

# Human Rights in Global Supply Chains: Corporate Social Responsibility and Public Procurement in the European Union

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Abstract:

The global supply chains of multinational enterprises are complex and multi-tiered, often involving many stages of production and spanning several jurisdictions. Important questions remain about to ensure that human rights are respected in these supply chains including how multinational enterprises are to exercise the responsibility to respect human rights in their supply chains and the role that can be played by states in protecting human rights outside of their borders. This article focuses specifically on the potential for states to use public procurement as a tool to promote human rights protection beyond their borders by purchasing goods from companies that ensure that human rights are respected throughout the whole supply chain of the procured product. The article considers the responsibilities of states and business enterprises with respect to global supply chains including the recognised relevance of public procurement in the United Nations Guiding Principles on Business and Human Rights as part of the 'state-business nexus'. The remaining sections analyse how the historical role of public procurement in pursuing social aims has developed to encompass matters of corporate social responsibility (CSR) and of human rights specifically; the development of the EU CSR strategy and the approach of the EU to linking this with developments in the EU procurement regime and, finally; the extent to which the recently revised EU procurement regime supports the use of procurement as a tool to promote human rights in global supply chains.

Keywords: CSR, EU, human rights, public procurement, UN Guiding Principles

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## Introduction

Commercial activities today are organised internationally through complex processes and stages, often with hundreds of companies and entities involved across a number of states and jurisdictions. Where harmful corporate behaviours cause human rights violations, one of the most pressing but unresolved issues in international law and practice is how to extend human rights protection beyond individual states' borders. Whilst current international developments addressing business and human rights, including the non-binding UN Guiding Principles on Business and Human Rights (UNGPs), make explicit reference to the responsibilities of multinational enterprises (MNEs) beyond their direct impacts, including for the actions of their business partners and in their global supply chains, there are no similar provisions for states. It remains the case that states' duties to protect human rights from violations caused by third parties, including corporations, is generally restricted to protecting those under their jurisdiction. Indeed, even the UNGPs make only a non-committal reference to extraterritoriality. The expectation that MNEs will respect human rights throughout their operations including in their supply chains is clearer than ever but the means by which this responsibility may be realised – including through the role of the state – vary and are less well articulated through international instruments. Therefore, important questions remain concerning how to achieve human rights protection through the global supply chains of MNEs.

Could public procurement, where the state engages private companies to provide products and services, provide an answer? Linking the award of public procurement contracts to the promotion of social aims provides a clear opportunity for states to exercise their duty to protect human rights, by procuring goods and services which are delivered under conditions which respect human rights.

This article considers whether public procurement also creates, at least in principle, an opportunity to promote human rights protection beyond states' borders through purchasing from companies that ensure human rights are respected throughout the whole supply chain of the procured product. The European Union (EU) strategy for corporate social responsibility (CSR) has acknowledged the potential for a link to be made between CSR and the legal framework for public procurement, but the EU has often been hesitant to commit to it. More recent developments in both the CSR strategy and the EU public procurement framework may however have stepped closer to doing so. The main focus of the article is to assess the extent to which the potential contribution of public procurement, with respect for cross border human rights protection, has been developed by the EU and whether the recently revised public procurement Directive could allow procurement contracts to be used to promote human rights in global supply chains. Section one discusses business and human rights in the global supply chain, including relevant responsibilities of states and business enterprises in the UNGPs. In section two the article goes on to examine the historical role that public procurement has played in the promotion of domestic social policies

and the outward expansion of this role to CSR and to human rights. The article then examines in section three the development of the EU CSR strategy and its role with respect to the business and human rights agenda and the use of public procurement as a tool to promote secondary policies. Finally, in section four, we assess how far the opportunity for public procurement to be used as a tool to promote human rights in global supply chains has the potential to be realised after the changes introduced in the recently reformed EU public procurement Directive.

## 1. Business and Human Rights in Global Supply Chains

Business activities extend far beyond the boundaries of the home state of MNEs. Global production systems are organised in highly fragmented and geographically dispersed networks<sup>3</sup> and characterised by the transnational dimension of the supply chain as well as the complexity and asymmetric power relations in such chains.<sup>4</sup> These complex supply chains encompass several tiers of production often across several jurisdictions with the lower tiers of manufacture often located in developing or less economically developed countries. In this context the corporate brands or lead firms in the supply chain<sup>5</sup> are far removed from the workers involved in the production of the goods they market and ultimately from the people who are directly impacted by their commercial activity. Their responsibility over and capacity to influence the rights of workers and others are therefore blurred.

Changes to global governance brought by economic globalisation left open an enormous gap concerning the activities of MNEs and the protection of human rights outside of the state-based governance paradigm.<sup>6</sup> The question of how to ensure that business enterprises identify and manage human rights risks associated with their activities and business relationships in all the countries in which they operate is one which has been on the international agenda for nearly two decades. Whilst important advances have been made a crucial issue remains: how to protect human rights in complex supply chains including through the lower tiers of production.<sup>7</sup>

At the international level, several attempts to address the question of business and human rights have been made over the last two decades. Non-binding instruments such as the Organisation for Economic Co-operation and Development

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<sup>3</sup> K. Lukas, L. Plank, and C. Staritz, *Securing Labour Rights in Global Production Networks: Legal Instruments and Policy Options*, June 2010, <http://bim.lbg.ac.at/en/accountability-labour-rights-global-production-networks>, p. 1.

<sup>4</sup> K. Lukas, *Human Rights in the Supply Chain: Influence and Accountability*, in: R. Mares (ed.) *The UN Guiding Principles on Business and Human Rights: Foundations and Implementation* 163 (Leiden, Koninklijke Brill, 2012)

<sup>5</sup> Brands or core firms are considered special companies as they are characterized by the impact and leverage they have down their production chain, as Mares describes. See R. Mares, *The Limits of Supply Chain Responsibility: A Critical Analysis of Corporate Responsibility Instruments*, 79 *Nordic Journal of International Law* 193-244 (2010) p. 194. This article refers generally to corporations, companies, multinational enterprises and businesses, and more specifically to brands or contracting brands when addressing issues directly related to supply chain and public procurement.

<sup>6</sup> J. G. Ruggie, *Business and Human Rights: The Evolving International Agenda*, 101(4) *The American Journal of International Law* 819-840 (Oct. 2007).

<sup>7</sup> Mares, *supra* note 5, p. 194.

(OECD) Guidelines on MNEs<sup>8</sup> and the voluntary UN Global Compact<sup>9</sup> articulated an expectation that businesses should respect human rights and prevent human rights abuses (including those by their business partners) wherever they operate. Equally during the 1990s a plethora of corporate self-regulation instruments were developed in the framework of CSR. In this period of economic liberalization, the CSR agenda developed and gained renewed prominence in response to changes in global business structures and the increased pressure on companies to assume responsibility for the impacts of their global business activities. These developments have at least expressed aspirations that MNEs will respect human rights in their global production systems but stop short of elaborating on how this responsibility will be realised (or of elaborating binding rules) and therefore of extending responsibility to lower tiers of the supply chain.

This issue has featured as a prominent one in the drafting process of the most recent and comprehensive international instrument addressing business and human rights: the non-binding UNGPs.<sup>10</sup> They ‘apply to all States and to all business enterprises, both transnational and others, regardless of their size, sector, location, ownership and structure’. The three pillar framework elaborated by the UN Special Representative of the Secretary General on the issue of human rights and transnational corporations and other business enterprises (SRSG) recognizes the differing roles played by multinational corporations and business enterprises and by states in terms of securing human rights. As is well known, it recognises: (i) the state duty to protect against violations of human rights; (ii) the corporate responsibility to respect human rights; and (iii) the need for access to remedies for victims of human rights abuses.

Through the process of elaborating the UNGPs the SRSG was conscious of the main issue of the global supply chain and built upon, and also disregarded, several concepts to make the connection, and identify the limits, between human rights abuses at the low level of the supply chain (in the lower tiers) and the lead MNEs or brands.<sup>11</sup> The main concepts discussed and considered were sphere of influence,

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<sup>8</sup> OECD, OECD Guidelines for Multinational Enterprises (2011), <http://dx.doi.org/10.1787/9789264115415-en> (last visited 20 August 2015). The 2011 edition includes direct references to the UNGPs and key aspects of the framework such as corporate due diligence (discussed below).

<sup>9</sup> See specifically Principles 1 and 2 of the UN Global Compact’s Ten Core Principles

<sup>10</sup> UNHRC, Guiding Principles on Business and Human Rights: Implementing the United Nations ‘Protect, Respect and Remedy’ Framework, Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises’ (UN Doc A/HRC/17/31) 21 March 2011. The UNGPs build upon the framework presented by the SRSG in 2008: UNHRC, Protect, Respect and Remedy: a Framework for Business and Human Rights, Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises (UN Doc A/HRC/8/5), 7 April 2008 and were further endorsed by the UNHRC in UN Doc A/HRC/RES/17/4, 6 July 2011.

