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Guidance on Socially Responsible Public Procurement: Response to consultation of the European Commission by the International Learning Lab on Procurement and Human Rights

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Executive summary

Public procurement is the purchase by the public sector of the goods and services it needs to carry out its functions. European Union (EU) member states spend around 14% of GDP on services, works and supplies and government buying accounts for a significant proportion of the overall global economy.

Endorsed unanimously by the UN Human Rights Council in 2011, the UN Guiding Principles on Business and Human Rights (UNGPs) highlight the ‘state duty to protect’ against business-related human rights abuses calls for states to address their potential impacts on human rights as an economic actor, including in the area of public procurement. In addition, Goal 12 of the UN Sustainable Development Goals reflects that as “mega-consumers,” governments have the purchasing power to set standards that can shift markets towards sustainable production.

The EU, EC and EU member states, as well as the UN, OECD and Council of Europe have committed to uphold the UNGPs, including in the public procurement context. Despite this, human rights dimensions of socially responsible public procurement (SRPP) have not so far been addressed in EU public procurement legislation policy or guidance:

- The European Union (EU) public procurement Directives and EU member state procurement laws and policies do not clearly define the human rights responsibilities of public bodies in connection with purchasing activities
- EU procurement laws and policies appear to have a ‘chilling effect’ on human rights and sustainability efforts by public buyers due to fear of legal challenges based on narrow interpretations of EU procurement rules relating to competition and equal treatment
- To the extent EU Public Procurement Directives refer to human rights concerns, these are defined restrictively with reference to ILO Core Labour Standards whereas reference should be made to all human rights acknowledged by the EU and the UNGPs
- Monitoring of conditions in government supply chains and remedy mechanisms for victims of human rights abuses by suppliers to public buyers in the EU are lacking
- There is a pressing need for guidance and capacity development support for EU public buyers on techniques and tools they can lawfully deploy to avoid or reduce the incidence of human rights abuses in the delivery of government contracts.
- Such guidance should address how public buyers may lawfully require suppliers to undertake human rights due diligence, how they should monitor their supplier's performance in addressing human rights risks in the supply chain, and how and when they should apply sanctions to suppliers that fail to implement the ‘corporate responsibility to respect’ human rights.

A lack of EU policy coherence in relation to public procurement and human rights undermines the fulfilment of the state ‘duty to protect’ against business-related human rights abuses as well as efforts to promote responsible business conduct, inside the EU and beyond. Given the scale of government spending, this presents a concrete and substantial threat to the realisation of the “decent work” agenda, the UNGPs and the Sustainable Development Goals, worldwide.

Recommendations

EU public procurement laws and policies as well as government purchasing practices should safeguard human rights. They should further yield a competitive advantage to companies that practice human rights due diligence as a mechanism to advance their operation on a socially and environmentally sustainable basis.

To this end the European Commission (EC) should publish guidance on Socially Responsible Public Procurement (SRPP) that addresses the respective duties and responsibilities of public buyers and their suppliers for human rights in alignment with:

- Relevant European human rights standards including the European Convention on Human Rights and Charter of Fundamental Rights
- The UN Guiding Principles on Business and Human Rights (UNGPs)
- The 2030 Agenda for Sustainable Development and Sustainable Development Goals
- Relevant policy commitments of the EU, EC on business and human rights and sustainable development
- Relevant policy commitments of EU member states on business and human rights and sustainable development, such as those contained in National Action Plans (NAPs) on business and human rights
- Standards and guidance on supply chains and human rights including the OECD Guidelines for Multinational Enterprises (2011), OECD Due Diligence Guidance (2018), OECD sector specific due diligence guidance and ISO 20400 Sustainable Procurement Guidance.

A strategic objective of EC SRPP guidance should be to enhance the use of EU government buying to increase the practice of human rights due diligence by businesses, in line with the UNGPs and OECD Guidelines for MNEs, and hence to increase business respect for human rights.

The EC's SRPP guidance should include:

1. *A revised definition of socially responsible public procurement aligned to the UNGPs and OECD Guidelines for MNEs as well as EU law and EC policy commitments on business and human rights, according to which:*

'SRPP' means procurement operations where human rights are respected and which promote sustainable development and responsible business conduct through the practice of risk-based supply chain due diligence to identify, prevent, mitigate and remedy potential and actual adverse impacts on human rights as well as environmental and social concerns.

SRPP operations may also seek to promote, for example, employment opportunities, decent work, compliance with social and labour rights, social inclusion (including persons with disabilities and migrant workers), equal opportunities, accessibility design for all and ethical trade, in addition to observing the principles enshrined in the Treaty for the European Union (TFEU) and the Procurement Directives.

According to this definition, SRPP includes public buyers integrating protection of internationally recognised human rights into all steps of their procurement processes as well as taking appropriate steps to ensure that their suppliers:

- i. avoid causing or contributing to human rights infringements in the performance of public contracts, and prevent and mitigate any such impacts;
 - ii. develop, implement and keep updated appropriate policies and procedures including: a company policy or other commitment to respect human rights; due diligence to identify, prevent, mitigate and account for how they address their impacts on human rights, and processes for remediation of adverse human rights impacts to which they cause or contribute.
2. *A clear statement of the state duty to protect against business-related human rights abuses in the procurement context, indicating its non-discretionary character, and an exposition of its implications for the interpretation and practical application of the EU public procurement Directives.*
3. *A clear explanation of “human rights due diligence” as a standard of conduct expected of all businesses including government suppliers and their business partners.*
4. Guidance on how to integrate human rights considerations into SRPP policies at national and local levels.
5. *Practical guidelines for public buyers on how to make effective use of the scope provided by the 2014 EU Procurement Directives to integrate human rights considerations across the public procurement cycle, including planning, tendering, contract monitoring and evaluation phases.*
6. Examples of good practices in integrating human rights into public procurement.
7. *Case studies addressing a selection of high risk sectors for human rights abuses in the EU public procurement context, such as catering, food and agricultural supply and garments supply chain, electronics and construction.*
8. Guidance on addressing perceived tensions between measures to protect human rights and other ‘primary’ or ‘secondary’ aims of public procurement, such as promoting the accessibility of public contracts to local and small and medium-sized enterprises (SMEs) or anti-corruption.
9. Finally, as the UNGPs are concerned to advance effective enjoyment of universally-recognised human rights, new EC SRPP guidance should clarify that appropriate measures to protect such rights serve to advance, rather than undermine, the achievement of a single procurement market.

