation of the applicable obligations referred to in Article 18(2) has occurred. Contrarily, mandatory exclusion of an economic operator must follow based on Article 69 Directive 2014/24/EU if the violations of the rights referred to in article 18(2) result in an abnormally low tender:

*Contracting authorities shall require economic operators to explain the price or costs proposed in the tender where tenders appear to be abnormally low in relation to the works, supplies or services.*

This relevant explanation can also include compliance with Article 71 of Directive 2014/24/EU on sub-contracting, which also refers to Article 18(2).

If one reads the directive cynically, the duty to exclude follows a low price, not the breach of one of the SPP obligations relevant under Article 18(2). This should be remedied, and Article 57 should be amended to the effect that a proven breach of Article 18(2) should always lead to the exclusion of the concerned economic operator, in the same way as breaches of obligations relating to the payment of taxes or social security contributions under Article 57(2) of Directive 2014/24/EU.

In the meantime, as outlined in Section 7, the monitoring and sharing of information is crucial to make contracting authorities aware of breaches possibly amounting to **grave professional misconduct** under Article 57(4)(c).

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<sup>71</sup> In the Netherlands, for example, this has been implemented through article 2.81 Aanbestedingswet 2012, which requires in terms of environmental requirements that (1) contracting authorities ensure that economic operators know where to find the specific applicable requirements, and (2) that these contracting authorities ensure that economic operators ‘took into account’ these requirements whilst drafting their bids.

## 10. Removing the requirement of ‘link to the subject-matter’ of the contract

### The L2SM’s first steps

The Court of Justice developed the ‘*link to the subject-matter of the contract*’ concept (L2SM) in its case law regarding the possibility of including environmental considerations in award criteria for public contracts. In the well-known *Concordia* case,<sup>72</sup> the Court held it is possible

*provided that they are linked to the subject-matter of the contract, do not confer an unrestricted freedom of choice on the authority, are expressly mentioned in the contract documents or the tender notice, and comply with all the fundamental principles of Community law, in particular, the principle of non-discrimination.*<sup>73</sup>

Through the ruling, the Court opened the door to green procurement award criteria, and L2SM featured among the counterweights to this opening in order to make sure that green criteria were not used to discriminate among economic operators.

The L2SM made its way to Directive 2004/18/EC while *Concordia Bus* was referred to in Recital 1, Article 53(1) on contract award criteria provided that, when the award was made to the MEAT, the contracting authority might refer to ‘*various criteria linked to the subject-matter of the public contract in question*’, including ‘*environmental characteristics*’. The ‘objectivity criterion’ was at the centre of *EVN Wienstrom* case decided soon after *Concordia Bus*.<sup>74</sup> The Court held that the principle of equal treatment implies ‘*that tenderers must be in a position of equality both when they formulate their tenders and when those tenders are being assessed by the contracting authority*’.<sup>75</sup> As a consequence,

*where a contracting authority lays down an award criterion indicating that it neither intends nor is able to verify the accuracy of the information supplied by the tenderers, it infringes the principle of equal treatment, because such a criterion does not ensure the transparency and objectivity of the tender procedure.*<sup>76</sup>

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<sup>72</sup> Case C-513/99, *Concordia Bus* [2002] ECR I-7213.

<sup>73</sup> *Ibid* para 64.

<sup>74</sup> Case C-448/01, *EVN and Wienstrom* [2003] ECR I-14527.

<sup>75</sup> *Ibid* para 47.

<sup>76</sup> *Ibid* para 51; see also, concerning another element of uncertainty in the tender invitation we don’t need to discuss here, paras 56 ff.

## L2SM and Directive 2014/24/EU

In the 2014 reform, the L2SM has been replicated with reference to almost all procurement phases (qualification being an exception, as discussed further on). Taking Directive 2014/24/EU as the reference point, the L2SM is required regarding (a) technical specifications; (b) labels; (c) variants; (d) award criteria, including life-cycle costing (LCC), and (e) contract performance conditions.

The nucleus of the notion of L2SM is given by the *'works, supplies or services to be provided under that contract'*. However, production processes (and processes relating to other stages of the life cycle) are also covered under the L2SM, provided they 'relate' to the nucleus. In a way, *'related'* is said to explain *'linked'*, but this pushes the problem one step down the road without solving everything.<sup>77</sup>

As *EVN Wienstrom* and *Max Havelaar* cases have held, neither the production nor the other processes need to affect the material characteristic of the *'nucleus'*.<sup>78</sup> Electricity is electricity, but contracting authorities may prefer electricity from renewable sources – the same applies to coffee etc.