<sup>11</sup> See for example, J. Ruggie, The Corporate Responsibility to Respect Human Rights in Supply Chains, 10<sup>th</sup> OECD Round Table Discussion on Corporate Social Responsibility, Discussion Paper, 30 June 2010, <http://www.oecd.org/corporate/mne/45535896.pdf> (last visited 20 August 2015) and SRSG, Protect, Respect and Remedy: A Framework for Business and Human Rights, 7 April 2008, *supra* note 10, p. 19.

complicity and due diligence.<sup>12</sup> Finally, due diligence caught on and was incorporated as part of what was defined as the corporate responsibility to respect.<sup>13</sup>

The concept of corporate due diligence for human rights is therefore specifically applicable to the issue of the responsibilities of corporations towards those in their global supply chain. The corporate responsibility to respect encompasses business activities and business relationships. Business relationships are understood to include relationships with business partners, entities in its supply chain (value chain in the terminology of the UNGPs), and any other non-State or State entity directly linked to its business operations, products or services.<sup>14</sup> Human rights due diligence is not limited to the direct impact of a corporation's own activity but also covers the adverse human rights impacts that corporations may contribute to through their business relationships.<sup>15</sup> Human rights due diligence, as defined by the SRSG, consequently switches the focus from the risk to the corporation to the risk posed to those affected by its activities.<sup>16</sup> It goes beyond the corporate governance standard of risk management to include a whole range of purposes: to identify, prevent, mitigate and account for human rights impact. In particular, a due diligence process should include: 'assessing actual and potential human rights impacts, integrating and acting upon the findings, tracking responses, and communicating how impacts are addressed'.<sup>17</sup> If, in this process, businesses identify that they have caused or contributed to adverse impacts, the UNGPs require them to provide for - or at least to cooperate in - reparations.<sup>18</sup>

But corporations are not the sole actors in the business and human rights dynamic, and in a world where states are also powerful economic agents they have an important role to play. The obligation of states to protect against corporate human rights abuses and their role in the oversight over the supply chain has received less attention in the literature. The obligation to protect the human rights of those under its jurisdiction against third parties is a well-established and uncontested one unlike the role which a state may play with regard to the human rights of nationals of another state located outside its own jurisdiction. The state duty as expressed in the UNGPs in fact refers to human rights abuses 'within their territory and/or jurisdiction by third parties, including business enterprises'. The involvement of the state in the protection

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<sup>12</sup> For a more detailed discussion of these concepts and the way the UNGPs drafting process approached them see R. Mares, *Business and Human Rights After Ruggie: Foundations, the Art of Simplification and the Imperative of Cumulative Progress*, in R. Mares (ed.) *supra* note 4, p. 16-20, and K. Lukas, *supra* note 4, p. 154-159.

<sup>13</sup> The corporate responsibility to respect is defined in UNHRC (21 March 2011), *supra* note 10, Principle 11, as a responsibility to avoid infringing the human rights of others and to address the adverse human rights impact of corporate activities. In order to meet this responsibility, companies should have in place policies and procedures including: (i) a human rights policy commitment; (ii) a human rights due diligence process to 'identify, prevent, mitigate and account for how they address their impacts on human rights'; and (iii) processes to enable the remediation in the event of adverse human rights impacts.

<sup>14</sup> UNHRC (21 March 2011), *supra* note 10, Principle 13, Commentary

<sup>15</sup> UNHRC (21 March 2011), *supra* note 10, Principle 17(a).

<sup>16</sup> O. Martin-Ortega, *Human rights due diligence for corporations: from voluntary standards to hard law at last?*, 32(1) *Netherlands Quarterly of Human Rights Law* 44-74 (2014), p. 56.

<sup>17</sup> UNHRC (21 March 2011) *supra* note 10, Principle 17.

<sup>18</sup> UNHRC (21 March 2011) *supra* note 10, Principle 22.

of the rights of those affected by the corporate activities of companies of its nationality but located beyond its borders would require acceptance of the extraterritorial reach of its obligation to protect human rights and its capacity to assert extraterritorial application of its laws.

This is an issue that has long been discussed and not necessarily moved forward in practical terms. The UNGPs attempted to advance this issue by establishing that ‘States should set out clearly the expectation that all business enterprises domiciled in their territory and/or jurisdiction respect human rights *throughout their operations*’<sup>19</sup>[emphasis added] and make the point that though in international law states are not required to regulate the extraterritorial activities of businesses, they are not prevented from doing so where there is a jurisdictional basis for this. Whilst the UNGPs make explicit references to supply chains in the context of the corporate responsibility to respect, there is no direct mention of them when discussing the state duty to protect. A way to elaborate on the connection between corporate activity and the obligations of the state in the UNGPs has been through the definition of the state-business nexus.<sup>20</sup> As part of the State duty to protect UNGP 6 affirms that ‘States should promote respect for human rights by business enterprises with which they conduct commercial transactions.’ This nexus includes the activities of MNEs beyond the states’ borders. The commentary to UNGP 6 goes on to provide:

‘States conduct a variety of commercial transactions with business enterprises, not least through their procurement activities. This provides States – individually and collectively – with unique opportunities to promote awareness of and respect for human rights by those enterprises, including through the terms of contracts, with due regard to States’ relevant obligations under national and international law’<sup>21</sup>

This points at the role that States can have with regard to the supply chains in which they are involved through their purchasing capacity. Specifically relevant for our analysis is the fact that the UNGPs directly recognise the role of the state in promoting human rights through its procurement activities. Some have argued that this inclusion goes as far as a ‘duty to respect and protect human rights in their supply chain and in the context of privately delivered public services’.<sup>22</sup> This interpretation assumes that the state’s duty to protect human rights has an extraterritorial reach, extending to

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<sup>19</sup>UNHRC (21 March 2011) *supra* note 10, Principle 2.

<sup>20</sup>UNHRC (21 March 2011) *supra* note 10, Principle 6.

<sup>21</sup>UNHRC (21 March 2011) *supra* note 10, Principle 6, commentary.

<sup>22</sup> International Corporate Accountability Roundtable and Danish Institute for Human Rights, Essential Elements of State National Plans for Implementation of the UN Guiding Principles on Business and Human Rights, Expert Workshop organized by the UN Working Group on Business and Human Rights, DIHR-ICAR Briefing Note: Protecting Human Rights through Government Procurement, 7 May 2014, Geneva, p. 7, [http://www.humanrights.dk/files/media/dokumenter/business/unwg\\_8\\_may\\_workshop\\_icar\\_dihr\\_procurement\\_final.pdf](http://www.humanrights.dk/files/media/dokumenter/business/unwg_8_may_workshop_icar_dihr_procurement_final.pdf) (last visited 20 August 2015). We note though that the private delivery of services that might be considered public raises its own legal issues including where supply chain questions arise and that delivery of services in this context presents different problems to that of goods. Discussion of the delivery of services is however beyond the scope of this article, which will be limited to a discussion of the production of goods in global supply chains and their purchase through government procurement.

protection of the rights of those in the supply chain, which as mentioned we consider is not established yet in international law. Whilst the UNGPs have strengthened the duty of the states by highlighting the state-business nexus and calling upon states to promote respect for human rights by the business enterprises they contract with this is not the same as maintaining that public authorities have a legal obligation not to get implicated in human rights abuses across the supply chain. Indeed, it should be kept in mind that the UNGPs are a self-proclaimed non-binding instrument.<sup>23</sup> States' significant buying power does however provide them with capacity to influence the behaviour of those enterprises with which it engages. In this way, public procurement interacts with both the state duty to protect and the corporate responsibility to respect human rights, and can become a relevant tool in the protection of human rights in the global supply chain. Section 2 establishes the historical and changed role of public procurement as a regulatory tool for the pursuit of domestic social policies and its evolution and expansion as a potential response to global governance gaps and the protection of human rights.

## **2. Public Procurement, 'secondary policies' and human rights**

Despite its potential significance, the influence exerted by the purchasing decisions of the state on global supply chains has received relatively little attention. The award of contracts for the provision of goods and services to the government (including at the various levels of government) can and has however been linked with the promotion of domestic social policies but it is only more recently that this linkage has been associated with the activities of MNEs as well as with state commitments to respect and protect human rights.<sup>24</sup>

Public procurement concerns the acquisition by government and government bodies of goods, services, works and other supplies, generally through contracting with private entities after a competitive public process and in the best conditions possible for the authority which contracts the goods and services. However, public authorities have also used public procurement to promote aims beyond the basic acquisition of those goods or services. The use of procurement contracts to pursue such so-called 'secondary' policies is not a new proposition. Secondary policies are those which are not inherently necessary to achieving the functional objective of a specific procurement.<sup>25</sup> In his extensive work on the subject, McCrudden adopts the term 'linkage' to describe the use of government contracting as a tool to pursue social regulation. Here, governments play a role as active participants in the market itself, through their purchasing decisions, but combine this position with a regulatory role in which those same purchasing decisions are used to advance government conceptions of social justice.<sup>26</sup> Procurement contracts can potentially be used in a number of

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<sup>23</sup> UNHRC (21 March 2011) *supra* note 10, Introduction to the Principles, para. 14.

<sup>24</sup> K. Zeisel, *The Promotion of Human Rights by Selective Public Procurement under International Trade Law*, in O. De Schutter (ed) *Transnational Corporations and Human Rights* 361 (Oxford: Hart, 2006).

<sup>25</sup> S. Arrowsmith and P. Kunzlik, *Social and Environmental Policies in EC Procurement Law: New Directives and New Directions* 12 (Cambridge: CUP, 2009).

