

DIGITALES ARCHIV

ZBW – Leibniz-Informationszentrum Wirtschaft
ZBW – Leibniz Information Centre for Economics

Botta, Giulia

Article

The interplay between EU public procurement and human rights in global supply chains : lessons from the Italian legal context

Reference: Botta, Giulia (2022). The interplay between EU public procurement and human rights in global supply chains : lessons from the Italian legal context. In: European journal of public procurement markets 4 S. 51 - 67.

<https://www.eupublicmarkets.com/wp-content/uploads/2023/01/The-interplay-between-EU-public-procurement-and-human-rights-in-global-supply-chains.pdf>.

doi:10.54611/LEPQ5875.

This Version is available at:

<http://hdl.handle.net/11159/15891>

Kontakt/Contact

ZBW – Leibniz-Informationszentrum Wirtschaft/Leibniz Information Centre for Economics

Düsternbrooker Weg 120

24105 Kiel (Germany)

E-Mail: [rights\[at\]zbw.eu](mailto:rights[at]zbw.eu)

<https://www.zbw.eu/econis-archiv/>

Standard-Nutzungsbedingungen:

Dieses Dokument darf zu eigenen wissenschaftlichen Zwecken und zum Privatgebrauch gespeichert und kopiert werden. Sie dürfen dieses Dokument nicht für öffentliche oder kommerzielle Zwecke vervielfältigen, öffentlich ausstellen, aufführen, vertreiben oder anderweitig nutzen. Sofern für das Dokument eine Open-Content-Lizenz verwendet wurde, so gelten abweichend von diesen Nutzungsbedingungen die in der Lizenz gewährten Nutzungsrechte.

<https://zbw.eu/econis-archiv/termsfuse>

Terms of use:

This document may be saved and copied for your personal and scholarly purposes. You are not to copy it for public or commercial purposes, to exhibit the document in public, to perform, distribute or otherwise use the document in public. If the document is made available under a Creative Commons Licence you may exercise further usage rights as specified in the licence.

The interplay between EU public procurement and human rights in global supply chains: Lessons from the Italian legal context

Giulia Botta

Abstract

Linking EU public procurement and the recently consolidated *Business & Human Rights* field of international law is a core challenge and opportunity in the current globalized economy. Global supply chains play a crucial role in enhancing socio-economic development, however evidence from NGOs and case law shows that human rights and labour standards abuses persist in many market sectors. Thus, goods, works, services procured by public entities may entail human rights risks, potentially occurring throughout their global supply chains. The EU regulatory framework has not adequately regulated such intersection, fostering ambiguity and uncertainties in the application which require legal clarification at multiple levels. This article looks at public procurement from a human rights' legal perspective, firstly analysing whether there are human rights obligations for contracting authorities (§ 1). Key potentials and uncertainties under the EU Public Sector Directive are highlighted (§ 2), followed by the analysis of the case of Italy, unpacking the use of minimum sustainability requirements to foster human rights respect along global supply chains (§ 3).

Keywords

Business & human rights, EU public procurement, Human rights criteria, Italy, Labour rights, Minimum sustainability criteria, Socially responsible public procurement, Supply chains.

1. Introduction

Public procurement constitutes an important leverage for more responsible business conduct along global supply chains. Indeed, public procurement is immersed in the context of the current global economy shaped by complex and fragmented value chains, whose exposure to human rights risks and adverse impacts has been increasingly documented in recent years. Although awareness on States and business' shared responsibility towards human rights has been gradually consolidated by the *Business & Human Rights* (B&HR) subfield of international law and the UN Guiding Principles on Business & Human Rights (UNGPs), enforcement gaps persist. Particularly, ambiguities and legal uncertainties regard the public procurement field, risking to foster irresponsible States' consumption (Methven O'Brien & Martin-Ortega, 2019).

In the EU public procurement legal context, given its high economic leverage (17% GDP), the potentials to use public contracts as means of strategic regulation for more responsible supply chains are several (Ankersmith, 2020). Indeed, procurement creates "unique opportunities to promote awareness of and respect for human rights by enterprises, including through the terms of contracts" (UNCHR, 2011, GP 6). Despite the urgency to act, the interplay between EU public procurement and B&HR has not been scrutinized in depth at regulatory level. Indeed, the EU public procurement framework appears contradictory on the inclusion of human rights considerations throughout the procurement process. Although the 2014 Public Sector Directive envisages *legal possibilities* to include social criteria, their effective implementation depends on Member States (MSs) and most often contracting authorities' discretion (Andhov, 2020).

Core questions are, thus, whether there is an obligation to prevent human rights violations in procurement; and how contracting authorities can leverage more responsible supply chains in practice. Exploring MSs' practices becomes fundamental to grasp how contracting authorities can be held accountable for human rights while purchasing. Italy represents one of the most prominent example of MSs adopting mandatory Minimum Sustainability Requirements in public procurement law for specific procurement categories since 2017. Such developments constitute drivers of transformation towards mandatory green criteria (Caranta, Marroncelli, 2021), incentivizing also experimentation in human rights-based criteria for product categories considered highly exposed to human rights risks (Cellura et al, 2022).

In this article, the interplay between EU public procurement and B&HR is disentangled, from an international human rights law perspective at first (1). Further reflections are developed, positioning human rights under *EU Sustainable Public Procurement*, unpacking dilemmas and potentials of the Public Sector Directive (2). To better grasp possible ways to implement human rights criteria at national level, the experience of Italy is explored to inspire future initiatives in other jurisdictions.