## Time to step away from L2SM

While the circumstances of the *'invention'* of the L2SM are clear, after more than a decade, its precise meaning is not. This in itself may have a chilling effect on contracting authorities otherwise ready to buy sustainably, but averse to litigation risks. It is suggested that the **L2SM is abandoned in favour of the more precise concept of the life cycle.**

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<sup>77</sup> Rec. 97 gives some instances of what may be considered L2SM: *'Criteria and conditions referring to such a production or provision process are for example that the manufacturing of the purchased products did not involve toxic chemicals, or that the purchased services are provided using energy-efficient machines. In accordance with the case-law of the Court of Justice (..), this also includes award criteria or contract performance conditions relating to the supply or utilisation of fair trade products in the course of the performance of the contract to be awarded. Criteria and conditions relating to trading and its conditions can, for instance, refer to the fact that the product concerned is of fair trade origin, including the requirement to pay a minimum price and price premium to producers'*. Rec. 97 also provides a negative example of unacceptable criteria. It explains that the L2SM condition 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'*.

<sup>78</sup> Case C-368/10 Commission v. Kingdom of the Netherlands [2012] ECR I-284.

Today, L2SM seems inextricably linked to the life cycle of the relevant good or service,<sup>79</sup> while the notion of the life cycle is autonomous from L2SM and much less ambiguous, being expressly defined in Directive 2014/24/EU under Article 2(20):

*'Life cycle' means all consecutive and/or interlinked stages, including research and development to be carried out, production, trading and its conditions, transport, use and maintenance, throughout the existence of the product or the works or the provision of the service, from raw material acquisition or generation of resources to disposal, clearance and end of service or utilization.*

Article 68 on LCC mostly mimics Article 2(20), and also refers to climate change.<sup>80</sup> Link to subject-matter is not expressly used. Only when regarding 'environmental externalities' does Article 68(2) specify that it is required that they are '*linked to the product, service or works during its life cycle*'. In this way, the link encompasses both the good or service sought and its life cycle.

For reasons of clarity and to enhance SPP, it is recommended that the L2SM is abandoned and reference in Articles 42, 43, 45, 67, 678 and 70 of Directive 2014/24/EU is made to '*the product, service or works during (or and) its life cycle*' rather than to the L2SM.

The objectivity criterion must take the central role in safeguarding equal treatment. Whether pertaining to the good or service purchased or to its life cycle, sustainability claims must be substantiated and proven. This is already clear concerning labels (Article 43(1)(b)) and, implicitly, regarding technical specifications as well (Article 42). According to Recital 92, the award criteria should allow '*for a comparative assessment of the level of performance offered by each tender in the light of the subject-matter of the contract, as defined in the technical specifications*'.

Any possible residual – and arguably inflated – risk that reference to '*research and development to be carried out, production, trading and its conditions, transport, use and maintenance*' might be used to discriminate among economic operators may be addressed under Article 18(1), which is of general application throughout all phases of the procurement process.

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<sup>79</sup> Art. 67(3) but also 42(1) and 70 Directive 2014/24/EU.

<sup>80</sup> Martinez Romera B., Caranta R., 'Purchasing Beyond Price in the Age of Climate Change' in *EPPPL*, 3/2017, 281-292.

## 11. Allowing selection based on sustainability criteria, including CSR

Corporate social responsibility (CSR) is a type of international private business self-regulation where a company takes responsibility for the impact of its business on the environment, society, and employees while striving for economic success.

Under the current EU Public Procurement Directives, consideration of general CSR policies in public tenders is prohibited (Rec. 97 and Rec. 104).<sup>81</sup> Abandoning L2SM will not in itself allow reference to CSR, since CSR still refers to the seller rather than to the good or service acquired and its life cycle. This begs the question why reference to CSR should be outlawed in the first place. Several answers concur.

The first comes from history. An early attempt to use public procurement to achieve wider societal goals saw some English municipalities boycotting firms doing business with Apartheid South Africa. The irony is that those policies came under the '*linkage*' word.<sup>82</sup> These attempts, however, spurred a politically motivated reaction calling only for the use of economic considerations in public procurements. This retrograde stance was, however, ditched for good in *Concordia Bus*.

The second answer comes from the way public procurement is traditionally articulated, sharply distinguishing between questions about the tenderer and questions about the tender and the goods and/or services being tendered. Qualification is about the bidder. Technical specifications, award criteria, and contract performance conditions are about the bid and the goods and/or services tendered. The different questions should not be mixed. This is why the case law resisted attempts to consider experience in award criteria for so long. Experience was considered to belong to selection and qualification. The 2014 directives have, however, abandoned this rigid distinction, and with certain qualifications, the tenderer's experience may be considered in the award criteria. Under Article 67(2)(b) '*organisation, qualification and experience of staff assigned to performing the contract, where the quality of the staff assigned can have a significant impact on the level of performance of the contract*' are permissible award criteria.

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<sup>81</sup> Andrecka M., '*Corporate Social Responsibility and Sustainability in Danish Public Procurement*' in 3/2017 *EPPPL*, 333-345.

<sup>82</sup> McCrudden Ch., *Buying Social Justice. Equality, Government Procurement, & Legal Change* (Oxford, 2007).