<sup>26</sup> This discussion here of linkage draws extensively on Professor McCrudden's work; a full and detailed discussion of the development of public procurement and its linkage with social policies can be found in C. McCrudden, *Buying Social Justice: Equality, Government Procurement, & Legal Change* (Oxford: OUP, 2007). See also C. McCrudden, *Corporate Social Responsibility and Public Procurement*. in D.



different ways: to promote compliance with existing law or to encourage or incentivise 'beyond compliance' behaviour.<sup>27</sup>

As a tool for the promotion of social policies, public procurement has been used in certain contexts throughout the 19th and 20th centuries. In a detailed discussion of the historical use of public procurement, McCrudden argues that in England and in the USA in particular (and also in France), public procurement was intimately connected with social and economic policy and indeed that modern procurement models emerged alongside the early development of the welfare state.<sup>28</sup> Many of these early developments in social procurement were linked with labour rights, such as setting upper limits on hours in a working day and establishing requirements that those working under government contracts be paid a fair wage. After WWI, government contracting came to be seen as an important mechanism for addressing the needs of disabled workers (including ex-servicemen) and, later, procurement was used to address other forms of discrimination and inequality, going so far as to support responses to 'quasi-constitutional' problems such as race relations, the rights of indigenous communities and gender equality. Public procurement has therefore been linked with the promotion of domestic labour rights and standards and other social issues for some time.<sup>29</sup> There were also early attempts to link international foreign policy aims to public procurement, and more specifically to promote anti-discrimination abroad. In the 1970s procurement was used as a means through which to exert pressure in relation to a particular political concern, pursuing social objectives outside of the purely domestic jurisdiction, such the abolition of job access and workplace discrimination in South Africa and Northern Ireland.<sup>30</sup>

The use of public procurement to pursue secondary, social policies has, it has been argued, followed wider trends in public policy with domestic linkage significantly restricted in the 1980s and 1990s, in tandem with the shift to wide acceptance of economic liberalism. In this paradigm the emphasis in procurement shifted away from secondary policies to concepts such as lowest price and 'value for money' narrowly construed and from a 'welfare model' to an 'economic model'.<sup>31</sup> Procurement policies became influenced by the institutions linked with economic globalization such as the World Bank and the WTO which demanded the removal of measures which could be seen to distort market access including by protecting domestic markets and could therefore be discriminatory to foreign companies.<sup>32</sup> This approach challenged the use

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McBarnet A. Voiculescu and T. Campbell (eds) *The New Corporate Accountability: Corporate Social Responsibility and the Law* 93-118 (Cambridge: CUP, 2009); C. McCrudden, *Using public procurement to achieve social outcomes*, 28(4) *Natural Resources Forum* 257-267 (2004).

<sup>27</sup>S. Arrowsmith and P. Kunzlik, *supra* note 25; J. Howe, *The Regulatory Impact of Using Public Procurement to Promote Better Labour in Corporate Supply Chains*, Legal Studies Research Paper No. 528, Melbourne Law School (2010).

<sup>28</sup> McCrudden, 2007, 2004, *supra* note 26.

<sup>29</sup> Numerous examples are discussed in McCrudden 2007, *supra* note 26.

<sup>30</sup> McCrudden, 2007, *supra* note 26, but see also P. Boulton, *Protecting the Environment through Public Procurement: The Case of South Africa* (32) *Natural Resources Forum* 1 – 10 (2008). See further McCrudden, *Human rights codes for transnational corporations: what can the Sullivan and MacBride principles tell us?* 19(2) *Oxford J Legal Studies* 167-202.

<sup>31</sup> McCrudden, 2007, 2009, *supra* note 26; Howe, *supra* note 27.

<sup>32</sup> McCrudden, 2007, *supra* note 26 see chapters 4, 11. See also C. McCrudden and S. G. Gross, *WTO Government Procurement Rules and the Local Dynamics of Procurement Policies: A Malaysian Case*

of public procurement as a tool of foreign policy to influence social conditions abroad. A 1996 state of Massachusetts (USA) Act which limited state agencies' capacity to contract companies doing business in Myanmar was challenged at the WTO for discrimination against non-US companies under the WTO Plurilateral Agreement on Government Procurement (GPA, discussed in Section 4).<sup>33</sup> At the same time though the use of public procurement to promote social – and environmental aims – adapted in line with emerging regulatory needs and policy developments.

As discussed in section one, many CSR codes and initiatives had been developed and adopted but despite this there remained an observable gap between 'the aspirations and practice' of businesses.<sup>34</sup> The responsibility assumed by MNEs for their global business operations was often seen as inadequate. At the same time the responsibilities of corporations who were awarded public contracts became more relevant in the context of a reduced role for the state and increased privatisation and contracting out of government services. From a regulatory perspective though the role of the state in regulating business activity was both reduced and made more difficult because of the shift towards internationalisation of corporate activity. In order to fill this void, McCrudden argues, these developments have in recent decades led to an expansion of the types of policies that governments are willing to link with public procurement especially with respect to environmental matters and social conditions in other countries.<sup>35</sup> This expanded role for public procurement in furthering policies beyond the domestic sphere included its linking with corporate social responsibility (CSR) and the activities of multinational corporations. Public procurement thus became a potential way for governments to influence or incentivise companies to fulfil their CSR obligations.<sup>36</sup> Public procurement could consequently be viewed as falling within a toolbox of responsive regulation allowing governments to use their leverage to facilitate corporate responsibility or influence the behaviour of MNEs without relying on mandatory regulation.<sup>37</sup>

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Study, 17(1) *European Journal of International Law* (2006); C, Hanley, Avoiding the issue: the Commission and human rights conditionality in public procurement, *European Law Review*, 714 (2002)

<sup>33</sup> An Act Regulating State Contracts with Companies Doing Business with or in Burma (Myanmar), 1996 Mass. Acts ch. 130 and California Transparency in Supply Chains Act of 2010, Civil Code Section 1714.43. The Massachusetts law was part of a whole set of legislative responses to the reports from corporate complicity on human rights abuses in Burma. Other US public bodies which enacted similar legislation were Takoma Park County in Maryland, and 21 cities including New York, Los Angeles and San Francisco. See also P. L. Fitzgerald, Massachusetts, Burma, and the World Trade Organization: A Commentary on Blacklisting, Federalism, and Internet Advocacy in the Global Trading Era, 34(1) *Cornell International Law Journal* 13-19 (2001). The Massachusetts act was eventually deemed unconstitutional by the US Supreme Court in the case *Crosby vs. National Foreign Trade Council*; B.P. Denning and J.H. McCall, *Crosby v. National Foreign Trade Council* 120 S.Ct. 2288, 94 *American Journal of International Law* 750-758 (2000)

<sup>34</sup> McCrudden, 2007, *supra* note 26, p. 375

<sup>35</sup> McCrudden, 2009, *supra* note 26

<sup>36</sup> Additionally, McCrudden (2007, *supra* note 26) argues, public procurement and CSR can be linked where public buyers – acting within the mandate of government to improve public welfare – have their own CSR responsibilities and appropriate purchasing decisions can be a way to fulfill those responsibilities.

<sup>37</sup> Howe, *supra* note 27, p. 3

The discussion in this section has not yet expressly addressed human rights (beyond their inclusion in the social responsibilities of corporations). Public procurement over the last decade has become recognised as one of the avenues that can be explored when considering fulfilment by states of international human rights obligations based on the possibility of requiring companies which tender for the provision of publicly funded goods or services to make certain commitments to respect and protect human rights.<sup>38</sup> The role for procurement was expressly acknowledged at the international level by the UN Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights (2003). The Norms established that their implementation should form the basis for procurement determinations concerning products and services to be purchased by the UN and its specialised agencies.<sup>39</sup> This unequivocal approach was not reflected in the UNGPs and the link to public procurement and human rights was less firmly asserted by the Principles in the commentary to Principle 6.<sup>40</sup> However, such mention of procurement when defining the state duty to protect is still of significance. Further, new initiatives reflect a renewed interest in the use of public procurement to achieve human rights goals abroad and open up important opportunities for the protection of human rights, and in particular labour rights. In the US for example the state of California passed the California Transparency in Supply Chains Act (2010).<sup>41</sup> A small number of non-governmental organisations have developed procurement initiatives focused specifically on labour rights in global supply chains: the Workers' Rights Consortium (WRC), formed in 2000<sup>42</sup> and the Sweatfree Purchasing Consortium (SPC), established in 2010, both focused on the apparel industry, assist US universities and state and city public buyers respectively to implement sweatshop-free purchasing practices.<sup>43</sup> In Europe a recently launched initiative, Electronics Watch, follows a similar approach focusing on public procurement of electronic goods.<sup>44</sup> These tools clearly act on the possibility for public procurement to be used as a tool to address labour conditions, including human rights in global production systems.

Historically then, procurement contracts have been closely linked with minimum standards for the production of goods and delivery of services contracted for. Demands for these same objectives prevail today but the context has changed; in a model based around the use of distributed global supply chains the labour conditions and fair pay requirements apply also in the context of workers who are geographically and contractually far removed from the contracting brand – and from the state purchasing the goods. More recently the potential of procurement contracts to enable or incentivise the behaviour of MNEs in their global business operations has been

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<sup>38</sup> See, K. Zeisel (2006), *supra* note 24.

<sup>39</sup> UN Sub-Commission on the Promotion and Protection of Human Rights 'Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with regard to Human Rights' (23 August 2003) UN Doc E/CN.4/Sub.2/2003/12/Rev.2, Article 16.