1. Introduction

Public procurement is the purchase by the public sector of the goods and services it needs to carry out its functions. Government buying accounts for a significant proportion of the overall global economy. European Union (EU) member states spend around 14% of GDP on services, works and supplies and globally, public procurement accounts for 15-20% GDP.¹

The 2030 Agenda for Sustainable Development reflects the role of governments as “mega-consumers” with purchasing power to set standards that can shift markets towards sustainable production.² UN Sustainable Development Goal 12 sets new objectives on public procurement as part of the drive towards sustainable production and consumption and more inclusive economies.³

Under the UN Framework and UN Guiding Principles on Business and Human Rights (UNGPs), the ‘state duty to protect’ against business-related human rights abuses calls for states to address their potential impacts on human rights as an economic actor, including in the area of public procurement.⁴

Given its scale and market value, public procurement holds enormous potential to promote the corporate respect for human rights highlighted by the UNGPs and drive the transition to sustainable production and consumption called for by the 2030 Agenda for Sustainable Development.

The EU as well as international and other European regional institutions and individual EU member states have committed to uphold the UNGPs through instruments including the European Commission’s 2011 *Communication on Corporate Social Responsibility* and the European Council’s *Strategic Framework and Action Plan on Human Rights and Democracy*, amongst others (Part 2).⁵

However, the 2014 EU Procurement Directives, member states’ transposing legislation and any existing official guidance at EU and member state levels relating to the Directives do not address the implications of the UNGPs in the public procurement context.⁶ Besides, there is evidence that existing EU laws have a “chilling effect” on measures by EU public authorities to integrate human rights into public procurement, despite important innovations in some EU member states and in particular at the level of local government.⁷

¹ European Commission, DG Growth, Public Procurement, https://ec.europa.eu/growth/single-market/public-procurement_en (accessed 30 May 2018).

² UN General Assembly, 21 October 2015, Transforming our world: the 2030 Agenda for Sustainable Development, A/RES/70/1: <http://undocs.org/A/RES/70/1>.

³ <https://sustainabledevelopment.un.org/sdg12>.

⁴ UNHRC, *Protect, Respect and Remedy: a Framework for Business and Human Rights*, UN Doc. A/HRC/8/5, 7 April 2008 and UNHRC, *Human Rights and Transnational Corporations and Other Business Enterprises*, UN Doc. A/HRC/Res. 17/4, 16 June 2011, para. 1 endorsing HRC, *Guiding Principles on Business and Human Rights: Implementing the United Nations ‘Protect, Respect and Remedy Framework*, UN Doc. A/HRC/17/31, 21 March 2011, Annex, para. 2 (hereafter “UNGPs”).

⁵ European Commission, *A renewed EU strategy 2011-14 for Corporate Social Responsibility*, COM(2011) 681 final (25 October 2011), 6; Council of the European Union, ‘EU Strategic Framework on Human Rights and Democracy’ (25 June 2012), https://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/foraff/131181.pdf. See also Council of the EU, ‘Council Conclusions on Business and Human Rights’, 3477th meeting of the Foreign Affairs Council, 10254/16 (20 June 2016).

⁶ Directive 2014/24, of the European Parliament and of the Council of 26 Feb. 2014 on public procurement and repealing Directive 2004/18, 2014 O.J. (L 94) 65; Directive 2014/25 of the European Parliament and of the Council of 26 February 2014 on procurement by entities operating in the water, energy, transport and postal services sector and repealing Directive 2004/17/EC, 2014 O.J. (L 94) 243.

⁷ C. Methven O’Brien *et al* (International Learning Lab on Public Procurement and Human Rights), *Public Procurement and Human Rights: A Survey of Twenty Jurisdictions* (DIHR/ICAR, 2016), available at: <http://www.hrprocurementlab.org/resources/reports/>; A. Sanchez-Graells, “Public Procurement and ‘Core’

This is important because governments procure goods and services via supply chains in which serious human rights abuses are widespread (Part 3).

Recognising this, and the need for policy coherence between policy instruments on responsible business and public procurement, other international actors, such as the OECD, have recently moved to bridge the two agendas.⁸

By contrast, a lack of EU guidance addressing how EU responsible business commitments interact with EU public procurement rules represents an embarrassing gap that undermines policy coherence at regional and member state levels and poses a significant threat to efforts to advance human rights, decent work and sustainable development in the EU and beyond.

There is therefore a pressing need for new EC SRPP guidance to address the implications of EU commitments to the UNGPs and SDGs in the public procurement context (Part 4) and to provide practical tools and approaches for EU public buyers to apply towards their effective implementation based on emerging good practices and approaches amongst European public buyers (Part 5).

2. Human rights and public supply chains: legal and policy frameworks

2.1 UN

Endorsed by the UN Human Rights Council in 2011, the UNGPs clarify that governments have a duty to protect human rights that extends to procurement.⁹ UNGP 1 provides that “States shall take appropriate steps to prevent, investigate, punish and redress [business-related human rights abuses] through effective policies, legislation, regulation and adjudication”. As UNGP 6 notes, this entails that states should promote awareness and respect for human rights by businesses in the context of public procurement. UNGP 8 calls for states to ensure “policy coherence” by alignment of goals and practice across governmental departments, agencies and institutions.

The UNGPs underscore that all businesses, including those supplying governments, have a responsibility to comply with all applicable laws and to respect human rights. UNGPs 11 to 24 outline elements of the “corporate responsibility to respect” human rights. This responsibility means that all businesses “should avoid infringing on the human rights of others and should address adverse human rights impacts with which they are involved”. Companies’ responsibility to respect human rights notably extends beyond their own operations to the activities of business partners, including suppliers and sub-contractors, wherever they are located. Applicable to all human rights, it thus requires that businesses monitor and manage human rights risks along their supply chains.