Therefore, the only standing reason for not allowing reference to tenderers' CSR is a deliberate policy choice to **avoid engaging** with the increasingly widespread uptake of CSR tools in industry. It is suggested that this should be abandoned, treating CSR the same as quality assurance standards and environmental management standards allowed under Article 62. It is to be noted that Article 62 indeed pertains to selection and qualification and there is no reason – if not a political cause – why it should not be widened. Article 62 itself includes safeguards against using quality assurance standards and environmental management standards for discrimination purposes, which add to those provided in Article 18(1).

## **12. Introducing mandatory sustainability requirements in the EU public procurement directives**

Since their adoption in 2014, it has been widely accepted that the EU Public Procurement Directives offer various *possibilities* for contracting authorities to purchase goods, works, and services with broader public policy objectives in mind, including the environmental and social considerations. Depending on the type of procurement, specific procedural stages, including technical specifications, award criteria, labels, exclusion grounds, and the contractual conditions, can be used to create a positive effect on the environment through public procurement. The directives provide contracting authorities with ample opportunities to shape their public procurement procedures with sustainability and social objectives in mind. However, the structure of the legal framework *enables*, but does not *mandate*, contracting authorities to include public policy objectives in their public procurements.

### **Developing SPP rules in line with Article 11 TFEU**

The EU Public Procurement Directives regulate how to buy and the procedures to be followed in purchasing goods and/or services. Those directives do not set quality or, more specifically, sustainability standards on what to buy. This is the task for EU sectoral legislation.

Article 11 TFEU requires that

*'Environmental protection requirements must be integrated into the definition and implementation of the Union's policies and activities, in particular with a view to promoting sustainable development.'*

Up until now, this provision has been viewed as a recognition of the importance of protecting the environment, yet what it requires remains unclear. It is questionable if it constitutes a

mandatory obligation for contracting authorities to integrate sustainability objectives. Importantly, the provision refers to EU institutions, which execute the policies and activities of the EU, not contracting authorities.

Various sector-specific EU mandatory requirements exist. For instance, requirements exist for contracting authorities to demand a certain level of energy efficiency in their public contracts.<sup>83</sup> A recently revised Directive has introduced obligations on contracting authorities to take energy or other environmental impacts into account in their public procurement decisions for vehicles.<sup>84</sup> Another Directive streamlines definitions and related rules on accessibility requirements of products and services.<sup>85</sup> Less stringent is the call to the public sector to play an exemplary role in the field of energy efficiency by adopting a minimum number of energy-efficient procurement measures<sup>86</sup> or the call to promote resource-efficient public buildings.<sup>87</sup> These regulatory measures display a patchwork of legislation that is sector-specific and differs in intensity.

It is submitted that Article 11 TFEU provides the basis for more comprehensive and demanding EU sectoral legislation.

### **Future pathways to mandatory sustainability requirements**

Mandatory sustainability requirements in the EU Public Procurement Directives can make a substantial contribution to achieving sustainability in the EU. If all EU public procurement is geared towards the common purpose of sustainability, this increases the likelihood that EU-wide and national objectives on these topics are, in fact, achieved, both within and outside the procurement context. Effective SPP requires reforms to be put into place that move public procurement rules beyond possibilities and towards obligations. Mandatory SPP promotes increased information availability in the market, greater standardisation, and more efficient procurement processes for contracting authorities. It is also likely to increase market demand,

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<sup>83</sup> Regulation (EC) No 106/2008 of the European Parliament and of the Council of 15 January 2008 on a Community energy-efficiency labelling programme for office equipment (L 39/1).

<sup>84</sup> Directive 2009/33/EC of the European Parliament and of the Council of 23 April 2009 on the promotion of clean and energy-efficient road transport vehicles.

<sup>85</sup> Directive 2019/882 of the European Parliament and of the Council of 17 April 2019 on the accessibility requirements for products and services.

<sup>86</sup> Directive 2006/32/EC of the European Parliament and of the Council of 5 April 2006 on energy end-use efficiency and energy services and repealing Council Directive 93/76/EEC.

<sup>87</sup> Directive 2009/28/EC of the European Parliament and of the Council of 23 April 2009 on the promotion of the use of energy from renewable sources and amending and subsequently repealing Directives 2001/77/EC and 2003/30/EC and Directive 2010/31/EU of the European Parliament and of the Council of 19 May 2010 on the energy performance of buildings *OJ L 153, 18.6.2010*.

increase innovation and lower the cost of more sustainable products and services.<sup>88</sup> In addition, there are implementation benefits to EU-wide standards creating EU incentives for a race to the top for SPP. Ultimately, mandatory SPP reform will need to come from the EU or its Member States in order to create market demand and define specific LCC methodologies for all product areas.