<sup>40</sup> As discussed in Section 1 *supra*.

<sup>41</sup> An Act Regulating State Contracts with Companies Doing Business with or in Burma (Myanmar), 1996 Mass. Acts ch. 130 and California Transparency in Supply Chains Act of 2010, Civil Code Section 1714.43. See also C. Leire and O. Mont, *The Implementation of Socially Responsible Purchasing*, 17 *Corporate Social Responsibility and Environmental Management*, 27–39 (2010).

<sup>42</sup> See <http://www.workersrights.org>; [http://www.sweatfree.org/about\\_us](http://www.sweatfree.org/about_us) (last visited 20 August 2015).

<sup>43</sup> Howe, *supra* note 27

<sup>44</sup> <http://electronicswatch.org/en> (last visited 20 August 2015).

recognised as has the place of public procurement in the protection of human rights by States.<sup>45</sup> The relationship between public procurement and the protection of human rights has in particular been bolstered by the express reference to public procurement in the commentary to the UNGPs. Through their purchasing decisions public bodies – and therefore states, including the EU – can potentially pursue secondary objectives of promoting respect for human rights by MNEs in their global supply chains. The next section examines the extent to which the EU has acted on this potential and incorporated procurement into its attempts to influence corporate behaviour – and including business and human rights in the supply chain. The section focuses on the EU CSR strategy and the hesitant approach of the EU in linking this with public procurement.

### **3. Corporate Social Responsibility and Public Procurement in the European Union**

The EU has followed international trends in responding to concerns over the activities of MNEs and was an important player in shaping the debate from an early stage.<sup>46</sup> Business and human rights matters have been addressed through several of the EU's internal and external policies but the itsCSR strategy has formed a major component of this response including, in recent years, to the UNGPs.<sup>47</sup> The EU CSR strategy has also been one of the main responses to, and fora for discussion of, the global nature of the activities of MNEs and therefore the reach of their responsibilities in the global supply chain. The manner and extent to which this has recognised and acted on the potential role of public procurement consequently has important implications for the ways in which this tool will be promoted and can be applied by member states.

The development of the CSR strategy – and consequently the response to the business and human rights agenda – was characterised from the start by the dichotomy between voluntarism, as supported by the European Commission and the adoption of binding obligations for companies, supported by the European Parliament and by tensions surrounding the parameters or reach of CSR. From its origins the EU CSR strategy considered both the impact of corporations inside and outside the EU and, of particular relevance for this article, how to address supply chain issues.<sup>48</sup>

Beginning in 1999, the Parliament called for more formalised and binding regulation of European enterprises including those operating in developing countries. The Parliament also emphasised a more expansive view of CSR than the Commission. While it focused on the activities of European companies in developing countries<sup>49</sup> and

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<sup>45</sup> But see also Howe, *supra* note 27, focusing on potential use of public procurement to promote labour standards in developing countries.

<sup>46</sup> See O. Martin-Ortega and M. Eroglu, *The European Corporate Social Responsibility Strategy: A Pole of Excellence?* in J. Orbie and L. Torrell (eds.), *The European Union and the Social Dimension of Globalisation* 166-185 (Oxon: Routledge, 2008).

<sup>47</sup> O. Martin-Ortega and M. Eroglu, *supra* note 46; O. Amao, *Corporate Social Responsibility, Human Rights and the Law: Multinational Corporations in Developing Countries* (Oxon: Routledge, 2011).

<sup>48</sup> R. Mares, *supra* note 5, p 216.

<sup>49</sup> Resolution on EU standards for European enterprises operating in developing countries: towards a European Code of Conduct, A4-0508/98, 15.1.1999 [OJ C 104/180, 15.4.1999].

how to extend responsibility of corporations to lower tiers of the supply chain,<sup>50</sup> the Commission, even recognising that ‘in a world of multinational investment and global supply chains, corporate social responsibility must also extend beyond the borders of Europe’ took a less active stance in directly addressing corporate behaviour in ‘third’ [non EU] countries.<sup>51</sup> This perspective emphasised competitiveness and increasing the comparative advantage of European enterprises rather than the moral or legal responsibilities of those enterprises to behave in a socially respectful way.

In taking the lead in defining the CSR strategy for the EU the Commission separated itself from the enthusiasm for binding standards shown by the European Parliament and instead relied heavily on a voluntary approach. The Commission's proposed CSR strategy was firstly elaborated in its Green Paper ‘Promoting a European Framework for Corporate Social Responsibility’ in 2001 (CSR Green Paper), followed by its 2002 Communication ‘Corporate Social Responsibility: A business contribution to sustainable development’ (2002 CSR Communication).<sup>52</sup> The Strategy was conceived of as voluntary and business-centred, involving the integration by companies of ‘*social and environmental concerns in their business operations and their interactions with their stakeholders*’.<sup>53</sup> Subsequent developments including the creation of a European Multi-stakeholder Forum on CSR (2002),<sup>54</sup> a revised CSR Strategy (2006),<sup>55</sup> and the launch of a European Alliance for CSR in 2006, consolidated the dominance of the Commission's definition and approach (voluntary, business-focused) towards regulating corporations’ responsibilities towards human rights and the environment and a weak approach to supply chain responsibility.

With regard to supply chain issues specifically there seemed to be, as Mares highlights, an irreconcilable difference between the Commission and the Parliament with regard to brands or core firms’ responsibility in the supply chain, and with the institutions preferring widely differing strategies for reaching subcontractors. While the Parliament favoured hard law and the brand having clear responsibility for supply chains abuses, the Commission rejected these preferences and focused on the promotion of awareness and generally encouraging respect for human rights.<sup>56</sup>

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<sup>50</sup> European Parliament, Committee on Employment and Social Affairs, *Report on Corporate Social Responsibility. A New Partnership*, 2006 (A6-0471/2006) and European Parliament, Motion for a European Parliament Resolution on Corporate Social Responsibility: A New Partnership (2006/2133(INI)), p. 26.

<sup>51</sup> In this sense the Commission committed to further promote the integration of CSR principles into EU policies, where appropriate in Communication from the Commission, ‘Corporate Social Responsibility: A business contribution to sustainable development, 2.7.2002 COM(2002)347.

<sup>52</sup> Commission Green Paper ‘Promoting a European Framework for Corporate Social Responsibility’ 18.7.2001 COM(2001) 366; COM(2002)*supra*note 51, p. 2.

<sup>53</sup> COM(2002)*supra*note 51.

<sup>54</sup> The approaches of Multi-stakeholder Forum is similar to those taken by the UN Global Compact see further at L. Albareda, J.M. Lozano and T Ysa, ‘Public Policies on Corporate Social Responsibility: the Role of Governments in Europe’ 74 *Journal of Business Ethics* 391 (2007).

<sup>55</sup> COM (2006) Final Communication from the Commission to the European Parliament, the Council and the European Economic And Social Committee Implementing The Partnership For Growth And Jobs: Making Europe A Pole Of Excellence On Corporate Social Responsibility (Brussels, 22.3.2006).

<sup>56</sup> Mares, *supra* note 5, p. 220.

During the process of defining the CSR strategy public procurement appeared repeatedly as an element to consider in close connection with CSR. Similarly to the general role of public procurement as a tool to pursue secondary policies (discussed in section two) the 1999 Parliament Resolution identified procurement as one of the elements which the Commission should use as part of a system of incentives for companies to comply with international standards (including, explicitly, for human rights).<sup>57</sup> The Commission's references to public procurement initially appeared in connection with promotion of the use of environmental and social labelling. The CSR Green Paper referred to the use of public procurement in the context of fiscal incentives to promote products using such labels.<sup>58</sup> Following the CSR Green Paper the Parliament enthusiastically made the case for public procurement to be linked to human rights obligations and urged the Council to 'take into account the Parliament's position on the principle of corporate social responsibility in the Directive on public procurement'.<sup>59</sup> It also called on the Commission to bring forward specific proposals to blacklist those companies which did not comply with minimum applicable international standards, including the ILO core labour standards and the OECD Guidelines for MNEs, to prevent them from tendering for public contracts.<sup>60</sup>

The Commission again diverged from the Parliament's call for stronger commitments and its 2002 CSR Communication made a limited mention of public procurement. In addressing specifically the role of public procurement in EU policies (at section 7.5) the Commission asserts the 'essentially economic nature' of the procurement Directives.<sup>61</sup> While generally confirming that there are possibilities for integrating social and environmental considerations<sup>62</sup> into public procurement the need to respect the principles of value and equal access which preside over the public procurement regime is also emphasised and in terms of action the Commission notes only that 'facilitating the exchange of experience about the possibilities to take into account social considerations in public procurement [...] could be useful to raise awareness amongst public purchasers'.<sup>63</sup> Concerning external relations policy (section 7.6) the Commission identifies the co-responsibility of government where public support is given to multinational enterprises and does mention public procurement. It suggests that member states could consider making access to [*inter alia*] public procurement conditional on adherence to and compliance with the OECD Guidelines for MNEs, while respecting EC international commitments. While this is an important recognition of the potential linkage of global business activities and public procurement, the reference is non-committal and pushes (discretionary) responsibility to the member states.<sup>64</sup> No further action is established - the Commission commits to

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<sup>57</sup> 1999 Parliament Resolution, *supra* note 49 at para. 28. Other tools suggested were fiscal incentives, access to EC financial assistance and publications in the Official Journal.