To avoid adverse human right impacts, businesses are required to implement “human rights due diligence.” A process adaptable to businesses of all sectors and sizes,¹⁰ human rights due diligence

Human Rights: A Sketch of the EU Legal Framework”, in O. Martin-Ortega and C. Methven O’Brien (eds), *Public Procurement and Human Rights: Risks, Dilemmas and Opportunities for the State as a Buyer* (Edward Elgar, Forthcoming).

⁸ OECD, *Responsible business conduct in government procurement practices* (2017), available at: <https://mneguidelines.oecd.org/Responsible-business-conduct-in-government-procurement-practices.pdf>.

⁹ Above, n.2.

¹⁰ UNHRC, *Human Rights and Transnational Corporations and Other Business Enterprises*, above n.2, para. 6.

comprises the following steps: 1) adopting and publishing a policy commitment to respect human rights; 2) human rights risk and impact assessment; 3) integrating assessment findings into company policies and procedures and taking appropriate actions; 4) monitoring the effectiveness of company responses to human rights impacts; v) communicating and reporting on human rights impacts and due diligence; vi) where businesses cause or contribute to abuses, providing for, or cooperating in, remediation of human rights abuses, for instance, via judicial or non-judicial state-based remedy mechanisms.¹¹

Adopted in 2015 by UN Member States, the 2030 Agenda for Sustainable Development proclaim new objectives on public procurement as part of the drive towards sustainable production and consumption and more inclusive economies. Goal 12 (Ensure sustainable consumption and production patterns) calls for a systemic approach and cooperation among actors operating in the supply chain, from producer to final consumer. Goal 12.7 calls on all countries to promote sustainable public procurement practices and to implement sustainable public procurement policies and action plans.

2.2 European Union

In line with the UNGPs, the European Commission's 2011 *Communication on Corporate Social Responsibility* called for enterprises "To identify, prevent and mitigate their possible adverse impacts" on human rights as well as environmental and social concerns, noting that "Large enterprises and enterprises at particular risk of having such impacts, are encouraged to carry out risk-based due diligence, including through their supply chains."¹²

The 2011 Communication explicitly referred to public procurement as an area for measures to enhance and promote "responsible business conduct", identifying buying as a means to strengthen market incentives for CSR which the EU should leverage together with other policies in the field of consumption and investment.¹³

EU institutions have committed to uphold the UNGPs through additional instruments including the European Council's *Strategic Framework and Action Plan on Human Rights and Democracy*¹⁴ and 2016 *Council Conclusions on Business and Human Rights*.¹⁵

Further measures taken at EU level to promote respect for human rights in supply chains include new legislative measures to address so-called conflict minerals, the timber trade and non-financial

¹¹ UNGPs 15, 17-20, UNGP 22.

¹² European Commission, *A renewed EU strategy 2011-14 for Corporate Social Responsibility*, above n.9, p.6.

¹³ Ibid, p. 11.

¹⁴ Council of the European Union, 'EU Strategic Framework on Human Rights and Democracy', above n.19.

¹⁵ Council of the EU, 'Council Conclusions on Business and Human Rights', above n.19.

reporting¹⁶ as well as the publication of human rights guidance for the oil and gas, ICT and employment and recruitment sectors.¹⁷

Besides, the EU is committed to uphold human rights via the TFEU Charter of Fundamental Rights and through the case law of the CJEU to the ECHR, as are EU member states also via their individual international treaty obligations and respective national constitutions.

2.3 Council of Europe

In general the jurisprudence of the ECtHR commits states parties to the ECHR to protect against human rights abuses by third parties including corporations within their jurisdiction via the doctrine of positive obligations.¹⁸

In 2016, the Committee of Ministers of the Council of Europe adopted a Recommendation in support of the implementation of the UNGPs amongst its member states. This recognises “that business enterprises have a responsibility to respect human rights”, and calls for its member states to “apply such measures as may be necessary” to encourage or require business enterprises to apply human rights due diligence “throughout their operations”.¹⁹

2.4 OECD and other international actors

The 2011 OECD Guidelines for Multinational Enterprises contain a new chapter on human rights.²⁰ According to the OECD Guidelines, “responsible business conduct” implies that companies undertake human rights due diligence as defined by the UNGPs. This has provided a basis for the OECD to develop detailed supply chain management guidance by industry sector encompassing human rights, for instance, addressing the banking and financial sectors, footwear and apparel, beyond its prior focus on precious metals.²¹ In 2018, the OECD published further detailed guidance on the process of due diligence *per se*.²² The OECD has also recently acknowledged links between public procurement, its responsible business agenda and sustainable development²³ and is currently initiating work to bridge the gap between its responsible business and public procurement policy agendas and instruments.

¹⁶ Regulation (EU) No. 2017/821 of the European Parliament and the Council of 17 May 2017 laying down supply chain due diligence obligations for Union importers of tin, tantalum and tungsten, their ores and gold originating from conflict-affected and high risk areas; Regulation (EU) No. 978/2012 of the European Parliament and of the Council of 20 October 2010 laying down the obligations of operators who place timber and timber products on the market; Directive 2014/95/EU of the European Parliament and of the Council of 22 October 2014 amending Directive 2013/34/EU as regards disclosure of non-financial and diversity information by certain large undertaking and groups, respectively.

¹⁷ European Commission Sector Guides on Implementing the UN Guiding Principles on Business and Human Rights, available at: https://ec.europa.eu/anti-trafficking/publications/european-commission-sector-guides-implementing-un-guiding-principles-business-and-hum-0_en.

¹⁸ C. Methven O'Brien, *Council of Europe Handbook on Human Rights* (Strasbourg: Council of Europe, forthcoming 2018).

¹⁹ Recommendation CM/Rec(2016)3 of the Committee of Ministers to member States on human rights and business (2 March 2016), Appendix, para.20.

²⁰ OECD, *Guidelines for Multinational Enterprises* (2011), available at: <http://mneguidelines.oecd.org/text/>.

²¹ Available at <http://www.oecd.org/investment/due-diligence-guidance-for-responsible-business-conduct.htm> (accessed 12 June 2018).