Of course, mandatory requirements at the EU level limit the discretion of contracting authorities and increase the opportunities for economic entities and, perhaps, environmental NGOs to challenge procurement decisions, thus pushing further the uptake of SPP. The following describes possible future actions to reinforce mandatory requirements in (or relating to) the EU Public Procurement Directives.<sup>89</sup>

- ***Mandatory minimum targets***

The EU legislature should introduce minimum targets, meaning that a certain percentage of public procurement must contain some type of sustainability criteria in the public procurement procedure, with a phase-in provision requiring 100% by a certain date. This would require the development of EU-wide standardised sustainability criteria in specific product and service categories to measure if these targets are achieved.

Member State national purchasing agencies (e.g. Swedish National Agency for Public Procurement) are already beginning to develop such criteria (often relying on the technical criteria underlying various eco-labels). Progress in Sweden suggests that any target should be set high, and the date for 100% mandatory inclusion of sustainable considerations for all tenders should come quickly. Over five years ago (2013), 70% of all Swedish government tender offers stipulated environmental requirements.

In the Netherlands, targets have also been used as a means to spur SPP on. In 2007, the Dutch national government committed itself to making its procurement activities 100% sustainable by 2010. The provinces and water boards similarly committed to an objective of at

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<sup>88</sup> Report from the Commission to the European Parliament and the Council 2017 assessment of the progress made by Member States towards the national energy efficiency targets for 2020 and towards the implementation of the Energy Efficiency Directive as required by Article 24(3) of the Energy Efficiency Directive 2012/27/EU COM (2017) 687 final; Commission and JRC Science for Policy Report, Synthesis Report on the National Plans for Nearly Zero Energy Buildings (NZEBS): Progress of Member States towards NZEBs, 2016; Commission Staff Working Paper Executive Summary of the Impact Assessment – Accompanying the document Directive of the European Parliament and of the Council on energy efficiency and amending and subsequently repealing Directives 2004/8/EC and 2006/32/EC COM (2011) 370 final SEC(2011) 779 final.

<sup>89</sup> Arguably, these changes would require adding Article 11 to Article 114 TFEU as legal basis of these Directives, whilst still taking into account the division of competences between the European Union and its Member States.

least 50%, and the municipalities to at least 75%, which was to be increased to 100% in 2015. Most of these targets were, however, not achieved, and sparked the more recent *Maatschappelijk Verantwoord Inkopen (MVI)* manifesto of 2016, which has been signed by over 100 Dutch contracting authorities.<sup>90</sup> This approach is less focussed on targets, but more on getting MVI plans set up internally in contracting authorities, thereby being more process-oriented than target-oriented.

- ***Explicit objective of the public procurement directives***

The achievement of sustainability targets should be added to the aims of the Public Procurement Directives right in Recital 1. Referring only to the achievement of internal market related principles undermines the same idea that strategic objectives are equally important for public procurement. This could potentially provide a more functional interpretation of the legal possibilities granted by these Directives, thereby providing even more leeway in a legal sense.

- ***General mandatory sustainability requirement***

The EU legislature and, in any case, the Member States, could introduce a general obligation always to procure sustainable outcomes within the structure of the EU Public Procurement Directives in an effort to lower the costs and information burdens of SPP. Furthermore, it could further specify the requirement under Article 18(2) Directive 2014/24/EU with a particular focus on what ‘*shall*’ means and ‘*appropriate measures*’ entails. Alternatively, the EU could also make it explicit to the Member States that they can make SPP mandatory.

There is relevant experience on the Member State level with general mandatory requirements. Slovakia requires that ‘*social aspects*’ be considered in some contracts, though environmental considerations are not included. Social aspects include decent, fair, and satisfactory working conditions, inclusion of disadvantaged, vulnerable, or excluded persons and groups of people in social relations, and simplifying their access to the labour market. In Denmark, central government entities and municipalities are subject to a ‘*comply or explain*’ (*følg eller forklar*) principle that obliges these entities to use social clauses on training and apprenticeships agreements in relevant procurements (eg construction projects), or to explain why they decided not to apply social clauses. Other government authorities and government entities, such as wholly owned public companies, must apply labour clauses for contracts in the construction

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<sup>90</sup> Manifest *Maatschappelijk Verantwoord Inkopen*, 2016.

sector.<sup>91</sup> In the Netherlands, a general requirement for contracting authorities exists in Article 1.4(2) Aanbestedingswet 2012 (Dutch Public Procurement Act 2012) to create ‘as much societal value as possible for public expenditure’ (*zo veel mogelijk maatschappelijke waarde voor de publieke middelen*). The focus of this provision is on achieving the best price and quality through tailor-made procurements.<sup>92</sup> However, there is considerable debate as to what aspects of sustainability ‘societal value’ may or may not include, thus leaving contracting authorities the challenging task of defining the term. In Norway, contracting authorities are obliged by law to create a strategy document detailing their approach to SPP. Still, it is unknown to what extent this requirement is enforceable in the courts. In Germany, following enactment of the 2014 procurement reforms, many States (*Länder*) included provisions in their procurement regulations obliging bidders to adhere to collective agreements, and to train apprentices, support women and families, and pay minimum wages.<sup>93</sup>

- **Specific mandatory requirements**

The EU legislature could include specific mandatory requirements in public procurement, including (1) creating user-friendly procedures and mandatory criteria for individual products and services, (2) installing a hierarchy of award criteria, (3) embracing eco- and social-labelling, (4) standardising methodological tools, (5) using ledger-based technologies.