<sup>58</sup> 2001 Green Paper, *supra* note 52, at para. 83. See Hanley, *supra* note 32, p. 27.

<sup>59</sup> European Parliament Resolution on the Commission Green Paper on promoting a European framework for corporate social responsibility, OJ C 187 E, 7.8.2003, para. 28.

<sup>60</sup> 1999 Parliament Resolution, *supra* note 49, at para. 54.

<sup>61</sup> COM (2002) *supra* note 51, at 7.5.

<sup>62</sup> The scope of the term 'social considerations' will be expanded upon in section four below.

<sup>63</sup> COM (2002) *supra* note 51, at 7.5.

<sup>64</sup> Section 7.6 states: 'Additionally, where public support is provided to enterprises, this implies co-responsibility of the government in those activities. These activities should therefore comply with the OECD guidelines for multinational enterprises, and, *inter alia*, not involve bribery, pollution of the

including in external policies a ‘reminder’ of the OECD Guidelines and generally to promoting awareness and application of CSR abroad and identifies no specific action concerning public procurement. In its Resolution responding to the Commission’s 2002 Communication, the Council further limits the implications of this (brief) recognition; whilst welcoming the general thrust of this approach, the response did not discuss procurement issues explicitly, and only generally called upon the Commission to focus on integrating CSR into Community policies and on the member states ‘to integrate, where appropriate, CSR principles into their own management’.<sup>65</sup> The CSR Communication that followed, that of 2006, did not make any express reference to procurement.

Although consistently framing the emergent CSR strategy in terms of voluntary action and a beyond compliance approach the Commission had by 2002 recognised the role that public procurement could play in influencing the behaviour of MNEs though it had not gone as far as making any specific commitments to encouraging this role for procurement or in linking the strategy with the procurement Directives. (New procurement Directives approved in 2004 did not make this link, as will be discussed later). A closer link would have increased the potential use of procurement as a ‘soft’ regulatory mechanism which may have been at odds with the business-led approach favoured by the Commission.<sup>66</sup> The EU has had to adapt its approach in light of new international developments however, including the development of the UN Framework on Business and Human Rights and the adoption of the UNGPs.

In 2011 the Commission issued a Communication launching a renewed strategy for CSR in response to calls from the Parliament and the Council and other commitments made by the Commission.<sup>67</sup> The global economic crisis and consequent loss of trust in business by consumers is also identified in the Communication as a driver for reviewing the CSR commitment. Among several factors seen to increase the effectiveness of CSR, the strategy recognises a need to clarify what is expected of business enterprises and the need to give greater attention to human rights, ‘which have become a significantly more prominent aspect of CSR’.<sup>68</sup> The Commission adopts a new, simpler but more encompassing definition of CSR incorporating the language of responsibility and of the UNGPs, noting the need for enterprises to adopt processes to meet CSR concerns into their business operations and to identify, prevent and mitigate negative impacts of their operations. Companies are also encouraged to adopt risk-

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environment or child or forced labour. Making access to subsidies for international trade promotion, investment and export credit insurance, as well as access to public procurement, conditional on adherence to and compliance with the OECD guidelines for multinational enterprises, while respecting EC international commitments, could be considered by EU Member States and by other States adherent to the OECD Declaration on International Investment.’

More proactively, the Commission announced its intention to ‘integrate further social and environmental priorities within its management, including its own public procurement’ reflecting the CSR-procurement linkage in which public buyers assume their own responsibilities.

<sup>65</sup> Council Resolution of 6 February 2003 on CSR, OJ No. C39/3 18 February 2003.

<sup>66</sup> See also Howe, *supra* note 27.

<sup>67</sup> Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: A renewed EU strategy 2011-14 for Corporate Social Responsibility COM (2011) 681 at 1.3.

<sup>68</sup> COM (2011), *supra* note 67, p. 5.

based due diligence, including through their supply chains when they are at particular risk of producing adverse impacts.<sup>69</sup> In addition, specific intentions concerning the implementation of the UNGPs are set out but, consistent with the prevailing approach, are couched in the language of expectation and cooperation rather than of binding commitment.

Significantly, although an assumption of voluntary behaviour prevails the Commission makes some movement away from the binary distinction seen in earlier developments and recognises a role for complementary regulation.<sup>70</sup> While maintaining an expectation that CSR be business-led, public authorities are also seen to have a role to play through voluntary policy measures and ‘where necessary’ complementary regulation and market incentives.<sup>71</sup>

The strategy accepts the desirability of enhancing market reward for CSR, providing further that ‘[t]he EU should leverage policies in the field of consumption, *public procurement* and investment to strengthen market incentives for CSR’ [emphasis added].<sup>72</sup> In this Communication the Commission makes a stronger commitment to developing the use of public procurement to promote secondary policies and expresses its intention to facilitate the better integration of social and environmental considerations into public procurement as part of the review of the Public Procurement Directives which was to take place from 2011.<sup>73</sup> It however provides the caveat that such integration should not introduce additional administrative burdens for both states and companies and should not undermine a central principle of procurement which is awarding contracts to the most economically advantageous tender.<sup>74</sup> Having been committed to a business-led approach to CSR and in turn a limited recognition of the potential role of public procurement without specific commitments to it, in its 2011 revised CSR strategy the Commission takes an approach more aligned with the Parliament recognising more clearly the role for regulatory and market based interventions by government and adopting a definition of CSR which expands upon the expectations and scope of corporate responsibilities and points at a potentially increased role of public procurement to achieve CSR objectives. This shift might also be seen as consistent with McCrudden’s position discussed above, that public procurement linkage follows broader trends in public policy: here the reaction to a lack of responsibility in the wider context of the global economic crisis sees a move towards the use of procurement to promote secondary policies, in contrast to the freer rein given in more economically confident times.

Earlier phases of development of the CSR strategy might be seen as a missed opportunity; the Parliament had called for the procurement Directives to be revised so that promotion of CSR was explicitly incorporated and this would have given a clear basis for public buyers, through the award of procurement contracts, to encourage respect by corporations for human rights throughout their operations including in their

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<sup>69</sup> COM (2011), *supra* note 67, p. 6.

<sup>70</sup> COM (2011), *supra* note 67, p. 5.

<sup>71</sup> COM (2011), *supra* note 67, at 3.4

<sup>72</sup> COM (2011), *supra* note 67.

<sup>73</sup> COM (2011), *supra* note 67, p. 11.

<sup>74</sup> Procurement principles and phases are discussed in the next phase.



global supply chains. In the revised CSR strategy the commitment to the use of public procurement to encourage CSR compliance is more forthcoming, giving a clearer mandate for the use of public procurement to pursue secondary policies including with respect for human rights. The key matters for public buyers seeking to act on this revitalised commitment are the extent to which this strengthened commitment was followed up in the revisions to the procurement Directives and to which the EU legal framework for public procurement now encourages or permits relevant considerations to be incorporated into procurement contracts. The next section examines the content of the EU Directive concerning public procurement of goods and services and the extent to which enables public procurement to be used as a tool to promote or influence respect by business enterprises for human rights through their global supply chains.

#### **4. Human rights in the supply chain and the EU framework for public procurement**

As discussed in the previous section the EU CSR strategy has acknowledged the role that public procurement could play in providing incentives to corporations to meet their responsibilities including those concerning respect for human rights throughout their business operations and in their supply chains. The extent to which public bodies in member states can in fact incorporate considerations of human rights conditions in the global supply chain of goods which they purchase into their procurement contracts and can use procurement to facilitate or incentivise corporate behaviour with respect to this aim specifically, depends on how far this recognition of the potential role for public procurement has been acted on. However, the recognition in the CSR strategy has not been developed within the public procurement regime. The previous regime, comprising the Public Sector Directive (2004/18) and the Utilities Directive (2004/17),<sup>75</sup> did not make this explicit connection and the announced possibility in 2011 to further coordinate the regime with the CSR strategy as part of a review of the procurement Directives did not materialise.

As discussed in section 2, the way that public procurement is used has developed in response to changes to regulation, policy and governance including at the international level. The underpinning purpose of the modern international legal regime applicable to the procurement of goods and services by public bodies is to open up this potential market through the application of rules on transparency and competition.<sup>76</sup> The EU and its member states are signatories to the World Trade Organisation Plurilateral Agreement on Government Procurement (GPA); like other WTO Agreements, the GPA aims to increase international trade and eliminate or reduce discriminatory trade rules and the protection of national markets. The GPA encompasses key principles of the wider WTO framework including national treatment and non-discrimination.<sup>77</sup> This, broadly, means that national rules should not treat

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<sup>75</sup> Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply; Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors, contracts and public service contracts.

<sup>76</sup> See also Hanley, *supra* note 32, p. 27.

<sup>77</sup> The Agreement on Public Procurement (GPA), 1994, entered into force on 1 January 1996. The GPA is one of the plurilateral agreements included in Annex 4 to the Marrakesh Agreement Establishing the

foreign goods or services (here concerning procurement) less favourably than those produced domestically and that goods or services cannot be discriminated against based on the country of ownership, production or origin.<sup>78</sup> Consequently, parties to the GPA cannot discriminate in favour of domestic producers/suppliers and any detailed rules adopted should not usually provide an advantage to given countries, or the domestic market. In the framework of the EU, all public sector authorities, whatever the procurement, are also subject to the Treaty on the Functioning of the European Union (TFEU), most significantly in relation to rules on equal treatment, freedom of establishment, and freedom to provide services. This means that at the very least contracting entities must act transparently and must treat all bidding parties equally, proportionately, and without discrimination. Any attempts to pursue secondary policies including the promotion of human rights must consequently respect these principles.