2. A human rights perspective on public procurement: Obligations for the State as purchaser?

Public procurement represents a substantial share of the EU overall economy, accounting for 14% GDP (17% if utilities procurement is included) (European Commission, 2022). Contracting authorities in the EU are, thus, important market players to influence commercial behavior through their purchasing decisions, encouraging responsible supply chains (Caranta, 2021; Sjøfjell & Wiesbrock, 2015). Considering the State's multiple roles as a regulator, employer, consumer, a growing attention has been on the use of public contracts as a tool for pursuing social objectives (Wiesbrock, 2016). Nonetheless, this is not a new phenomenon. For instance, in the nineteenth century's France, workers enjoyed limited working hours in public contracts; in the UK in the aftermath of World War I, public procurement was used to provide work for disabled ex-servicemen; more recently anti-discrimination provisions in favour of minorities have been used in the US, the UK, Canada, South Africa (McCrudden, 2007a; Williams-Elegbe 2022), while scholarship has increasingly focused on procurement potentials for regulating international labour standards (Corvaglia, 2017; Eamon, C. 2020, Ortega O'Brien 2017) and for driving more corporate social responsibility (McCrudden, 2007b; Ankersmith, 2017).

Contracting authorities, as any other consumer, purchase goods, works, services via transnational supply chains, which shape the current global economy. Global supply chains form "complex, diverse, fragmented, dynamic and evolving organizational structures" (Delautre, 2019), characterized by subcontracting cascades with variegated ownership structures and employment relations (Sarter, 2022). Value chains unleashes economic development, employment opportunities, higher competitiveness, but also increased exposure to human rights risks (Ufbeck et al., 2019). Indeed, throughout each supply chain phase, adverse impacts may impinge international labour standards and internationally recognized human rights (Bernaz, 2016; ILO, 2016). Emblematic cases, such as the Rana Plaza collapse in Bangladesh (2013) and a flourishing case law in different jurisdictions, have gradually raised awareness on the opaque and untraceable nature of supply chains (Agrawal et al., 2019). In a context of legal unclarity and structural gaps (Ruggie, 2013), the Business and Human Rights (B&HR) subfield of international law has addressed corporate human rights impacts gaining momentum especially with the adoption of the United Nations Guiding Principles of Business and Human Rights - UNGPs (UNCHR, 2011). Rooted in the Protect, Respect and Remedy Framework, the UNGPs structure rests on three main

normative pillars: the (1) State duty to protect against human rights; the (2) corporate responsibility to respect human rights, through human rights due diligence, an assessment process through which companies 'identify, prevent, mitigate and account for how they address their impacts on human rights' in their business activities [GP 15]; (3) access to effective remedies for victims.

Approaching public procurement from a B&HR perspective requires to think about procured goods as entailing both domestic and foreign inputs added at different levels of production and in different jurisdictions, raising questions on extraterritoriality (Corvaglia & Li, 2018; Velluti & Tzevelekos, 2018). Particularly, abuses linked to public purchasing of goods (Methven O'Brien & Martin-Ortega, 2020) and services (Methven O'Brien, 2015) have been increasingly documented in recent years in relation to sectors characterized by complex value chains and high impacts of human rights such as workwear, electronics, personal protective equipment, healthcare surgical instruments, food, etc. Evidence has been collected by different NGOs and studies as the "Public Procurement and Human Rights: A Survey of Twenty Jurisdictions" (DIHR et al., 2016).

In a context of legal uncertainty, as irresponsible State purchasing may inevitably feed a vicious cycle of transnational abuses, it must be clarified whether there is an obligation to prevent human rights violations for contracting authorities. Indeed, the attention on the responsibility of the State towards human rights when procuring has been quite marginal (Williams-Elegbe, 2022; Methven O'Brien, Martin-Ortega, 2020). Also, under the EU public procurement framework the subject has had limited traction so far. The UNGPs have provided more clarity. Indeed, unpacking its First Pillar, public procurement is a key dimension of the State duty to protect, under the so-called State-business nexus, namely the commercial transactions among the State and the private sector. GP 6 specifies that the States should promote respect for human rights by business enterprises with which they conduct commercial transactions. The Commentary mentions procurement, as "unique opportunities to promote awareness of and respect for human rights by those enterprises, including through the terms of contracts, with due regard to States' relevant obligations under national and international law" (UNCHR, 2011). However, as a voluntary and soft law instrument, the UNGPs penetration and practical effectiveness has been consistently questioned (CHRB, 2020; Smit et al., 2021).

Other legal grounds of justification can be advanced to support the State intrinsic duty to protect human rights also when purchasing. States as primary human rights law subjects and duty bearers, own positive obligations to protect human rights having ratified international conventions and treaties. Regarding the extension of State responsibility in their business activities, the UN Committee on Economic, Social and Cultural Rights has clarified in the "General Comment n. 24 on State Obligations under ICESCR in the context of business activities" (2017) that the States have obligations to ensure that companies they do business with and procure from, respect human rights at home and abroad throughout their business chain. States could be "held directly responsible for the action or inaction of business entities if the entity concerned is acting on that State party instruction or is under its control or direction in carrying out the particular conduct at issue", as in the context of public contracts. Therefore, States do not relinquish their international human rights law obligations in conducting *acta iure gestionis*, as there is a direct link between the State, procuring entity and contractors in its supply chain.

A further argument is the idea of the State leading by example and responsible governance. Indeed, since governments operate both as regulators and participants in the market, "when

principles they expose in the former are not applied in the latter, the government appears to lack coordination or to be simply hypocritical” (McCrudden, 2007).

In conclusion, although scholars have argued that public procurement may not be the right tool to ensure human rights protection (Sanchez-Graells, 2020) in comparison with other methods by which governments may use legal compulsion powers, as criminal justice, taxation policy, allocation of resources, the existence of State’s obligations to protect human rights while purchasing and incentives to lead by example justifies an increased use of public procurement framework to pursue B&HR objectives.