²² OECD, *Due Diligence Guidance for Responsible Business Conduct* (2018), available at: <https://mneguidelines.oecd.org/OECD-Due-Diligence-Guidance-for-Responsible-Business-Conduct.pdf>.

²³ OECD, *Responsible business conduct in government procurement practices* (2017), available at: <https://mneguidelines.oecd.org/Responsible-business-conduct-in-government-procurement-practices.pdf>.

Addressing “Responsible Supply Chains”, the G7 2015 Leaders’ Declaration committed to strive “for better application of internationally recognized labour, social and environmental standards, principles and commitments (in particular UN, OECD, ILO and applicable environmental agreements) in global supply chains”. It further recognised that governments and business have a joint responsibility “to foster sustainable supply chains and encourage best practices”, calling for tools to support public procurers in meeting social and environmental commitments.²⁴ In 2017, referring to “Sustainable Global Supply Chains”, the G20 Leaders’ Declaration undertook to “work towards establishing adequate policy frameworks in our countries” to “foster...the implementation of labour, social and environmental standards and human rights in line with internationally recognised frameworks”.²⁵

The International Standards Organisation (ISO) 2017 *Sustainable Procurement Guidance* (ISO 20400) urges the integration of human rights as well as green and other considerations in supply chain management, both private and public.

2.5 EU Member States

Since the UNGPs’ endorsement in 2011, legislation has been enacted by France and the United Kingdom defining corporate responsibilities with human rights dimensions in the context of supply chain management.²⁶

National action plans on business and human rights (NAPs), called for by the UN Human Rights Council as well as the EC 2011 Communication on CSR and European Council Strategic Framework on Human Rights and Democracy, are also providing a platform for new commitments by governments in the area of public procurement.²⁷ Most NAPs published by EU member states to date refer to the need for measures to integrate human rights into public procurement practices, for example:

- The U.K.’s revised NAP commits “to review the degree to which the activities of U.K. State-owned, controlled or supported enterprises, and of State contracting and purchasing of goods and services are executed with respect for human rights, and make recommendations to ensure compliance with the UNGPs.”²⁸
- The Dutch government in its NAP asserts that government suppliers should perform risk analysis to show that they respect human rights in accordance with the UNGPs, and commits to

²⁴ G7 Leaders Declaration. Summit 7-8 June 2015, available at: https://sustainabledevelopment.un.org/content/documents/7320LEADERS%20STATEMENT_FINAL_CLEAN.pdf (accessed 12 June 2018).

²⁵ G20 Leaders’ Declaration: Shaping an interconnected world. Hamburg, 7/8 July 2017, available <http://www.g20.utoronto.ca/2017/2017-G20-leaders-declaration.pdf> (accessed 12 June 2018).

²⁶ *Loi no. 2017-399 du 27 Mars 2017 relative au devoir de vigilance des sociétés mères et des entreprises donneusesd’ordre*, <https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000034290626&categorieLien=id> (accessed 4 April 2017); UK Modern Slavery Act 2015, <http://www.legislation.gov.uk/ukpga/2015/30/contents/enacted> (accessed 30 May 2018); California Transparency in Supply Chains Act 2010, <https://oag.ca.gov/SB657> (accessed 30 May 2018).

²⁷ Human Rights Council Res. A/HRC/26/22, Rep. of the Human Rights Council, 26th Sess., June 10-27, 2014 (July 15, 2014). United Nations Office of the High Commissioner for Human Rights, *State National Action Plans*, <http://www.ohchr.org/EN/Issues/Business/Pages/NationalActionPlans.aspx> (last visited Nov. 12, 2015).

²⁸ U.K. Foreign & Commonwealth Office, Good Business: Implementing the UN Guiding Principles on Business and Human Rights 9 (2013), available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/236901/BHR_Action_Plan_-_final_online_version_1_.pdf [hereinafter U.K. NAP]; See C. Methven O’Brien, *supra*.

undertake an evaluation of its sustainable procurement policy's social conditions for consistency with the OECD Guidelines for Multinational Enterprises and the UNGPs.²⁹

- Denmark's NAP highlights that public authorities should assume social responsibility relating to human rights as well as environmental, social, and economic conditions. It further invites Danish municipalities and regions to jointly prepare guidelines for public authorities on how to avoid adverse impacts as a result of purchasing.³⁰
- In Finland, the NAP proposes various measures to integrate human rights into procurement, including updating the State Procurement Manual's "responsibility themes," and developing a report on "product groups that pose the highest risk for human rights violations."³¹
- Belgium's NAP makes commitments including an examination by the Working Group on Sustainable Public Procurement of the Interdepartmental Commission for Sustainable Development on how to strengthen and optimize the integration of respect for human rights into the purchasing policy of the public authorities.³²
- The NAP of the Czech Republic tasks its Ministry of Regional Development to incorporate human rights issues into new guidance being developed and to incorporate information on the social and human rights context of public contracts and to take these issues into account into training courses for contracting authorities by end 2018.³³
- Germany's NAP commits the Federal Government to examine whether and to what extent binding minimum requirements for the corporate exercise of human rights due diligence can be enshrined in procurement law in a future revision. It will draw up a phased plan indicating how this aim can be achieved.³⁴

2.6 Corporate sector

Subsequent to such policy developments, many corporations including businesses based in or operating from EU member states have established human rights policies and detailed performance standards for suppliers that take legal form via incorporation into purchase contracts.³⁵

²⁹ Dutch Ministry of Foreign Affairs, National Action Plan on Business and Human Rights (Apr. 2014), *available at* <http://businesshumanrights.org/sites/default/files/documents/netherlands-national-action-plan.pdf> [hereinafter Dutch NAP]; Sustainable development and policy House of Representatives 30 196, no. 33, May 2008, at 5.

³⁰ Government of Denmark, Danish National Action Plan-Implementation of the UN Guiding Principles on Business and Human Rights 13 (2014), *available at* http://www.ohchr.org/Documents/Issues/Business/NationalPlans/Denmark_NationalPlanBHR.pdf [hereinafter Danish NAP].