The EU legislation only applies to public contracts above the specified economic threshold<sup>79</sup> therefore national legislators are free to regulate public procedures for lower amounts in different ways to those specified in the Directives, as long as they comply with TFEU provisions. Two principles have served as the foundation for public procurement in the EU: (i) obtaining value for money and (ii) acting fairly within European and national legislation.<sup>80</sup> 'Value for money' is described as implying that contracting authorities have an obligation to safeguard taxpayers' interests by procuring goods and services in the most cost-effective way. Best value for money is not purely price sensitive, but rather it is price sensitive within the defined parameters of the goods or services required, which take into account factors such as quality, efficiency, effectiveness, and fitness for purpose, but may also include other factors, including environmental considerations.<sup>81</sup> 'Acting fairly' means applying the principles of the internal market established in the TFEU and the Procurement Directives. In order to respect the principles of non-discrimination, equal treatment, transparency and proportionality, contracting authorities must ensure equal access to the contract by operators from all EU countries and from countries with equivalent rights. They should not treat comparable situations differently or different situations in the same way, unless such treatment is objectively justified. Public authorities should advertise

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WTO. This means only those WTO Members who are a party to the Agreement are bound by its obligations and responsibilities. The EU is a party to the Agreement.

<sup>78</sup> Article III, GPA and see Articles IV, V and preamble.

<sup>79</sup> 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, article 4.

<sup>80</sup> European Commission, "Buying Green: A Handbook on Public Procurement", 2011: 16, available at: [http://ec.europa.eu/internal\\_market/publicprocurement/docs/gpp/buying\\_green\\_handbook\\_en.pdf](http://ec.europa.eu/internal_market/publicprocurement/docs/gpp/buying_green_handbook_en.pdf) (last visited 20 August 2015).

<sup>81</sup> Note that although the European Commission identifies value for money as a key principle, Arrowsmith and Kunzlik argue that it is not *per se* an objective of the European regime, partly on the basis that this is not an objective that is within the competence of the EU. In this argument value for money is a matter for member states as distinct from an internal policy objective of the EU, and EU rules might then be seen to facilitate the pursuit of value for money by member states but is not a general policy aim for the EU. See S. Arrowsmith and P. Kunzlik, Public procurement and horizontal policies in EC law: general principles in Arrowsmith and Kunzlik (eds), *supra* note 25; see further S. Arrowsmith, Understanding the purpose of the EU's of the EU regime and some proposals for reform procurement Directives: the limited role', in Swedish Competition Authority, The Cost of Different Goals of Public Procurement (Stockholm, 2012).

tender opportunities widely enough to ensure competition and proceed with transparency during the procurement decision-making process to preclude any risk of favouritism or arbitrariness, informing unsuccessful tenderers of the reasons for rejecting their tenders. Finally they should adopt measures in the procurement process that are appropriate to the objectives pursued and do not go beyond what is necessary to achieve them.<sup>82</sup> These principles clearly restrict in overall terms the considerations, with respect to horizontal policies, that can form part of the procurement process.

As of 2014 the European legal framework for public procurement had remained unmodified for a decade. The 2004 Directives did make reference to social considerations but in limited terms and did not include specific reference to human rights. A revised legislative package for modernisation of EU public procurement was approved by the European Parliament on 15 January 2014 and adopted by the Council on 11 February 2014.<sup>83</sup> The reformed public procurement Directive (2014/24/EU)<sup>84</sup> aims to modernise public procurement rules including through simplification and increased flexibility, improved market access and a reduction in the 'missed opportunities for society' including through additional provisions for social objectives.<sup>85</sup> It has, in several respects, increased opportunities to incorporate social and environmental considerations into public procurement contracts but there are clear limitations when attempting to apply even these new measures to address human rights in the context of global production systems. Before unpacking these limitations it is necessary to understand the meaning of the term 'social considerations' and whether this encompasses firstly human rights specifically and secondly human rights in global supply chains.

#### *The meaning and scope of 'social considerations'*

The 2014 Directive, like the 2004 Directive, does not make direct reference to human rights, referring in terms of 'secondary' procurement aims only to "social considerations" (and environmental considerations). Acknowledging the place of social considerations in the Directive, an immediate concern is whether this term extends to human rights *per se*. Social considerations are not defined in Directive 2014/24/EU but communications from the Commission make it clear that human rights are envisaged as an aspect of this term. The Commission's 2010 publication, *Buying Social*, sought to raise public buyers' awareness of socially responsible public procurement [SRPP] and to clarify the opportunities within the legal framework for public procurement for taking social considerations into account.<sup>86</sup> The guidance lists social considerations that 'could be important for public procurement' and these include, *inter alia*,

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<sup>82</sup> European Commission, *Buying Green*, *supra* note 81, p. 16.

<sup>83</sup> The new Directives came into force in April 2014 and must be implemented by member states by April 2016.

<sup>84</sup> Directive 2014/24, *supra* note 79.

<sup>85</sup> Impact Assessment Accompanying the Proposal for a Directive of the European Parliament and of the Council on Public Procurement, SEC(2011) 1585 final, Brussels, (20.12.2011) at p. 23.

<sup>86</sup> European Commission, 'Buying Social: a guide to taking account of social considerations in public procurement', 2010, at p. 5. See also Schultan et al, *Pay and Other Social Clauses In European Public Procurement an overview on regulation and practices with a focus on Denmark, Germany, Norway, Switzerland and the United Kingdom*, Study on behalf of the European Federation of Public Service Unions (EPSU), December 2012 (2012).

‘protecting against human rights abuse and encouraging respect for human rights.’<sup>87</sup> This view has been supported elsewhere particularly with reference to the fact that commitment to human rights is a core component of the foundation Treaties.<sup>88</sup>

This interpretation of the Commission however has been challenged by the Northern Ireland Human Rights Commission (NI HRC). This body makes a distinction between SRPP and ‘public procurement and human rights’.<sup>89</sup> It considers that SRPP is a matter of preferred policy goals, whereas public procurement and human rights is a question of legal compliance.<sup>90</sup> This position is based on the argument that the UK Human Rights Act 1998 together with the UNGPs impose a legal obligation on public bodies to protect human rights including with respect to their procurement activities.<sup>91</sup> While it is not disputed that states have a duty to protect human rights, as discussed in Section 2 we argue that the NI HRC wrongly interprets this to extend beyond a state’s borders through the supply chain.

In our view it is also clear that the term ‘social considerations’ in the Directive does not refer only to areas of discretionary policy making but also to matters for which States may be subject to international legal obligations or commitments, and which may be legislated at EU or national level. For instance, it is clear that the Directive anticipates the inclusion of the labour conditions specifically addressed through certain ILO conventions and matters of health and safety and equality that may be regulated by member states, as will be elaborated in more detail below.

#### *Social considerations with reference to global supply chains*

As discussed above the scope of ‘social considerations’ within the Directive is not entirely clear; the provisions refer often to environmental, social and labour laws or to environmental or social criteria but do not expand upon the meaning of these terms (in the current or in the previous Directive). However, we read it as potentially including human rights. The 2014 Directive refers more frequently than its predecessor to social considerations and it is therefore within these references that the most obvious opportunities to address human rights appear. Concerning the application of this term specifically to human rights through global supply chains however, there are further limitations. Generally, within the Directive, social considerations appear to be

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<sup>87</sup>European Commission, *Buying Social*, *supra* note 86, p. 9.

<sup>88</sup> Northern Ireland Human Rights Commission, *Public Procurement and Human Rights in Northern Ireland*, November 2013; and van den Biesen, P.(2006), *Opinion on Social Criteria in EU Procurement Directives and Dutch Procurement Policy* available at <http://www.fern.org/sites/fern.org/files/Social%20criteria%20in%20EU%20Procurement%20Directives.doc> (last visited 20 August 2015); A similar position has been taken by ICAR and the Danish Institute of Human Rights, *supra* note 22.

<sup>89</sup> Northern Ireland Human rights Commission, *supra* note 88.

<sup>90</sup> Northern Ireland Human rights Commission, *supra* note 88, p. 12.

<sup>91</sup>Specifically regarding the duty, under s.6 of the Act, on public bodies to give effect to the rights protected under the European Convention on Human Rights, p. 13. The NI HRC asserts that: ‘public authorities must look beyond the impact of public procurement on the human rights of people in Northern Ireland. In purchasing goods and services from suppliers in other countries, public authorities are under a duty to take reasonable measures to ensure they are not implicated in human rights abuses across the supply chain. Further, the government and public authorities must require and support businesses themselves to achieve respect for human rights in practice’.

framed in terms of domestic (for EU and member states) and inward looking policy matters rather than with the external dimension of business activities and EU policy.