3. Human rights considerations in EU sustainable public procurement: Potentials and dilemmas

Under the EU regulatory framework, public procurement has been increasingly recognized as means of strategic regulation and driver for sustainable production and consumption through environmental and social considerations (Arrowsmith & Kunzlik, 2009; Caranta & Trybus, 2012). Indeed, the *Public Sector Directive 2014/24/EU* contains direct links to sustainable development in its recitals and provisions (Recitals 2, 41, 47, 91, 93, 95, 96, 123 and Arts. 2(22), 18(2), 42(3)(a), 43, 62, 68, 70). Under Recital 2, public procurement is defined as a strategic instrument to achieve overarching goals of smart, sustainable and inclusive growth, either directly in the performance of the contract or indirectly by encouraging companies to change corporate practices (Sjafjell & Wiesbrock, 2016). Recital 37 recalls that MS and contracting authorities have to take relevant measures to ensure compliance with applicable environmental, social and labour law. Recital 40 prescribes that environmental, social and labour law observance should be performed at all the relevant stages of the procurement cycle. Not only the 2014 Directives but also further legislative developments have recognized such potentials. The *EU Green Deal* explicitly calls public authorities to *lead by example* ensuring that their procurement is sustainable (European Commission, 2019). As such, the Sustainable Products Initiative clearly outlines it (European Commission, 2022). Indeed, under art. 58 of the proposed *Ecodesign for Sustainable Products Regulation*, contracting authorities must include sustainable requirements in the form of mandatory technical specifications, selection criteria, award criteria, contract performance clauses or targets as appropriate (European Commission, 2022).

In Sustainable Public Procurement, human rights-related considerations fall under the umbrella-term of *Socially Responsible Public Procurement*, “procurement aiming to set an example and influence the market-place giving companies incentives to implement socially responsible supply chain and management systems, achieving positive social outcomes in public contracts” (European Commission, 2021). The *Buying Social Guide*, updated in 2021, has given prominent attention to decent work, compliance with labour and social rights, ethical trade and human rights in supply chains. Furthermore, the EU *Communication on decent work worldwide for a global just transition and a sustainable recovery* has outlined that socially responsible public procurement is a powerful tool to combat forced labour and child labour, requiring the public sector to *lead by example* in public procurement activities (European Commission 2022).

Unpacking the *Public Sector Directive*, there are “legal possibilities” to include social and human rights considerations along the procurement process. Thus, willing contracting authorities (or MSs) can in principle and according to the ECJ case law (Case C-368/10 Commission v Netherlands; C-513/99 Concordia Bus; Case C-448/01 AG and Wienstrom GmbH v Republik Österreich), use their discretion as a lever to boost compliance with human rights (Sanchez Graells, 2020). However, their effective enforcement depends essentially on each MS and contracting authorities’ discretionary decisions (Wiesbrock, 2016). All relevant decisions are,

indeed, left to either the implementing legislation of MSs – particularly limited and fragmented when looking at the EU panorama (La Chimia, 2017).

Art. 18.2 on procurement principles, known as the “horizontal clause”, is a key provision (Sjafjell & Wiesbrock, 2016; Andhov & Mitkidis 2017). MSs shall, indeed, take appropriate measures to ensure that in the performance of public contracts economic operators comply with applicable obligations in the field of environmental, social and labour law established by EU law, national law, collective agreements or by the international environmental, social and labour conventions (Annex X). Despite the legally binding nature of the Directive, nonetheless a mismatch between opportunities for sustainability and limitations in the application is outlined by scholars. Indeed, uncertainty flows in the broad and vague meaning of art.18.2, which does not impose a direct obligation upon contracting authorities (Andov, 2020; Andov & Hamer, 2021), but, rather, provides a “legal possibility”. Those contradictions are even more evident after the ECJ ruling in the *Case 395/18 Tim SpA*, clarifying that art. 18.2 constitutes a cardinal EU procurement principle, together with the ones prescribed by art 18.1 - open competition, non-discrimination among tenderers, proportionality, transparency - thus creating the basis for a “*sustainability* principle”.

Probably the clearest provision fostering human rights protection while purchasing is the mandatory exclusion of economic operators convicted by final judgement of child labour and other forms of trafficking in human beings (art. 57.1.f). The obligation to exclude is not limited to the tendering phase, but reinforced by an obligation to terminate any contracts awarded to companies subsequently convicted for those offences (art 73.b). Nonetheless such provision is narrowed to child labour and human trafficking confirmed by final judgements, not taking into account multiple cases of other labour and human rights risks hidden behind complex supply chains. Art. 57.4 allows MSs to take adequate measures to ensure that, in the performance of public contracts, economic operators comply with obligations of environmental, social, labour law established by EU law, national law, collective agreements or by certain international environmental, social and labour law provisions. This casts a rather wide net in principle, however the provision lays down optional exclusion grounds. Therefore, the application in practice is limited by constraints on the exercise of executive discretion (Sanchez Graells, 2020) and the sufficient link to the subject matter of the contract provision (Semple, 2015; Outhwaite & Ortega, 2016). Further, the provision creates significant uncertainty as to the scope of ‘applicable obligations’ where tenderers are based in jurisdictions other than the contracting authority’s (Ølykke, 2016; Conlon 2020). In connection to art. 18.2 further contradictions can be exposed: if sustainability represented a cardinal procurement value as interpreted by the ECJ in *Tim* case, why violations of obligations in the fields of environmental, social and labour law (art. 57.4.a) or professional misconduct (art. 57.4.c) would not constitute mandatory grounds of exclusion?

Third-party certification of compliance, in particular labels, constitute another possibility (D’Hollander & Marx, 2014). Indeed, according to Recital 75, “contracting authorities that wish to purchase works, supplies or services with specific... social or other characteristics should be able to refer to particular labels”. However, limitations again relate to the fact that requirements must only concern criteria which are linked to the subject-matter of the contract and appropriate to define characteristics of the procured subject-matter (art 43.1.a) hindering the possibility to use labels linked to general corporate policies or aspects of the supply chain that are too far detached from the direct provision of services or supply of products to the contracting authority. Another limitation is the contracting authorities’ capacity and resources, as they should have specific expertise to make judgements of equivalence between different labels and between the prescribed

elements of the applicable label and the documentation provided by economic operators (Sanchez-Graells, 2020).