(1) The EU legislature should introduce more effective and user-friendly procedures, tools and technologies for contracting authorities to engage in SPP effectively. Going further, the EU legislature (or individual Member States) could introduce mandatory requirements or criteria relating to the characteristics of the goods or services. Accordingly, this could include maximum levels for energy and resource use, harmful environmental substances, or minimum levels of recycling. In Italy, there are government-mandated minimum environmental criteria for a number of product and service categories.<sup>94</sup>

(2) Furthermore, it should introduce a hierarchy of possible award criteria mentioned in Article 67 Directive 2014/24/EU with a preference for awards based on the lowest LCC, or make the

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<sup>91</sup> Finance Act 2013 and the agreements on municipalities and regions’ finances for 2014. Accessible via: <https://www.kfst.dk/media/53506/vejledning-om-sociale-klausuler-i-udbud.pdf> (last accessed: 15 October 2019).

<sup>92</sup> It has been difficult, however, for economic operators to use this provision before the Courts. Predominantly, the Courts have referred to the use of award criteria as being sufficient to fulfil this duty of care: Janssen W.A., Bouwman G., ‘Legislating societal value into Dutch Public Procurement Law’, *Public Procurement Law Review* 2020/2, 91-102.

<sup>93</sup> See Sack D. S. Thorsten., Sarter, K. E., Böhlke N., *Öffentliche Auftragsvergabe in Deutschland: Sozial Und Nachhaltig?* Baden-Baden: Nomos Verlagsgesellschaft Mbh & Co (2016).

<sup>94</sup> Article 34 of 2016 Italian Public Contracts Code [Criteri di sostenibilita’ energetica e ambientale].

use of LCC mandatory. For instance, in the Netherlands, Article 2.114 Aanbestedingswet 2012 (Dutch Public Procurement Act 2012) obliges contracting authorities to justify awards based on lowest price. However, this includes awards based on the lowest LCC. This creates an extra obstacle to award based on LCC for Dutch contracting authorities. Such a hierarchy could also include restricting the use of the lowest cost option. Contracting authorities should be required to combine economic, social and environmental elements in their procurement decisions. This implies that EU law could explicitly restrict the use of price-only and cost-only assessment or, at the very least, restrict it to specific cases such as highly standardised products that do not leave room for quality assessment.

If the lowest price option is maintained, contracting authorities should be able to apply the lowest price or the lowest cost as the sole criterion only in duly substantiated exceptional cases, in particular involving highly standardised products, while other safeguards should ensure that environmental protection requirements have been considered in the procurement process (eg in technical specifications).

Under the current legal framework, environmental considerations risk being left out of the equation entirely if the lowest-price criterion is chosen for the award of the contract. When the lowest-price criterion is chosen, potential tenderers are likely to cut down costs to the detriment of environmental protection standards, as environmental externalities and degradation are not taken into consideration. Allowing contracting authorities to opt for the lowest-price option – with no safeguards to ensure that environmental protection requirements are fulfilled – is not desirable. It could also be argued that it follows from Article 11 TFEU that the lowest-price option for awarding public contracts must be entirely abandoned.<sup>95</sup>

(3) Before invoking mandatory LCC, the EU legislature should make the implementation process more accessible by fully embracing eco- and social labelling in SPP in order to make purchasing decisions far simpler for contracting authorities. This would allow contracting authorities to rely directly on eco-labels that are now beginning to incorporate LCC methodologies. Thus, EU Public Procurement Directives may need revision to allow for contracting authorities to require third-party certified labels rather than just evidence of meeting technical criteria (ie, a move further than the CJEU decision in *Max Havelaar*).

(4) To make LCC a first-choice preference or mandatory, the introduction of standardised LCC measuring tools is required. LCC tools should seek to be easily understood and easy to use.

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<sup>95</sup> ClientEarth, 'Procuring best value for money. Why eliminating the 'lowest price' approach to awarding public contracts would serve both sustainability objectives and efficient public spending' 3, 4 (2012).

Mandatory SSP will lead to standardisation in LCC methods, including data generation and transfer, measurement, pricing, and common vocabulary. One of the main problems associated with costing is that life-cycle assessment tends to be based on aggregate, generic modelling. To cost properly requires knowing precisely the flow of commodities, the cost of processing, and the cost of consuming. This requires improved technology, standardised data gathering and transfer techniques, and consistent valuation methodology, with the challenge being how to cost out future benefits based on abating current environmental costs. Creation of such standards is a long-term goal, and is necessary for LCC methodology and for making broad-based SPP a reality. The EU could become a leader in developing LCC tools so there is not a patchwork quilt of local or private tools that favours local companies or entrenched industry actors that would lead to discrimination or lack of innovation.