In referring to ‘measures aiming at the protection of health of staff involved in the production process’ and the ‘favouring of social integration of disadvantaged persons’<sup>92</sup> Directive 2014/24, so far as the Recitals go, provides additional opportunities for incorporating social considerations though clearly these are not framed in terms of extraterritoriality or human rights. In fact, as mentioned, the suggested relevant criteria appear to emphasise internal (member state) employment policies, for example, ‘the employment of long-term job-seekers, the implementation of training measures for the unemployed or young persons in the course of the performance of the contract to be awarded.’<sup>93</sup>

New references in the 2014 Directive to social considerations in the production process of goods are important since they could potentially extend to tiers of the supply chain. Guidance on social considerations issued by the Commission complicates this possibility however by explaining that references to production processes apply only to:

‘staff involved in the construction, production or supply of goods or services covered specifically by the public procurement contract in question. The company cannot, therefore, be required to apply a general social or environmental responsibility policy, as such a requirement is not specific to the goods or services purchased.’<sup>94</sup>

This presents problems for human rights within global supply chains since manufacture or assembly is often carried out at extremely large factories undertaking work for numerous brands. It may not be possible to ensure that conditions applied to employees here only apply to staff producing the goods covered specifically by the contract in question.

Some aspects of the revised Procurement regime do connect directly with both the external obligations of the EU and with a more outward looking focus, specifically in relation to commitments of the EU at the international level. The 2004 Directive referred to the ILO only in Recital 33, noting that contract performance conditions were compatible with the Directive where they were not discriminatory and could be used to address various issues in integration and employment including compliance with the basic ILO Conventions. Setting out the general principles of procurement, Art 18(2) of the 2014 Directive, by contrast, expressly links public procurement with compliance with relevant international Conventions, establishing that member states shall take

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<sup>92</sup> Recital 99, Directive 2014/14, *supra* note 79.

<sup>93</sup> Recital 99, Directive 2014/14, *supra* note 79. Measures referred to herein can apply at any of the three main phases of the procurement process. The phases are discussed further, below in this section.

<sup>94</sup> Public Procurement Reform Fact Sheet No 8: Social Aspects of The New Rules at [http://ec.europa.eu/internal\\_market/publicprocurement/docs/modernising\\_rules/reform/fact-sheets/fact-sheet-08-social\\_en.pdf](http://ec.europa.eu/internal_market/publicprocurement/docs/modernising_rules/reform/fact-sheets/fact-sheet-08-social_en.pdf) (last visited 20 August 2015).

‘appropriate measures to ensure that in the performance of public contracts economic operators comply with applicable obligations in the fields of environmental, social and labour law established by Union law, national law, collective agreements or by the international environmental, social and labour law provisions listed in Annex X.

Annex X goes on to list a number of international conventions including the core ILO standards and several environmental conventions. One important limitation with regard to the challenges of human rights, is that, significant though the references to ILO standards and other conventions are they address specified rights only and these may not cover all human rights relevant in global production systems.

#### *The EU CSR strategy and the 2014 Procurement Directive*

Returning to consider the link between the CSR strategy and the revised Directive it must be acknowledged at the outset that, with reference to the preceding discussion, the Directive falls short in a number of obvious ways. First, no direct link is made between the Directive and the EU CSR strategy. Second, although the Directive has expanded the potential to incorporate social considerations into procurement contracts, it does not at any point refer expressly to human rights, international human rights treaties or CSR standards or business and human rights instruments, including the UNGPs. The most direct link with international human rights obligations is to those of the core ILO Conventions which address certain human rights. Third, while social considerations are permitted in certain circumstances, particular but general CSR provisions or other general requirements for social responsibility which do not relate to the subject matter of the contracted goods are expressly excluded. Following on from these points the Directive also avoids any reference to the language of the responsibilities articulated in the UNGPs for example, the express possibility of requiring corporations to undertake human rights due diligence. Nevertheless, the Directive does increase the opportunities to incorporate social considerations into public procurement, which we now turn to discuss.

#### *Life cycle and subject-matter*

An important introduction with respect to the production of goods has been reference to the life-cycle of products. Setting procurement terms which pertain to the way a product was produced is clearly a potentially significant means of incorporating human rights (as social considerations) as they relate to the production and delivery of those supplies including where this takes place outside of the EU. References to the life cycle of a product have been linked in the Directive with the subject-matter of the contract. A broad commitment is established in Recital 97, providing that contracting authorities should be allowed to use award criteria or contract performance conditions relating to contracted supplies at any stage of their life cycles, from extraction of raw materials to disposal of the product, and including factors involved in the specific process of production, provision or trading and its conditions of those works, supplies

or services or a specific process during a later stage of their life cycle', even where such factors do not form part of the material substance of those supplies.<sup>95</sup>

The factors referred to here illustrate considerations which will be considered linked to the subject-matter. Art 67(3) similarly provides that award criteria will be linked with the subject matter if they relate to the supplies at any stage of the life cycle including to the specific process of production, provision or trading of those supplies.<sup>96</sup> An example of such a factor, provided in the Recital (giving effect to earlier ECJ jurisprudence) is that of fair trade products, where payment of a minimum price to the producer forms part of the trading conditions. Any attempts to require respect for human rights in the supply chain specifically would therefore have to relate to factors involved in the specific production process or trading conditions.

This reference to life-cycle and the broader view of subject-matter undoubtedly opens up opportunities for the inclusion of social considerations though it may be easier to agree factors which form part of the trading conditions or specific production process by reference to a social label or a similar means of objectively establishing the close link with the characteristic rather than more general requirements for respect for human rights or the undertaking of responsibilities such as human rights due diligence. This is especially the case given that an immediate restriction to this potentially far-reaching impact is that the condition of a link with the subject-matter of the contract specifically excludes *'criteria and conditions relating to general corporate policy which cannot be considered as a factor characterising the specific process of production or provision of the purchased supplies'*. Contracting authorities are not permitted therefore to require tenderers to have a certain social or environmental policy in place. Whilst paying a price premium for fair trade products clearly characterises the provision of those products, encouraging or incentivising a contractor to have in place a CSR policy recognising human rights responsibilities would appear to be excluded. The potential for requiring particular actions or respect for particular rights within the supply chain is ambiguous at the least since it is not immediately clear whether this would satisfy the 'characterising' requirement.<sup>97</sup>

While the life-cycle criteria expands greatly the potential to include in procurement contracts social considerations, and therefore human rights, relating to the transnational business operations involved in the manufacture and delivery of the contracted goods, the subject-matter requirement may in some respects be a restraining factor. The 2004 Directive referred to subject matter in a small number of Recitals and with respect to award criteria (Art 53) requiring a link to subject matter when the award was based on Most Economically Advantageous Tender (sometimes

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<sup>95</sup> Substantive provisions are included on technical specifications (Art 42) and on award criteria (Art 67(3) allowing references to the specific process or method of production or provision or to a specific process for another stage of its life cycle *even where such factors do not form part of their material substance*.

<sup>96</sup> And see Art 70, which applies the subject-matter reference in Art 67(3) to contract performance conditions.

<sup>97</sup> Several points might be raised here about the relevance of WTO rules in the drafting of this provision and in particular the thorny 'PPM' debate. Discussion of this area is beyond the scope of this article but see for instance Hanley, *supra* note 32. See also S. Arrowsmith, *Government Procurement in the WTO* (The Hague: Kluwer Law International, 2003).

referred to as MEAT) rather than lowest price.<sup>98</sup> The 2014 Directive greatly enhances the reliance on the subject matter criteria, consistently requiring a link to the subject matter when referring to social and environmental considerations (and in some other contexts), applicable at all phases of the process. The (clarified) ability to include fair trade requirements, for instance is clearly beneficial in linking public procurement with social considerations including where they apply outside of the EU. But it may be restraining in other respects taking into account the exclusion of criteria which cannot be said to characterise the particular process of production or provision.<sup>99</sup> Where human rights can be closely linked with the goods contracted for there is now greater scope to incorporate this into the procurement process but where the issues are more complex – or the rights in question more removed from the goods – then this will be difficult.

#### *Pre-award criteria in the procurement process*

The procurement Directives refer to three main phases of the procurement process: setting technical specifications, the application of award criteria (both of these stages apply pre-award, when assessing tenders) and the application of contract performance conditions (these apply after the tender has been awarded, when the contract is performed, but must be specified in the procurement documents).

The new Directive does not significantly alter the range of criteria which may be included when determining the technical specification of goods to be purchased. The 2004 Directive established criteria and these have remained largely the same in the new Directive.<sup>100</sup> The definition of technical specifications does not explicitly recognise general social considerations nor does it make reference to minimum labour standards or human rights. Only a limited reference to social considerations is included, establishing that whenever possible technical specifications should be defined so as to take into account accessibility criteria for people with disability or design for all users.

The new provisions do though widen the potential application of technical specifications, confirming in Article 42(1) that these may refer to ‘the specific process or method of production or provision of the requested works, supplies or services or to a specific process for another stage of its life cycle *even where such factors do not form part of their material substance*’ but as noted, there is no direct reference to social considerations and the subject-matter requirement will of course apply. Although the technical specifications can be drawn up by reference to the life cycle of the supplies,

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<sup>98</sup> With references also in the context of electronic auctions and also framework agreements.

<sup>99</sup> See also A. Semple, Reform of the EU Directives and WTO GPA: Forward Steps for Sustainability (June 22, 2012). Available at SSRN: <http://ssrn.com/abstract=2089357> (last visited 20 August 2015).