Another possibility is to include human rights requirements in the award phase (Ashraf; Van Seters). Indeed, the contracting authority has discretion to assess the most economically advantageous tender (MEAT) on the basis of criteria, including qualitative, environmental and/or social aspects, linked to the subject-matter of the contract in question (art 67.2). Nonetheless, the implementation of a general policy based on human rights guarantees as award criteria raises again difficult functional questions, related to the discretion and the link to the subject matter of the contract. It must be stressed that a specific situation where contracting authorities have no discretion to deviate from MEAT on the basis of the violation of labour or social obligations concerns abnormally low tenders (art. 69.3) (Ølykke, 2016). Thus, under Recital 103 contracting authorities have a specific positive duty to reject the tender where they have established that it is abnormally low because it does not comply with applicable obligation.

Finally, contract performance requirements based on labour rights and human rights are a possibility (Nielsen, 2017). Recitals 98 and 99 indicate clearly that contracting authorities should be able to impose contract performance requirements of a labour and social nature “to favour the implementation of measures for the promotion of equality of women and men at work, the increased participation of women in the labour market and the reconciliation of work and private life... and, to comply in substance with fundamental ILO Conventions, and to recruit more disadvantaged persons than are required under national legislation” or to implement “measures aiming at the protection of health of the staff involved in the production process, the favouring of social integration of disadvantaged persons or members of vulnerable groups amongst the persons assigned to performing the contract or training in the skills needed for the contract in question”. Core difficulties are related to ensuring effective monitoring and enforcement systems and identifying clear audit strategies (Gothberg, 2019). The effectiveness of mechanisms would rest on both the ability to specify the relevant applicable obligations, the investment of significant resources in monitoring and the practical possibility for the contracting authority to react to potential breaches of human rights guarantees in a manner that does not damage the more immediate public interest in the execution of the public contract—which can be particularly challenging where human rights infringements take place in a different jurisdiction or in a manner that only indirectly affects the core object of the contract (Sanchez-Graells, 2020).

Although the present EU regime is becoming more enabling towards sustainability, the scope it permits to use public tenders to advance respect for human rights globally remains quite limited. Nonetheless, developments in the direction of B&HR in the EU suggests a policy shift underway that may alter such limitations (Ortega & O'Brien, 2017) providing more legal grounds to act in this direction, particularly with a *Directive on Corporate Sustainability Due Diligence* (European Commission, 2022). The proposed Directive, whose European Council negotiation position has been recently released (December 2022), sets out a horizontal framework of due diligence obligations applying to large limited liability companies over a defined threshold in terms of size, including EU and third-country companies operating in the EU market and smaller companies in high-risk sectors. Companies, pursuant to art. 4 on the “due diligence” process, are required to identify, prevent, mitigate and account for their adverse human rights, and environmental impacts, in their own operations and across their global value chains, defining clear ‘obligations of means’. Precise due diligence steps enucleated under artt.5-11 should extend not only to a company’s own operations, but also to those of its subsidiaries, contractors and subcontractors, at

least to the extent of “established business relationships” (Art 6.1). Namely, companies would be asked to put in place “cascading” requirements reaching down all suppliers and covering all tiers of the supply chain. A criticism raised by scholars is the lack of precise reference to public procurement, differently from art. 18(2) the EU Parliament resolution (2020/2129(INL)), representing a contradiction and a golden missed opportunity (O’Brien & Ortega 2022; O’Brien & Ortega, 2020). The only reference to the public-private interplay is under art. 24 on “Public support”. Nonetheless indirect impacts on public purchasers’ practice can be foreseen, providing further legal justifications to include human rights considerations in procurement. The Directive could impact the applicability of mandatory (art. 57.1.f) and facultative (57.4.a and 57.4.c) exclusion grounds for tenderers, mitigating the risk of contracting with suppliers that abuse human rights. Indeed, the role of supervisory authorities (art. 18-20) monitoring, investigating, sanctioning businesses that fail to comply with due diligence obligations could facilitate public buyers in excluding non-compliant operators. Further implications may relate to selection criteria, since the *human rights due diligence* reporting could be used by suppliers as proof of technical ability pursuant to art. 58 together with Part II(d) of Annex XII of the Public Sector Directive. Regarding contract performance conditions, the envisaged creation of Model Contractual Clauses (art. 12) and Guidelines provided by the Commission to support companies to comply with the directive (art. 13) provides a powerful opportunity.

4. CAMs: Minimum sustainability requirements and voluntary human rights criteria in Italy

In Italy approximately 169.9 trillion euro are spent yearly by over 22.000 public agencies in public procurement (ANAC, 2020), a significant share to orientate the market towards more compliance to B&HR (Fiorentino & La Chimia, 2021). Italy is an example of MS adopting mandatory sustainability criteria in public procurement law, driving transformation towards mandatory green requirements (Caranta & Marroncelli, 2021), including experimentation of voluntary social and human rights criteria.