(5) We suggest the development of a ledger-based technological tool to support a high degree of compliance with mandatory SPP rules. To further national and EU efforts on informing, training and guiding public procurers in a dynamic manner, the existing best practices and guidelines should be readily available and easily accessible to procurers across Europe, enabling compliance with mandatory rules while simultaneously incentivising the amelioration of current SPP guidelines. To that effect, a distributed-ledger technology<sup>96</sup> could be used to mitigate three potential hurdles of inserting mandatory requirements into the public procurement framework, namely maintaining or ameliorating institutional quality in public purchasing,<sup>97</sup> fulfilling the need for practical support for creating tenders that entail environmental and social considerations,<sup>98</sup> and mitigating the legal risks that SPP entails for public procurers.<sup>99</sup> As an additional spillover effect, access to tender procedures for Small and Medium-sized Enterprises could be enhanced due to the transparency effects. Pre-emptively improving compliance with mandatory requirements in SPP, the present achievements on SPP would thereby be preserved and furthered.

Besides representing a one-stop-shop for best SPP practices and guidelines, in order to incentivise further amelioration and developments in the field, the envisaged tool would need to allow for decentralised modification of data that is easily traceable to the modifying authority. Due to this need (and the fundamental need for transparency) of public officers being able to

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<sup>96</sup> Astri. Whitepaper on Distributed Ledger Technology Platform for Business Innovation. 2018; OECD Observatory of Public Sector Innovation, Blockchain and its Use in the Public Sector 2018.

<sup>97</sup> See Mélon L. and Spruk R., 'The impact of e-procurement on institutional quality' Working Paper AEDE 2019 Annual Conference.

<sup>98</sup> See Mélon L., 'More than a nudge? Arguments and tools for mandating green public procurement in the EU' Working paper, SMART Conference on Corporate Sustainability Reforms 2019.

<sup>99</sup> Ibid.

add and modify best practices to the database without the need to pass through a central authority, ledger-based technology could prove helpful. Creating such a database, one that provides accessibility while simultaneously encrypting sensitive business information and allows tracking of the development, could enhance the efforts of SPP implementation. While the initial investment of creating such a database would arguably not be negligible, once developed, this tool would allow for more efficiency in terms of impact, time and monetary resources used to facilitate SPP. Not only EU officials, but also national, regional and local authorities could cooperate in building this vast database of knowledge simultaneously. The information inserted could be easily traced back to the responsible authority, which is itself interested in preserving its best practices for further procurement processes, thereby facilitating the quick and easy creation of future '*sustainable*' tenders. In other words, since it could be doubtful that there would be ample interest in public authorities undertaking additional activities in the form of ledger-based technology tool creation for others to engage in sustainable public procurement, the benefits of having an easy-to-use tool for their future '*sustainable*' tenders could provide sufficient incentives to engage in such an activity.

The proposed tool would aspire to be easy to use, allowing users to determine the necessary sustainable conditions to be inserted in the call for tenders in a manner entailing a minimum legal risk, since it would represent a step-by-step guide adapting to each authority's needs. Serving the interest of corporate confidential information while surpassing a pure database, encrypted parts would allow the information to be traceable and protected where needed.

The tool should provide step-by-step guidance for the creation of a detailed sustainable tender. By way of example, if procuring lighting for a particular institution, the procurer should be able to access a block in which all the information on SPP of lights is stored, where he would further be able to choose the type of lights he is procuring (table lamps, office lamps, hallway lamps, etc.). Once the type of lights is selected, the best practices of other EU public administrations would be available to him to choose from, preferably in his language, with detailed information on the requirements needed for the most sustainable and economically feasible option to be procured. The simplicity of accessing the information would be in the provision of actual tenders already executed – those that had the most success in SPP. In accessing particular information on the exact product, service, or works needed, the procurer overcomes his reluctance to insert new criteria into the procurement process. The best practices provided are arguably risk-free in legal terms, and provide the latest and '*best*' developments since ledger-based technology

allows for regular updates, the authorship of which is verifiable at any given moment.<sup>100</sup> In terms of protection of sensitive information, only the last step of accessing actual tenders beyond simple guidelines should be encrypted, thereby maximising the benefits of ledger-based technology and minimising its shortcomings.<sup>101</sup> These suggestions represent a basis for further research on the matter by experts in the field, in cooperation with public procurement experts at the EU and national level.

### **13. Conclusion**

SPP reform has, up to now, been mainly a matter of reforming regulation. Further improvements in the legislative framework are desirable, but alone they will never unleash public procurement's potential for sustainability. Both practical experiences and research, however, point to the fact that support for actors – and contracting authorities first among them – is the essential way to promote sustainability in public procurement. There is a clear need for more engaged supporting measures by the Commission and Member States alike.