³¹ Finnish Ministry of Employment and the Economy, National Action Plan for the Implementation of the UN Guiding Principles on Business and Human Rights 21 (2014), *available at* <http://business-humanrights.org/en/finland-publishes-national-action-plan-on-business-human-rights> [hereinafter Finnish NAP].

³² National Action Plans on Business and Human Rights, What National Action Plans say on Public procurement, Belgium, accessible via: <https://globalnaps.org/issue/public-procurement/>

³³ National Action Plans on Business and Human Rights, What National Action Plans say on Public procurement, Czech Republic, accessible via: <https://globalnaps.org/issue/public-procurement/>

³⁴ National Action Plans on Business and Human Rights, What National Action Plans say on Public procurement, Germany, accessible via: <https://globalnaps.org/issue/public-procurement/>

³⁵ BHRRC (2018b), List of companies with human rights policies, available at: <https://www.business-humanrights.org/en/company-policy-statements-on-human-rights> .

3. Human rights abuses in government supply chains

Despite commitments described above, governments continue to procure goods and services via supply chains in which serious human rights abuses are widespread, as illustrated by the following examples.

- Child labour: In the ICT sector, manufacturers source from countries where child labour is prevalent in factories.³⁶ Child labour is common in extractive industries that supply raw materials required by the ICT sector. As many as 1.5 million children work in gold mines, for example.³⁷ Child labour has been found in European public bodies' supply chains for natural stone³⁸ and healthcare equipment,³⁹ amongst others.
- Forced labour: Forced labour has been exposed in ICT supply chains. One investigation revealed the systematic exploitation of Chinese students at factories producing servers for brands commonly purchased by Danish public bodies.⁴⁰ Surgical gloves bought by health authorities in EU member states contain rubber from plantations relying on forced labour.⁴¹
- Human trafficking: The use of trafficked labour is widespread across a range of EU member states, for example, in the agriculture and fisheries sectors.⁴²
- Illegal wages and hours: Extreme working hours harmful to workers' health are common amongst ICT manufacturers supplying EU public purchasers.⁴³ Excessive working hours have

³⁶ U.S. Department of State, Country Reports on Human Rights Practices for 2013: China 78 (2013), available at <http://www.state.gov/documents/organization/220402.pdf>; U.S. Department of Labor, Bureau of International Labor Affairs, List of Goods produced by Child Labor (2013), available at <http://www.dol.gov/ILAB/reports/child-labor/list-of-goods>.

³⁷ F. Johannisson, "Child Mined Gold in Your Gadgets? Child Labor in Ghana and Mali and Sourcing Policies of IT Brands" 6 (2013), available at http://ibis.dk/sites/default/files/media/pdf_global/csr_pdf/child_mined_gold_in_your_gadgets_final.pdf.

³⁸ D. Heyl, "Public Procurement and Human Rights in the Netherlands: the case of natural stone", International Learning Lab on Public Procurement and Human Rights Blog, 30 September 2016, <http://www.hrprocurementlab.org/blog/public-procurement-and-human-rights-in-the-netherlands-the-case-of-natural-stone/>.

³⁹ SwedWatch et. al, *Healthier Procurement: Improvements to Working Conditions for Surgical Instrument Manufacture in Pakistan* (Apr. 2015), available at <http://www.swedwatch.org/en/reports/healthier-procurement>.

⁴⁰ DanWatch & GoodElectronics, *Servants of Servers: Rights Violations and Forced Labour in the Supply Chain of ICT Equipment in European Universities* (2015), available at <https://www.danwatch.dk/en/undersogelse/servants-of-servers/?chapter=1>.

⁴¹ Danwatch, <https://www.danwatch.dk/da/artikler/kritisable-arbejdsforhold-bag-gummihandsker-paa-danske-hospitaler/243> (last visited Nov. 12, 2015).

⁴² N. Clark, Detecting and tackling forced labour in Europe, Joseph Rowntree Foundation (2013), <https://www.jrf.org.uk/sites/default/files/jrf/migrated/files/forced-labour-europe-full.pdf>; "Caporalato, almeno 10 i braccianti morti in Italia tra luglio e settembre", <http://www.redattoresociale.it/Notiziario/Articolo/491577/Caporalato-almeno-10-i-braccianti-morti-in-Italia-tra-luglio-e-settembre>; "We thought slavery had gone away': African men exploited on Irish boats", The Guardian, 18 May 2018, https://www.equalityhumanrights.com/sites/default/files/the_invisible_workforce_full_report_08-08-14.pdf.

⁴³ D. Barboza, "After Suicides, Scrutiny of China's Grim Factories," N.Y. TIMES (June 6, 2010), <http://www.nytimes.com/2010/06/07/business/global/07suicide.html>; STUDENTS & SCHOLARS AGAINST CORPORATE MISBEHAVIOUR (SACOM), WORKERS AS MACHINES: MILITARY MANAGEMENT IN FOXCONN 2 (Oct. 12, 2010), available at http://sacom.hk/wp-content/uploads/2010/11/report-on-foxconn-workers-as-machines_sacom.pdf.

been documented amongst security and other companies serving as suppliers to government in Poland⁴⁴ and amongst commercial cleaning contractors in the UK.⁴⁵

- Health and safety: NGO investigations have revealed that surgical instruments used by healthcare bodies in Sweden and the U.K. are manufactured under hazardous working conditions.⁴⁶ Minerals required for the manufacture of ICT components are extracted by processes that frequently endanger workers' health.⁴⁷
- Freedom of association: EU government buyers have been found to purchase uniforms from factories in Export Processing Zones where trade unions are prohibited.⁴⁸ A contractor on an Irish government construction project recently refused to recognise its workers' union during a pay dispute.⁴⁹

4. Elements of new EC SRPP Guidance

Such abuses demonstrate the damaging consequences of a lack of policy coherence on public procurement and human rights for the effective enjoyment human rights, decent work and sustainable development in the EU and beyond.

By contrast EU public procurement laws, policies and purchasing practices should safeguard human rights. They should further yield a competitive advantage to companies that practice human rights due diligence as a mechanism to advance their operation on a socially and environmentally sustainable basis.