After the adoption of a *National Action Plan on Green Public Procurement* (2008) following the Green Paper on *Integrated Product Policy* (EU Commission, 2003), specific “Minimum Sustainability Criteria” (so-called *Criteri Ambientali Minimi* - CAMs) have been elaborated since 2011 to be included in procurement procedures for certain categories. CAMs are mandatory sets of rules and technical criteria adopted by Ministerial Decrees issued by the Ministry of the Environment (Cellura, 2018). The criteria became mandatory for the first time in 2015 (Law 221/2015) for above specific contract thresholds and then transposed in the actual Public Contracts Code (D. Lgs. 50/2016) under art. 34- *Energy and Sustainability Criteria*. In 2017, the article has been amended by D. Lgs. 57/2017, making the criteria mandatory for all contracting authorities for whatever the contract value. The case-law has consolidated the mandatory force of CAMs, stating that contracting authorities do not only have a general obligation to *sustainable development* but they are obliged to include CAMs when procuring specific categories (Botta, forthcoming). Furthermore, the jurisprudence has clarified that under art.34, the contracting authorities are obliged to include in their tender documents “*at least* technical specifications and contract clauses” of CAMs (art.34.1). The inclusion of award criteria for the application of the *most advantageous tender* is “to be taken into account”, but not mandatory (art. 34.2). Finally, art.34.3 specifies that the aforementioned obligations shall apply contract awards of any amount. Currently, CAMs exist for 18 procurement categories¹, regularly updated and under expansion.

¹ See Annex 1.

Regarding human rights considerations and ethical criteria, a landmark source is the “Guide for the integration of social aspects in public procurement activities” for all the Italian Contracting Authorities (MITE, 2012). It is based on two innovative elements: (1) *minimum social criteria* to promote the application of internationally recognized standards on human rights and working conditions along the supply chains. (2) A *structured dialogue* methodology to foster cooperation and synergy between buyers and suppliers (Ricotta, 2014). The collaborative approach between contracting authorities, suppliers and sub-suppliers has different purposes: shedding lights on working and human rights conditions and social standards along supply chains; monitoring the application of social criteria and activating potential corrective actions in case of failure in meeting such standards. The Guide is not binding, thus its application remains voluntary, depending on a discretionary adherence by individual contracting authorities, resulting so far in isolated practices by pro-active entities (Cellura et al., 2021).

Linking CAMs and human rights, the revised version of the NAP-GPP (2013) highlighted the need to apply the Guide approach to high-impact sectors exposed to human right abuses. The revised NAP has significantly addressed social aspects, recommending their integration in the tender procedures when purchasing product categories characterized by complex supply chains with risk "of lack of human rights protections and undignified working conditions" (MITE, 2013). Some specific CAMs have been updated including reference to voluntary social criteria, related to social clauses, labour conditions and equal pay, transparency of supply chains, CSR standards. A peculiar attention to human rights requirements related to supply chains transparency and due diligence processes is to be found in the CAMs on textiles, work-shoes and leatherware, office furniture and food. Voluntary human rights criteria have been integrated under various procurement phases: selection criteria, technical specifications, award criteria and contract clauses.

Focusing on the textiles sector, the set of obligations on minimum sustainability criteria (**CAM-textiles**) was updated in 2017 and most recently in 2021. Voluntary social and human rights criteria for suppliers have been included along with mandatory environmental ones, to guarantee that textiles are produced respecting decent work conditions, human rights and the UNGPs. Section E of the Ministerial Decree enucleates the core facultative social criteria. Appendix B lists the internationally recognized human rights and ILO Conventions that must be respected. The international social and environmental conventions contained in Annex X of the Public Contracts Code are mentioned together with the Universal Declaration of Human Rights and the national labour law applicable to the country where the supply chain phase is located. To effectively address human rights risks, social criteria and *human rights due diligence (HRDD)* are recommended during selection of tenderers, contract award phase, execution of the contract.

In the selection phase, economic operators may be asked to adopt ethical management systems based on *HRDD*, demonstrating the following elements: company policy and management systems integrating responsible business conduct; a clear mapping of human rights risks and adverse impacts along company's operations and supply chains; specific mechanisms established to prevent and mitigate adverse impacts; the public disclosure of due diligence processes; the definition of remediation processes as grievance mechanism for potential victims, as recommended by the UNGPs.

In the award phase, the inclusion of human rights considerations as specific award criteria is recommended when adopting MEAT (art. 95 c.6 of the Code). Additional technical points can be assigned to products for which the suppliers have demonstrated – through the adoption of specific

management systems envisaging *HRDD* - that specific supply chain phases operations respected international human rights and international labour standards specified under Appendix B. Nonetheless, the points shall be assigned in a proportional way according to the number of production phases that are controlled in a transparent and proportional way and based on audits and controls executed.

Further, in the execution of the contract, setting up specific contract performance conditions related to social aspects in the supply chains is allowed. Art. 100 of the Code, indeed, provides that “contract performance conditions can be related to social and environmental needs”. The Decree recommends, among others, the implementation of ethical supply chain management systems and the requirement that contractors must respect human rights during the entire duration of the contract. Furthermore, for monitoring the compliance with the requirements, on-site audits, unannounced visits, desktop-audits, off-site interviews with trade unions and local NGOs can be required for different supply chain phases. The results of the audits must be communicated to the contracting authority and in the case of critical issues to the local authorities. At the end of the audit process, a comprehensive report of all actions taken must be produced.

Similarly, the **CAM-workshoes and leatherware**, updated in 2018 includes human rights requirements, acknowledging the complexity and fragmentation of leather production supply chains, which may have significant impacts on workers conditions. The Decree, thus, suggests to integrate social criteria related to human rights, workers’ rights and labour conditions in the bidding documents, to ensure increased traceability of raw materials and transparent processes. Similarly to textiles, voluntary human rights criteria are recommended as selection criteria, award criteria and contract clauses. A peculiarity is that a specific *mandatory* requirement on “supply chain transparency and traceability” is provided under technical specifications. It requires the supplier to identify and map the entire supply chain, with the possibility to be exposed to on-site audit.