Additionally, more coherence is needed in the development of instruments for SPP and in referring to sustainability standards, including adequately addressing the multidimensionality of SPP. Both aspects are bottlenecks for implementation. To date, we see more policy diffusion than policy transfer regarding policies and practices of SPP.

These conclusions recap the reasoning in the report and offer actionable suggestions intended to enhance the contribution of public procurement to sustainability in the EU and beyond. They follow the structure of the report. The critical preliminary point is, however, to stress again: in order to use SPP as a leverage to promote more sustainable production and consumption practices, as SDG 12.7 indicates, it has to encompass the multidimensionality of sustainability. The separation of SPP into GPP and SRPP is partly artificial, and is not beneficial for reaching the SDGs and generating a comprehensive and strategic view on more SPP practices. It is due to a path dependency that builds on the allegedly different nature of implementing environmental and social criteria in procurement processes, and is upheld by the argument that the procurement process is already too complex. Not only from a normative point of view SPP has to include all three dimensions of sustainability but also based on the practical insight, the differences between social and environmental criteria in procurement are not so much based on inherently different characteristics as on how well aspects of sustainability of a

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<sup>100</sup> Ibid.

<sup>101</sup> ADB. Technical Assistance Consultant's Report. Regional: Development of a Global e-Government Procurement Architecture using Blockchain Technology. Project Number: 47192-001. 2018.

product are established in the market. At first sight, comparing the energy efficiency of electronics might be easier than comparing the avoidance of labour and human rights violations or fair wages in the same products. However, the rapid increase in the supply of clothing that has been produced in a socially responsible manner shows how quickly markets can adapt to accommodate criteria that have been brought forward by the demand side.

## Part 1 Organisational and behavioural changes

In order to further implement SPP and truly reach its potential, changes inside the organisations and in the behaviour of public procurers are necessary. Organisational routines need to be altered to allow for new sustainable routines to emerge and for sustainability to become an integral part of the organisation. Research shows that due to the complexity of sustainability as a whole, and of SPP in particular, a lack of knowledge can make public procurers risk-averse and drive them to make traditional (and less sustainable) choices. It is therefore necessary to make sure that public procurers are able, motivated, and have the opportunity to procure in a sustainable manner, and that leaders play an instrumental role in that. We provide the following recommendations:

- ❖ Efforts by the Commission and other actors to further **professionalise public procurement** and to foster strategic procurement and SPP can profit from synergy effects in training and capacity building in these topics. **Continue the support for the development of support structures** for SPP, such as projects and platforms to further promote SPP, and **develop coordinated campaigns** to spread knowledge about SPP.
- ❖ **Support contracting authorities in adopting SPP policies and strategies as a standardised set of internal processes that will make sustainability considerations business as usual:** policies and strategies to set the baseline for the SPP conduct and identification of capacity-building needs within individual organisations.
- ❖ **Involve public procurers** in the (re)development of SPP criteria and guidelines to drive their motivation and commitment to SPP and stimulate public contracting authorities to involve public procurers in the (re)development of SPP.
- ❖ **Promote organisational architecture schemes that support sustainability considerations:** To make contracting authorities act in a sustainable way, it is recommended (a) to remove structural barriers in the organisation and make SPP an integral part of the organisation, (b) to have appropriate organisational structure and

governance that allows an officer or unit with responsibility for sustainable procurement to be able to act as a change agent within the organisation; (c) to set up a special steering group or competence centre within the organisation (procurement improvement unit, sustainability unit, sustainable procurement unit; Central Purchasing Bodies may also play this role).

- ❖ **Focus on support for a strategic approach to education and capacity building in SPP** and the development of competence centres. Public procurers should have thorough knowledge of SPP or an appropriate level of expertise in sustainability to help the contracting authority get the best value for money, sustainability considerations included. The training programmes and capacity building on offer can be more systematic and consistent.
- ❖ **Focus on the dissemination of information and education to all relevant SPP stakeholders, including suppliers and bidders**, not just to contracting authorities or public procurers.

The Commission should also:

- ❖ focus on the **development of tools** to increase the ability of procurers to implement SPP: the complexity of SPP requires the creation of tools such as LCC methodologies that will make it easier to assess the value of sustainable alternatives;
- ❖ **lead by example**: although European institutions do not follow the same rules for public procurement as the contracting authorities in the EU, publishing their best practices might show the way and demonstrate the methods of sustainable procurement, proving the commitment of European institutions to SPP and instilling motivation.

## **Part 2 Planning and managing contracts sustainably**

Whilst SPP is a highly relevant element of the practice of EU public procurers, assuming responsibility towards their supply chain and its impacts is a more recent issue, but if anything, a more pressing one. Public buyers have little experience in assessing environmental, social, and human rights risks, even less experience in responding to them or working with suppliers to identify, prevent and mitigate such risks, and next to none in providing remediation or being involved in remediation processes when harm has occurred. However, policy coherence and the achievement of SDGs demands this be addressed. To this end, it is not enough to have sustainability provisions in the contract documents if their actual performance is not checked.