To this end, the European Commission (EC) should publish new guidance on Socially Responsible Public Procurement (SRPP) that addresses the respective duties and responsibilities of public buyers and their suppliers for human rights in alignment with the UNGPs, Sustainable Development Goals and other relevant supply chain commitments and due diligence standards.

A strategic objective of EC SRPP guidance should be to enhance the use of EU government buying to increase the practice of human rights due diligence by businesses, in line with the UNGPs and OECD Guidelines for MNEs, and hence to increase business respect for human rights.

The core of new EC SRPP Guidance must be a new definition of SRPP that aligns with these and the definition of CSR advanced by the EC in its 2011 *Communication on Corporate Social Responsibility* by clearly indicating the non-discretionary character of the state duty to protect against business-related human rights abuses, including in the procurement context, as well as the corporate responsibility to respect human rights which applies to all businesses, including government suppliers.

⁴⁴ G. Piskalski and Kozek, "Public procurement and human rights in Poland – Can a source of a problem become its solution?" International Learning Lab on Public Procurement and Human Rights Blog, 28 November 2016, <http://www.hrprocurementlab.org/blog/public-procurement-and-human-rights-in-poland-can-a-source-of-a-problem-become-its-solution/>.

⁴⁵ UK Equality and Human Rights Commission, *The Invisible Workforce: employment practices in the cleaning sector*, https://www.equalityhumanrights.com/sites/default/files/the_invisible_workforce_full_report_08-08-14.pdf.

⁴⁶ SwedWatch et. al, *Healthier Procurement: Improvements to Working Conditions for Surgical Instrument Manufacture in Pakistan* (Apr. 2015), available at <http://www.swedwatch.org/en/reports/healthier-procurement>

⁴⁷ Verite, *Risk Analysis of Indicators of Forced Labor and Human Trafficking in Illegal Gold Mining in Peru* 38-39 (Jan. 2013).

⁴⁸ Danwatch, *The Lost Thread: Violations and abuse of power in the garment industry in Bangladesh* 23 (2015).

⁴⁹ O. Kelliher, "Archaeologists Seek "Appropriate Pay" After Site Walk-Off", *The Irish Times* (July 9, 2018) available at <https://www.irishtimes.com/news/environment/archaeologists-seek-appropriate-pay-after-site-walk-off-1.3558194>

Proposed new definition of SRPP:

A revised definition of socially responsible public procurement aligned to the UNGPs and OECD Guidelines for MNEs as well as EU law and EC policy commitments on business and human rights, according to which:

‘SRPP’ means procurement operations where human rights are respected and which promote sustainable development and responsible business conduct through the practice of risk-based supply chain due diligence to identify, prevent, mitigate and remedy potential and actual adverse impacts on human rights as well as environmental and social concerns.

SRPP operations may also seek to promote, for example, employment opportunities, decent work, compliance with social and labour rights, social inclusion (including persons with disabilities and migrant workers), equal opportunities, accessibility design for all and ethical trade, in addition to observing the principles enshrined in the Treaty for the European Union (TFEU) and the Procurement Directives.

According to this definition, SRPP includes public buyers integrating protection of internationally recognised human rights into all steps of their procurement process, in line with the state duty to protect under the UN Framework and UNGPs. In addition, SRPP extends to taking appropriate steps to ensure that government suppliers:

- i. avoid causing or contributing to human rights infringements in the performance of public contracts, and prevent and mitigate any such impacts;
- ii. develop, implement and keep updated appropriate policies and procedures including: a company policy or other commitment to respect human rights; due diligence to identify, prevent, mitigate and account for how they address their impacts on human rights, and processes for remediation of adverse human rights impacts to which they cause or contribute.

The scope of new EC SRPP guidance should extend beyond “buying social” to address: i) human rights as a distinct dimension of SRPP of a character and context qualitatively different to those of “social” procurement as previously defined by the EC; and ii) human rights due diligence as a requirement on all businesses including government suppliers.

In addition, new SRPP guidance should include the following elements:

- *A clear statement of the state duty to protect against business-related human rights abuses in the procurement context, indicating its non-discretionary character, and an exposition of its implications for the interpretation and practical application of the EU public procurement Directives.*
- *A clear explanation of “human rights due diligence” as a standard of conduct expected of all businesses including government suppliers and their business partners.*
- Guidance on how to integrate human rights considerations into SRPP policies at national and local levels.

- *Practical guidelines for public buyers on how to make effective use of the scope provided by the 2014 EU Procurement Directives to integrate human rights considerations* across the public procurement cycle, including planning, tendering, contract monitoring and evaluation phases.
- Examples of good practices in integrating human rights into public procurement.
- *Case studies addressing a selection of high risk sectors for human rights abuses in the EU public procurement context*, such as catering, food and agricultural supply and garments supply chain, electronics and construction.
- Guidance on addressing perceived tensions between measures to protect human rights and other ‘primary’ or ‘secondary’ aims of public procurement, such as promoting the accessibility of public contracts to local and small and medium-sized enterprises (SMEs) or anti-corruption.
- As the UNGPs are concerned to advance effective enjoyment of universally-recognised human rights, new EC SRPP guidance should clarify that appropriate measures to protect such rights serve to advance, rather than undermine, the achievement of a single procurement market.

Lastly, in terms of structure, new guidance should address opportunities for EU government policy-makers and public buyers to integrate human rights across all aspects of the procurement process. Examples of best practices and emblematic case studies of effective measures to address high risk spend categories, such as those identified in the following section, should be provided in a separate guide.

5. Integrating human rights into the procurement cycle: EU experiences

Various European actors have embarked on innovative practices to integrate human rights as an aspect of “social” procurement, as illustrated by the following examples.