The **CAM-office furniture** updated by Ministerial Decree n. 167/2019, refers to human rights risks especially related to wood and timber production. The Decree clearly outlines that the supplier must comply with principles of social responsibility and minimum social standards defined by a number of international human rights and ILO Conventions. Furthermore, as means of verification, the economic operator must submit documentation demonstrating compliance with the rights covered by the International Conventions, for instance through SA 8000 certification or equivalent. Where suppliers do not hold such certification, they must at least demonstrate that they have followed the *structured dialogue* recommended under the aforementioned Ministerial Guide.

Finally, the **CAM-food and catering** (updated in 2020) highlights the urgency to reduce social impacts and human rights risks raising throughout all supply chain phases of food production – entailing sowing, cultivation, harvesting – especially in case of intensive cultivation (MITE, 2022). The social aspects to consider concern: the conditions of farm workers, especially seasonal workers, to avoid their exploitation; the support, indirectly, to local economies and small producers introducing zero-km and reduced supply chains; the fair compensation of catering companies and farmers; poverty conditions and food insecurity of populations, to avoid deprivation of valuable food resources; the use of fair trade products; the employment of disadvantaged or differently-abled people and the use of social agriculture processes (Law No. 141/2018). Human rights concerns and traceability requirements are recommended not only for exotic products (fruits, coffee, chocolate) where most requirements relate to production from fair-trade, under a recognised

certification scheme or multi-stakeholder initiative. Human rights and labour exploitation risks relates also to national challenges, considering the phenomena of informal work and “*caporalato*”² (Fasciglione, 2022). To fight this phenomenon and ensure that food produced through forms of exploitation is not served in public canteens, a *structured dialogue* along supply chains between buyers and suppliers is envisaged, tracing back the supply chains all the way back to the farms where the products come from, in order to verify, also on the spot, how work is managed even in labour-intensive phases as harvesting.

In conclusion, the approach introduced by the Italian legislator recommending human rights criteria, *HRDD* and ethical management systems for more responsible supply chains of high risk produces, provides a potential example for inspiration and a way forward future development. Nonetheless, data on their effective implementation are still missing as their application is in an embryonal stage. More data is available on the implementation of the mandatory green requirements, outlining potential benefits but also multiple obstacles. These range from monitoring and enforcement challenges, together with lack of resources and capacities of single public administrations as outlined by the *Italian GPP Observatory survey 2021*, and which must be addressed with mandatory approaches and increased harmonization at EU and national level. However, the case of CAMs could provide inspiration for further developments in other MSs in this direction and at EU level for more harmonization on human rights criteria in public procurement.

5. Conclusion

The high exposure to human rights risks along complex global supply chains, and the lack of effective legal mechanisms at international and EU level requires to shed light on the role of public procurement. Bridging *B&HR* and public procurement constitutes a core challenge and opportunity justified by multiple arguments. Indeed, States as mega-consumers can strategically encourage responsible business conduct of suppliers. Although a clear set of obligations on public procurement and human rights is missing, creating uncertainties, legal grounds of justification exist at international law level. Patterns of development under EU law on B&HR suggest the existence of an obligation to prevent human rights abuses for public purchasers.

Exploring EU public procurement law (the EU Public Sector Directive) a set of “legal possibilities” to include human rights considerations can be found. However, dilemmas and limitations in their implementation are evident, hindering contracting authorities’ potential willingness. Regardless limitations intrinsic to the law, possible future developments, such as the proposed Directive on Corporate Sustainability Due Diligence suggest impacts at procurement level, providing more legal grounds of justification.

Exploring MSs’ insight from practice, the peculiar Italian experience on mandatory sustainability criteria and peculiar voluntary human rights prescribed by CAMs, shows interesting experimentation. Despite implementation difficulties and the fact that the human rights criteria are still voluntary, the approach based on minimum social criteria and *structured dialogue* among buyers and suppliers represents a possible way forward that could inspire future developments and harmonization on public procurement and B&HR.

² Illegal phenomenon of recruitment and exploitation of workers through intermediaries, the so-called ‘*caporali*’.

ANNEX 1 – Minimum sustainability requirements in Italy

Category	Normative framework (Ministerial Decree)	Voluntary social criteria
Office Furniture	<ul style="list-style-type: none"> • <u>CAM</u> approved by <u>DM 23/2017</u> • Updated by <u>Decreto correttivo</u> (DM 3 luglio 2019, in G.U. n. 167 del 18 luglio 2019) 	YES
Urban Furniture	<ul style="list-style-type: none"> • <u>CAM</u> approved by <u>DM 50/2015</u> 	
Nappies	<ul style="list-style-type: none"> • <u>CAM</u> approved by <u>DM 16/2015</u> 	
Workshoes And Leatherware	<ul style="list-style-type: none"> • <u>CAM</u> approved by <u>DM 125/2018</u> 	YES
Paper	<ul style="list-style-type: none"> • <u>CAM</u> approved by <u>DM 102/2013</u> 	
Ink Cartridges	<ul style="list-style-type: none"> • CAM approved by <u>DM 261/2019</u> • Explicatory document: <u>Circolare esplicativa (2019)</u> 	
Public Works	<ul style="list-style-type: none"> • <u>CAM</u> approved by <u>DM 259/2017</u> 	
Street Lighting (maintenance and management)	<ul style="list-style-type: none"> • <u>CAM</u> approved by <u>DM 244/2017</u> 	
Street Lighting (Service)	<ul style="list-style-type: none"> • <u>CAM</u> approved by <u>DM 98/2018</u> 	
Indoor Lighting, Heating and Air-Conditioning	<ul style="list-style-type: none"> • <u>CAM</u> approved by <u>DM 74/2012</u> 	
Cleaning Services and Rental and Cleaning Of Linen	<ul style="list-style-type: none"> • <u>CAM</u> approved by <u>DM 2/2021</u> 	
Urban Waste	<ul style="list-style-type: none"> • <u>CAM</u> approved by <u>DM 58/2014</u> 	
Food and Catering	<ul style="list-style-type: none"> • CAM approved by <u>DM n. 65/2020</u>, in <u>G.U. n.90 del 4 aprile 2020</u>) • Supporting document: <u>Relazione di accompagnamento</u> 	YES
Sanitisation of Hospitals	<ul style="list-style-type: none"> • <u>CAM</u> approved by <u>DM 51/2021</u> • Corrective Decree n. 24 September 2021 <u>G.U.R.I. n. 236 del 2 ottobre 2021</u>. 	
Printers	<ul style="list-style-type: none"> • CAM approved by <u>DM 261/2019</u> 	
Textiles	<ul style="list-style-type: none"> • <u>CAM</u>, including protective masks and individual protective equipment approved by <u>DM 30 giugno 2021</u>, in <u>G.U.R.I. n. 167 del 14 luglio 2021</u> 	YES
Vehicles	<ul style="list-style-type: none"> • <u>CAM</u> approved by <u>DM 157/2021</u> 	
Green Spaces	<ul style="list-style-type: none"> • CAM approved by <u>DM n. 63 del 10 marzo 2020</u>, in <u>G.U. n.90 del 4 aprile 2020</u> 	YES