Long supply chains spanning the world make checking externalities and breaches of workers' rights more complicated. Lack of performance management of contracts and framework agreements is detrimental for public procurement, for the internal market and its sustainability goals, as well as for the efficiency of public spending and the credibility and trust of public institutions. Competence centres, as described above, may provide some answer to the need for control and accountability. Central Purchasing Bodies and joint initiatives that move ahead with performance management help smaller contracting authorities meet their commitments. However, better contract management in general is needed. More specifically:

- ❖ **Sustainability check** following the Nordic model **needs to be scaled-up** and coordinated at the European level;
- ❖ **Environmental, social, and human rights risks must be mapped** with reference to each procurement, and specific information and risk mitigations plans requested from bidders;
- ❖ **Reporting must be strengthened** to increase responsible public procurement and prevent environmental, social, and human rights violations in their supply chain.
- ❖ **Duty to protect the environment and social and human rights in public supply chains through public procurement must become a standard contract clause** binding suppliers and highlighting their responsibility to assure sustainability in their supply chains.
- ❖ **Contract performance clauses must be strengthened:** specific environmental, social, and human rights due diligence procedures and transparency commitments allowing public procurers to demand information and action from suppliers in order to identify, prevent and mitigate risks, and to report and remediate violations when they do occur, must be included in the contract documents and the signed contract;
- ❖ **Use BIM in construction procurements** to turn construction projects into collaborative projects, making projects more sustainable through the better design of energy-efficient buildings while delivering an accurate calculation of the life-cycle cost of a building.

The above action could and should be undertaken by each contracting authority, but could be made mandatory through legislation at EU and national level. Legislation should also demand that public procurers exercise their own SPP due diligence and transparency in their supply chain by:

- ❖ Establishing their own SPP policy
- ❖ Understanding and mapping their own supply chain
- ❖ Designing their own procedures to identify, prevent and mitigate environmental, social, and human rights risks
- ❖ Establishing remediation procedures when their purchasing actions and practices have contributed to actual human rights violations
- ❖ Annually reporting on the actions undertaken, their effectiveness and plans for the future to increase responsible public procurement and to prevent environmental, social, and human rights violations in their supply chain.

Along with the measures for professionalisation discussed above, the Commission and/or the OECD might set up a joint web page, where the following support can be found:

- ❖ Updated and coordinated Guidelines on how to implement SPP, including SRPP
- ❖ Templates for Self-assessment Questionnaires
- ❖ Guidelines for suppliers
- ❖ A platform to handle audits

### Part 3 Regulatory Improvements

Regulatory changes are still needed to further clarify the legality and to bolster the political will to understand social and environmental objectives in public procurement. This is not limited to the EU. In the WTO context, the explicit inclusion of social aspects and a general integration of SPP in the General Procurement Agreement (GPA) is yet to be achieved. A working group has been established, but it is not meeting. The EU, as a party to the agreement, should increase the effort to push for further reform. Concerning the EU Public Procurement Directives specifically, some aspects, such as the *'link to the subject-matter'*, still generate legal uncertainty, hindering the progress towards SPP. A more muscular approach to mandatory SPP will mobilise massive resources in the right direction. More precisely, the 2014 EU Public Procurement Directives should be amended by:

- ❖ **giving effect to Article 18(2): Any breach** must be made mandatory grounds for exclusion in line with Article 57(1) of Directive 2014/24/EU; parallel changes must be introduced in the other public procurement and concession directives;

- ❖ **deleting all reference to the ‘link to the subject matter’**; objectivity is safeguarded by reference to the life cycle of the goods and service purchased; suggested action on developing LCC methodologies at EU level will also reinforce progress in limiting risks of discrimination beyond what is achievable through the ‘link to the subject matter’;
- ❖ **explicitly allow contracting authorities to require suppliers to have effective sustainability policies in place as part of selection criteria**: sustainability policies, including CSR, imply a structured approach to respect for human rights and wider sustainability, which is as relevant as experience or economic standards and can push entire commercial sectors towards sustainability; reference to commonly accepted international standards will limit the risk of discrimination; higher threshold limits/financial assistance should be foreseen not to hamper SMEs participation in procurements;
- ❖ **introduce minimum mandatory sustainability requirements in PP rules**: following instances such as Directive 2010/31/EU on the energy performance of buildings and Directive 2012/27/EU on energy efficiency, introduce new legislation and strengthen existing law setting minimum environmental and social standards for the procurement of given goods and possibly services. Further, make SPP mandatory for all Member States, which can include compulsory criteria for individual products and services, installing a hierarchy of award criteria, embracing eco- and social labelling, and standardising methodological tools, including through the development of a ledger-based technological tool. The EU legislature should also consider requiring LCC as the basis for all public purchasing.

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