5.1. National government

In the **Netherlands**, the Dutch national sustainable procurement policy requires companies supplying goods and services to public bodies in the Netherlands to respect human rights as part of the “social conditions” applicable to all central government EU contract award procedures since 1 January 2013.⁵⁰ Suppliers may meet the social conditions by a variety of means, such as participating in a multi-stakeholder supply chain initiative or undertaking risk analysis. PIANOo, the government’s tendering expertise centre, has published a step-by-step guide addressing how to meet the Social Conditions at each phase of the tender-procedure.⁵¹

⁵⁰ Dutch Ministry of Foreign Affairs, National Action Plan on Business and Human Rights 5 (April 2014), available at <https://business-humanrights.org/sites/default/files/documents/netherlands-national-action-plan.pdf>

⁵¹ PIANOo, *Social Conditions in Global Supply Chains*, <https://www.pianoo.nl/about-pianoo/sustainable-public-procurement-spp/spp-themes/social-conditions-in-global-supply-chains> (last visited 29 March, 2017); PIANOo, *Getting*

Some studies have however questioned the effectiveness of the “social conditions” in practice, due to failure to incorporate them into public contracts, lack of contract performance monitoring and low awareness by both public buyers and suppliers of relevant risks.⁵² In this context, the Dutch National Action Plan on business and human rights⁵³ commits to evaluate the social conditions for consistency with the OECD Guidelines for Multinational Enterprises and UNGPs, and their potential extension to municipal, provincial, and water authorities.

In the **U.K.** the Modern Slavery Act 2015 includes certain public buyers amongst the commercial organisations which are required to report under its Transparency in Supply Chains provision (s.54) on their efforts to identify, prevent and mitigate the risks of modern slavery and human trafficking in their supply chain. A Private Members Bill seeks to amend to extend this reporting obligation to all public buyers and to exclude non-compliant companies from tender processes.⁵⁴

5.2 Regional and local government and other public bodies

Sweden’s County Councils are responsible for healthcare, public transportation and regional planning and spend about 13 billion euros per year through procurement.⁵⁵ Since 2010, the County Councils have collaborated in using a common code of conduct for suppliers, follow-up questions to review suppliers’ compliance with the code, and targeted factory audits. In 2012, the Councils established a formalised structure with a National Coordinator, Steering Committee, Expert Group and point of contact at each county council. The Councils have prioritised seven categories of goods for human rights criteria in public procurement, including surgical instruments worth approximately €267,000 annually.⁵⁶ A 2015 study found the measures mentioned had a substantial impact in reducing serious labour rights abuses, including child labour, amongst surgical instruments workshops in the County Council’s supply chain.⁵⁷

With input from stakeholders including the Scottish Human Rights Commission, the **Scottish Government** and COSLA developed *Guidance for the Procurement of Care and Support Services* which includes advice on how human rights can be included in the commissioning and procurement

Started with Social Conditions in Global Supply Chains, <https://www.pianoo.nl/about-pianoo/sustainable-public-procurement-spp/spp-themes/social-conditions-in-global-supply-chains/getting-started-with-social> (last visited 29 March, 2017)

⁵² See further C Methven O’Brien et al, *A Survey of 20 Jurisdictions*, supra n.1.

⁵³ Dutch Ministry of Foreign Affairs, National Action Plan on Business and Human Rights (Apr. 2014), available at <http://businesshumanrights.org/sites/default/files/documents/netherlands-national-action-plan.pdf>.

⁵⁴ Modern Slavery (Transparency in Supply Chains) Bill (HC Bill 105), available at https://www.publications.parliament.uk/pa/bills/cbill/2016-2017/0105/cbill_2016-20170105_en_1.htm (last visited 02 May 2017).

⁵⁵ K. Hemstrom, TCO development webinar: Sustainable IT Webinar Series, *Best Practice Sustainable IT Procurement* (16 March, 2016), available at <http://tcodevelopment.com/news/watch-webinar-on-demand-best-practice-sustainable-it-procurement/>; Electronics Watch, Public Procurement and Human Rights Due Diligence to Achieve Respect for Labour Rights Standards in Electronics Factories: A Case Study of the Swedish County Councils and the Dell Computer Corporation 4 (February 2016), available at http://electronicswatch.org/en/publications_1633

⁵⁶ See further, Electronics Watch, *Public Procurement and Human Rights Due Diligence to Achieve Respect for Labour Rights Standards in Electronics Factories: A Case Study of the Swedish County Councils and the Dell Computer Corporation 4* (February 2016), available at http://electronicswatch.org/en/publications_1633

⁵⁷ Swedwatch et al., *Healthier Procurement: Improvements for Working Conditions for Surgical Instrument Manufacture in Pakistan* (March 2015), available at http://www.swedwatch.org/sites/default/files/healthier_procurement.pdf

of care services, with particular reference to service specifications, selection and award criteria and contractual clauses relating to services.⁵⁸

Transport for London (TfL) has adopted an Ethical Sourcing Policy, linked to the Ethical Trading Initiative's Base Code, according to which TfL aims to improve labour conditions in the supply chain for specified product categories or products. Suppliers under contracts that include ethical sourcing provisions should monitor conditions via third party audits and provide TfL with results while TfL will collaborate with suppliers to remedy breaches.⁵⁹

UK universities are obliged to produce statements in compliance with the Transparency in Supply Chains section of the UK Modern Slavery Act (2015) and to report on their efforts to identify, prevent and mitigate modern slavery and human trafficking in their own supply chains.⁶⁰ In addition, over forty **Local Authorities** have initiated reporting under the UK Modern Slavery Act on a voluntary basis.⁶¹

Several UK Framework Agreements, such as the **London Universities' Purchasing Consortium** Cleaning and Security Framework Agreements include contract clauses that demand the exercise of human rights due diligence and prevention of modern slavery in the contractor's supply chain.

5.3 Non-government actors

The **UK Equality and Human Rights** has published guidance for public authorities on how to comply with public sector equality duty obligations at different stages of the procurement cycle.⁶²

Northern Ireland's Central Procurement Directorate and the **Northern Ireland Human Rights Commission** are undertaking a pilot project on how to embed a human rights based approach to public procurement in relation to temporary worker contracts.⁶³

The **British Medical Association** in collaboration with the **Royal College of General Practitioners** has published guidance on how to introduce ethical and sustainable criteria into procurement by general practitioners and clinical commissioning groups.⁶⁴

The **Geneva Centre for the Democratic Control of Armed Forces (DCAF)** seeks to support effective oversight and accountability of the armed forces, including via the *Montreux document on pertinent*

⁵⁸ Scottish Government, *updated Guidance on the Procurement of Care and Support Services*, <http://www.gov.scot/Topics/Government/Procurement/policy/SocialCareProcurement> (last visited 29 March, 2017).