References

Agenzia Nazionale Anti-Corruzione (ANAC), (2020). Rapporto Annuale 2020.

Andhov, M. & Mitkidis, K. P. (2017). Sustainability Requirements in EU Public and Private Procurement – A Right or an Obligation? University of Copenhagen Research Paper.

Andhov, M. (2020). Contracting Authorities and Strategic Goals of Public Procurement – A Relationship Defined by Discretion? In Bogojevic Groussot & Hettne, (Eds.), (2020). *Discretion in EU Public Procurement Law*, Bloomsbury, 117-37.

Andhov, M. & Risvig Hamer, C. (2021). Article 18-Public Procurement Principles. In Caranta R. & Sanchez-Graells, A. (Eds.), (2021). *European Public Procurement: Commentary on Directive 2014/24/EU*, Edward Elgar Publishing, 199-207.

Ankersmit, L. (2020). The contribution of EU public procurement law to corporate social responsibility. *Eur Law Journal*, 26, 9–26.

Agrawal T., Koehl L. & Campagne C., (2018). A secured tag for implementation of traceability in textile and clothing supply chain. *The International Journal of Advanced Manufacturing Technology*.

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

Ashraf N. & Van Seters, J. (2019). Sewing the pieces together: towards an eu strategy for fair and sustainable textiles. *ECDPM*.

Bernaz, N. (2016). Business and human rights: History, law and policy - Bridging the accountability gap. *Taylor and Francis*.

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

Caranta R. & Richetto S. (2010). Sustainable procurements in Italy: of light and some shadows. In Caranta R. & Trybus M. (Eds.), (2010). *The law of green and social procurement in Europe*, Djof Publishing Copenhagen, *European Procurement Law Series*.

Caranta R., (2016). Labels as Enablers of Sustainable Public Procurement. In Sjaafjell, B. & Wiesbrock A. (Eds.), (2013). *SPP under EU Law: New perspectives as stakeholder*, Cambridge University Press.

Caranta R. & Marroncelli S. (2021). Gli appalti pubblici tra mitigazione e resilienza: il contributo del GPP alla lotta contro i cambiamenti climatici. *Riv. giuridica dell'ambiente*, 23.i.

Caranta, R. (2021). Public procurement for the SDGs – Rethinking the basics (2021), available at [SSRN](#).

Cassel D. (2020). State Jurisdiction over Transnational Business Activity Affecting Human Rights. In Deva, S. & Birchall, D. (Eds.), (2020). *Research Handbook on Human Rights and Business*. Edward Elgar Publishing.

Cellura, T. (2018). L'applicazione dei criteri ambientali minimi negli appalti pubblici – gli acquisti verdi dopo il correttivo al nuovo codice degli appalti. *Appalti & Contratti*, Maggioli Editore.

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

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

Corvaglia M. A. & Li, K. (2018). Extraterritoriality and public procurement regulation in the context of global supply chains' governance. *Eur. World*. 2(1).
<https://doi.org/10.14324/111.444.ewlj.2018.06>.

CHRB Alliance, (2020). "Corporate Human Rights Benchmark: Key Findings Report".

Craven, R. (2016). Subcontracting matters: Articles 43 and 71 of the 2014 Directive. In Ølykke & Sanchez-Graells (Eds.), (2016). *Reformation or Deformation of the EU Public Procurement Rules*, Edward Elgar, 295-317.

DIHR et al. (2016). Public Procurement and Human Rights: A Survey of Twenty Jurisdictions.

D' Hollander D. & Marx A. (2014). Strengthening private certification systems through public regulation: The case of sustainable public procurement. *Sustainability Accounting, Management and Policy Journal*, 5(1).

Delautre, G. (2019). Decent work in global supply chains: An internal research review. *Working paper 47*. Geneva: ILO.

Eamon, C. (2020). Civil liability for abuses of ILO core labour rights in European Union government supply chains: Ireland as a case study. In O'Brien, M. & Martin-Ortega, O. (2020). *Public Procurement and Human Rights: Opportunities, Risks and Dilemmas for the State as Buyer*, Edward Elgar Publishing.

EU Commission (2003). COM (2003) 302, Integrated Product Policy: Building on Environmental Life-Cycle Thinking.

EU Commission (2014). Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on Public Procurement and repealing Directive 2004/18/EC.

EU Commission (2021), 2021/C 237/01. Buying Social – A guide to taking account of social considerations in public procurement.

EU Commission (2022), COM/2022/66 final. Communication On Decent Work Worldwide For A Global Just Transition And A Sustainable Recovery.

EU Commission (2019), COM/2019/640. The European Green Deal.

EU Commission (2021), [COM/2021/350](#). Updating the 2020 New Industrial Strategy: Building a stronger Single Market for Europe's recovery.

EU Commission (2022), [COM\(2022\)71](#). Proposal for a Directive Of The European Parliament And Of The Council on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937.

European Parliament (2021), Resolution [2020/2129\(INL\)](#): Recommendations as to the content of the proposal requested recommendations for drawing up a Directive of the EU Parliament and Council on corporate due diligence and corporate accountability.

Fasciglione M. (2022). Rapporto sulla Due Diligence d'Impresa nella Filiera Agroalimentare, IRISS-CNR.

Fiorentino, L. & La Chimia, A. (2021). Il procurement delle pubbliche amministrazioni. *Tra innovazione e sostenibilità*, Astrid Editore.

Gothberg, P. (2019). Public procurement and human rights in the healthcare sector: the Swedish county councils collaborative model. In O'Brien, M. & Martin-Ortega, O. (Eds.), (2019). *Public Procurement and Human Rights*, Edward Elgar.

Hansom, D. (2016). Mandatory exclusions: a new tool to protect human rights in EU public procurement? *International Learning Law on Public Procurement and Human Rights blog*.

ILO (2016). Decent work in global supply chains - Report IV to the 105th ILC. *Geneva*.

ILO (2020). [Achieving decent work in global supply chains Report](#) (accessed 12 November 2022).

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

GPP Observatory (2021). [I numeri del Green Public Procurement](#).

Mazzantini, G. (2021). Analisi economica della spesa pubblica italiana. In Fiorentino, L. & La Chimia, A. (Eds.), (2021). Il procurement delle pubbliche amministrazioni. *Tra innovazione e sostenibilità*, Astrid Editore.

McCrudden, C. (2007a). *Buying Social Justice: Equality, Government Procurement & Legal Change*. Oxford University Press.

McCrudden, C. (2007b). *Corporate Social Responsibility and Public Procurement. The New Corporate Accountability: Corporate Social Responsibility And The Law*, Cambridge University Press, 2007.

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

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

O'Brien, C. M. & Martin-Ortega, O. (2020). "Human rights and public procurement of goods and services". In Deva S. & Birchall D. (Eds), (2020). *Research Handbook on Human Rights and Business*.

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

O'Brien C. M. & Martin-Ortega O. (2022). Commission Proposal on Corporate Sustainability Due Diligence: Analysis From A Human Rights Perspective. *Policy Department for External Relations Directorate General for External Policies of the Union*.

Ministero dell'Ambiente (MITE), (2008). Piano di Azione Nazionale su Green Public Procurement, Decree n. 135/2008.

Ministero dell'Ambiente (MITE), (2015). Law 221/2015 on Environmental provisions to promote green economy measures and to limit the excessive use of natural resources (Collegato Ambientale).

Nielsen, H. N. (2017). Labour clauses in public contracts: ILO Convention no. 94 in the European Union after RegioPost. *Public Procurement Law Review*, 26(5), 201-219.

Ølykke, G. S. (2016). The provision on abnormally low tenders: a safeguard for fair competition? In Ølykke G. S., & Sanchez-Graells, A. (Eds), (2016). *Reformation or Deformation of the EU Public Procurement Rules*, Edward Elgar.

Outhwaite, O. & Martin-Ortega, O. (2016). Human rights in global supply chains: corporate social responsibility and public procurement in the European Union. *Human Rights and International Legal Discourse*.

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

Ricotta, S. (2014). Relazione italiana ed europea sui criteri sociali.

Semple, A. (2015). The Link to the Subject Matter: A Glass Ceiling for Sustainable Public Contracts? In Sjäffell & Wiesbrock (Eds.), (2015). *Sustainable Public Procurement under EU Law*. Cambridge University Press, 50-74.

Smit, L. et al. (2021). Human rights due diligence in global supply chains: evidence of corporate practices to inform a legal standard. *International Journal of Human Rights*, 25(6), 945-973.

Sanchez-Graells, A. (2020). Public Procurement and 'Core' Human Rights: A Sketch of the EU Legal Framework. In Martin-Ortega, O. & O'Brien, C. M. (Eds.), (2020). *Public Procurement and Human Rights*, Edward Elgar.

Sjaffel, B. & Wiesbrock A. (2016). Sustainable Public Procurement under EU Law: New Perspectives on the State as Stakeholder. *Cambridge University Press, Cambridge*.

Sjäffell, B. & Wiesbrock, A. (2015). Why should public procurement be about sustainability? In Sjäffell & Wiesbrock (Eds.), (2015). *Sustainable Public Procurement under EU Law: New Perspectives on the State as Stakeholder*, Cambridge: Cambridge University Press.

Stumberg, R. & Vander Meulen, N. (2019). Supply chain transparency in public procurement: lessons from the apparel sector. In Martin-Ortega, O. & O'Brien, C. M. (Eds.), (2019). *Public Procurement and Human Right*, Elgar.

Telles P. & Ølykke, G. S. (2017). Sustainable Procurement: A Compliance Perspective of EU Public Procurement Law. *EPPPL Review*, 239-252.

Ulfbeck, V. G., Andhov, A. & Mitkidis, K. (2019). Law and Responsible Supply Chain Management: Contract and Tort - Interplay and Overlap. *Routledge. Routledge Research in Corporate Law*.

UNGC (2018). Decent Work in Global Supply Chains. *Baseline report*.

UNHCHR (2011). Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy Framework".

Wiesbrock, A. (2016). Socially responsible public procurement: European value or national choice? In Sjaafell & Wiesbrock (Eds.), (2016). *Sustainable Public Procurement under EU Law: New Perspectives on the State as Stakeholder*, Cambridge University Press, Cambridge.

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

Velluti, S. & Tzevelekos, V. P. (2018). Extraterritoriality of EU law and human rights after Lisbon: The case of trade and public procurement. *Europe and the World: A law review*.