⁵⁹ Transport for London, *Ethical Sourcing Policy*, available at <http://content.tfl.gov.uk/tfl-ethical-sourcing-policy.pdf>

⁶⁰ O. Martin Ortega, *Modern Slavery and Human Rights in Global Supply Chains: Roles and Responsibilities of Public Buyers. Policy and practice insights for Higher Education Institutions in the framework of their obligations under the UK Modern Slavery Act*. BHRE Research Series. Policy Paper n.2 (2016), available at <http://www.bhre.org/policy-papers/> (last visited 29 March, 2017); Olga Martin-Ortega and Patrycja Krupinska (2018), "[UK Modern Slavery Act 2015 Transparency in Supply Chains: The Second Year of Reporting by Universities](#)." BHRE Research Series, Report no. 3. June 2018

⁶¹ Olga Martin-Ortega, Anna Gorna and Rahima Islam (2018), "[UK Modern Slavery Act Transparency in Supply Chains: Reporting by Local Authorities](#)". BHRE Research Series, Report no. 2. March 2018.

⁶² Equality and Human Rights commission, *Guidance on Procurement*, <https://www.equalityhumanrights.com/en/advice-and-guidance/guidance-procurement> (last visited 29 March, 2017).

⁶³ Northern Ireland Human Rights commission, *Written Evidence on Business and Human Rights* (July 2016), available at <http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/human-rights-committee/human-rights-and-business/written/35141.pdf>. See further, Northern Ireland Human Rights Commission, *Public Procurement and Human Rights in Northern Ireland*, available at http://www.nihrc.org/uploads/publications/NIHRC_Public_Procurement_and_Human_Rights.pdf.

⁶⁴ British Medical Association, *Ethical Procurement Guidance for GPs and CCGs*, <https://www.bma.org.uk/collective-voice/influence/international-work/fair-medical-trade/tools-and-resources/ethical-procurement-guidance> (last visited 29 March, 2017).

international legal obligations and good practices for States related to operations of private military and security companies during armed conflict and the *International Code of Conduct for Private Security Service Providers*. As an extension of this work, DCAF has developed guidance on government procurement practices and human rights in the area of private security services.⁶⁵

Electronics Watch is an independent monitoring organisation that aims to help public sector organisations ensure respect for human rights in their ICT supply chains. Electronics Watch allows public buyers to share the cost of monitoring suppliers and to combine efforts to remedy labour rights and health and safety breaches thus lowering the cost of responsible public procurement while extending impact by aggregating leverage.⁶⁶ Electronics Watch provides model contract performance clauses that meet procurement law requirements while also including a Code of Labour Practices for suppliers containing human rights and labour safeguards. Contract clauses *inter alia* encourage suppliers to disclose factory locations to purchasers so that labour conditions can be monitored. Electronics Watch also produces country profiles, thematic research, factory surveys and investigative reports to evaluate whether its code of conduct is being met. Several public buyers in Europe include Electronics Watch clauses in their ICT supply contracts. The first such contract was for the purchase of Apple Equipment and Services by Higher Education Purchasing Consortium, Wales (HEPCW). This contract required suppliers to adopt transparent supply chain management practices and respond to reports of abuses.⁶⁷

6. Conclusion

Public procurement must be harnessed effectively if EU commitments to uphold the UNGPs and promote the achievement of the Sustainable Development Goals are to be realised. However, current public procurement legislation, guidance and practices in the EU fall short of what is needed to deliver policy coherence.

To help address this gap, and to align with EU member states' obligations to respect, protect and promote human rights as well as other legal and policy commitments to human rights and sustainable development at EU and member state levels, this submission has called for a revised approach to be adopted in new EC guidance on SRPP.

In particular, a new definition of SRPP has been proposed to align with the definition of CSR advanced by the 2011 EC Communication on CSR. A case has further been advanced for clear and explicit guidance to explain the *state duty to protect against business-related human rights abuses in the procurement context and its practical implications for EU public buyers and their suppliers, in particular, as regards "human rights due diligence" as a standard of conduct expected of all businesses including government suppliers and their business partners*. Examples of emerging good practices and case studies in the area of public procurement and human rights that could be incorporated in such guidance have been highlighted.

Such initiatives have the potential to leverage public authorities' buying market to accelerate the uptake of human rights due diligence by business. Yet care must be exercised to ensure new

⁶⁵ DCAF, <http://www.dcaf.ch/> (last visited Nov. 12, 2015)/

http://www.ppps.dcaf.ch/sites/default/files/uploads/DCAF_Procurement_v4.pdf

⁶⁶ Electronics Watch, <http://electronicswatch.org/en/> (last visited 29 March, 2017).

⁶⁷ Electronics Watch, *The UK Higher Education and National Apple Equipment and Services Framework Agreement* (2016), available at http://electronicswatch.org/the-uk-higher-education-and-national-apple-equipment-and-services-framework-agreement_2455571.pdf

measures on procurement and human rights avoid duplication of efforts and capture synergies across existing sustainable, social and green procurement initiatives. Further analysis, dialogue with stakeholders as well as targeted EC support for strategic capacity building initiatives on will thus be important follow up measures needed to support the efficient and effective operationalisation of new EC SRPP guidance along the lines indicated here.

About the International Learning Lab on Public Procurement and Human Rights

www.hrprocurementlab.org

The International Learning Lab on Public Procurement and Human Rights ('the Lab') is a global network of public procurement experts and stakeholders comprising procurement agencies and purchasing officers, regional and international organisations, non-governmental organizations (NGOs), procurement professional associations, national human rights institutions (NHRIs), legal practitioners and academics.

The Lab serves as a platform and mechanism for:

- Experience-sharing on opportunities and challenges for integrating respect for human rights into public purchasing
- Identifying good practices and lessons learned
- Developing tools and guidance to build capacity on public procurement and human rights
- Awareness-raising and targeted advocacy to promote policy coherence on procurement and human rights in line with international standards.

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