<sup>100</sup> Annex VII. The technical specifications that are expressly permitted include: quality levels, environmental performance level, design for all requirements (including accessibility of disabled people) and conformity assessment performance, use of the product, safety or dimensions (including requirements relevant to the product as regards the name under which the product is sold), terminology, symbols, testing and test methods, packaging, marking and labelling, user instructions, production processes, conformity assessment procedures and, as inserted by the new Directive, climate change performance. These criteria could be formulated on their own or by reference to specific, national, European or international standards approved by a recognised standardising body.



there is limited reference to their potential application in relation to social considerations, with this appearing only in a limited context within Recital 99.<sup>101</sup>

Technical specifications within Article 42 are conceived of in terms of characteristics related to function or performance and to given standards. There is additional capacity in the context of labelling requirements: Directive 2004 restricted this use to eco-labels whereas the new Directive opens this up to wider use, to include the use of social labels (Art. 43(1)).<sup>102</sup> While the application of standards – including through the use of labels – may be relevant to social considerations (and Directive 2014 clarifies explicitly that requirements for Fairtrade products, for example, will be permissible) it appears that there are still relatively limited opportunities to incorporate human rights protection at this stage of the procurement process, especially in relation to the activities of business enterprises outside of the EU.

At the award criteria phase, in the 2004 Directive the criteria under which contracting authorities could base the award of public contracts was either: (a) the most economically advantageous tender (from the point of view of the contracting authority) or, (b) the lowest price.<sup>103</sup> The criteria to determine the most economically advantageous tender had to be linked to the subject matter of the public contract, and included quality, price, technical merit, aesthetic and functional characteristics, running costs, cost-effectiveness, after-sales and technical assistance, delivery date and delivery period or periods of completion.

The new Directive appears to take a less restrictive approach with Recital 97 in particular providing for broader use of award criteria (and contract performance conditions), as discussed above but again, limitations concerning the subject-matter may apply when considering human rights. Recital 98 goes further, emphasising that '[i]t is essential that award criteria or contract performance conditions concerning social aspects of the production process relate to the...supplies provided under the contract' and that they should not be chosen or applied in a way that discriminates against economic operators from other member states or third countries who are parties of the WTO GPA, going to confirm that 'requirements concerning the basic working conditions regulated in Directive 96/71/EC, such as minimum rates of pay, should remain at the level set by national legislation or by collective agreements applied in accordance with Union law in the context of that Directive.' With regard to the potential for public buyers to *require* higher conditions – for instance within the supply chain – this is a reminder that compliance with national law only should be considered the appropriate standard.

References in Recital 99 to further social considerations which may be included in award criteria or contract performance conditions appear to emphasise internally focused employment policies, specifically 'the protection of health of staff involved in

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<sup>101</sup> In technical specifications contracting authorities can provide such social requirements which directly characterise the product or service in question, such as accessibility for persons with disabilities or design for all users.

<sup>102</sup> Article 43(1) refers to the possibility of contracting authorities laying down environmental, social or other characteristics and requiring the use of labels related to these criteria. This may only apply however, where specified conditions are met including that they are related to the subject matter.

<sup>103</sup> Article 53, 2004 Directive, *supra* note 75.

the production process' and the 'favouring of social integration of disadvantaged persons' and therefore are unlikely to be read more broadly, to apply to human rights in this context outside of the EU.<sup>104</sup> Although there is greater flexibility in terms of incorporating social considerations into the award of contracts, the Recitals appear to imply that this flexibility should be directed only to internal EU policies.

Concerning substantive provisions, the new Directive no longer refers to lowest price as one of the award options, referring only to MEAT. Awards on this basis can include life-cycle costing and here again, more expansive wording has been adopted so that the MEAT may include the best quality-price ratio and which shall be assessed on the basis of criteria including qualitative linked to the subject-matter.<sup>105</sup> Life cycle costing is described in Art 68 but does not clearly refer to production costs, except to the extent they are to be read into costs of acquisition; overall life-cycle costs are framed more with reference to environmental criteria and with no direct reference to social criteria.

#### *Abnormally low tenders*

Apart from opportunities to consider social considerations in assessing tenders, there is also some opportunity to *exclude* tenders where it appears that a competitive tender in fact may be based on violation of social or environmental laws. Recital 103 states that rejection of 'abnormally low tenders' should be mandatory where the contracting authority has established that the reason for the low price is because of non-compliance with EU or compatible national law in the fields of social, labour or environmental law.

Further, one of the rationales of the new Directive is to allow for strategic use of public procurement in response to new challenges. Among these – which might be viewed as secondary procurement objectives – are sanctioning violations of mandatory social, labour or environmental law as recognised in Recital 37.<sup>106</sup> Article 69(3) confirms that 'contracting authorities shall reject the tender, where they have established that the tender is abnormally low because it does not comply with applicable obligations referred to in Article 18(2). These measures make significant reference to the importance of compliance with international and other law (albeit that relevant mandatory laws may not apply to some human rights problems or in certain locations). However, the requirement that the authority *establishes* that the tender is low because of this restricts their practical impact particularly where global supply chains are in question: the authority may have limited if any knowledge of the details of the supply chain much less the resources to satisfy this threshold. This requirement also places responsibility with the member state so that this function will be undertaken by the buyer rather than the contractor.

#### *Contract performance*

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<sup>104</sup> These must again relate to the specific supplies to be provided under the contract. Examples given include employment of long-term job-seekers and the implementation of training measures for the unemployed or young persons in the course of the performance of the contract to be awarded.

<sup>105</sup> Recital 92 notes that awards should not however be based only on non-cost criteria.

<sup>106</sup> And see Explanatory Memorandum accompanying Proposed Directive, at p. 10.

Since they do not relate to the assessment of tenders and award of contracts, contract performance conditions (CPCs) are less likely to be problematic with respect to the rules on non-discrimination and therefore have been subject to more permissive rules and this can be seen in both the 2004 and the 2014 Directives.

Recitals 98 and 99, discussed above, apply also to CPCs but the assumption that social considerations might be applied more liberally in CPCs (compared with other phases of the procurement process) is emphasised in Recital 98 of the 2014 Directive which further provides that,

Contract performance conditions might also be intended to favour the implementation of measures for the promotion of equality of women and men at work, the increased participation of women in the labour market and the reconciliation of work and private life, the protection of the environment or animal welfare and, to comply in substance with fundamental International Labour Organisation (ILO) Conventions, and to recruit more disadvantaged persons than are required under national legislation.

This is a wider ranging and apparently more permissive reference to social considerations than is seen for the other phases of procurement and notably is not limited by reference to standards within national or EU Directives. The wording of Recital 104 further asserts this less restrictive approach by noting that CPCs should be compatible with the Directive provided they are not discriminatory and are linked to the subject-matter. Further, Article 70 which permits the use of CPCs so long as they are related to the subject-matter of the contract within the meaning established in Art 67(3) states that those conditions may include 'economic, innovation-related, environmental, social or employment-related considerations'. Although direct reference to human rights is absent, the broader construction and apparently less restrictive approach to the applications of CPCs potentially offers a stronger basis for including a wide range of secondary aims within the CPCs of a procurement contract.

An additional enhancement to the application of CPCs in the 2014 Directive is the reference to sub-contracting. The question of subcontractors is referred to in the Recitals, which links the responsibility with social considerations, recognising the importance by subcontractors of observance of applicable obligations such as those in social and labour law. The Recital does imply action by the member states, indicating that this should '*be ensured through appropriate actions by the competent national authorities ... such as labour inspection agencies or environmental protection agencies*'.<sup>107</sup> This is stated similarly in Article 18(2) which establishes as a principle of procurement the position that member states shall take appropriate steps to ensure that in the performance of public contracts, economic operators comply with applicable obligations of social, environmental and labour law. This clearly provides opportunities for linking social or human rights aims with procurement contracts and the applicable obligations in Annex X, include among others, the core International Labour Organisation Conventions, providing some clear link with human rights if only

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<sup>107</sup> Recital 105. Reference is also made to the importance of transparency in the subcontracting chain but here the emphasis is specifically on the presence of employees within a domestic context.

in a limited capacity.<sup>108</sup> A missed opportunity in this regard is to have included a reference to the responsibility of suppliers to exercise due diligence over their subcontractors, that is due diligence in their supply chain. This would not only have framed the Directive within the developments in CSR and business and human rights but also provided a way for contracting states to have increased influence over the supply chain of the products they purchase.<sup>109</sup>

Taken together the provisions relating to subcontractors do not go as far as referring to the activities of business throughout their operations or through the global chain for contracted goods but they are important in introducing greater recognition of the importance of transparency and responsibility in the use of sub-contractors and this is the only phase of the procurement process which does so.

## Conclusions

Public procurement could be used to encourage or facilitate respect for human rights in the global supply chains of businesses that contract with states. In acting on this aspect of the state-business nexus, public procurement interacts with both the state duty to protect human rights and the corporate responsibility to respect human rights, as described in the UNGPs.

In some respects the EU has missed opportunities to link public procurement with the secondary aim of encouraging respect for human rights throughout the operations of business enterprises. The potential for procurement to be used in this way was recognised but calls from the European Parliament for closer linkage between the CSR strategy and the procurement Directives were not acted on. The incorporation of commitments established in the UNGPs and further revisions appears to have shifted this resistance in the 2011-14 CSR strategy. Despite this clearer commitment to using public procurement to promote secondary policies concerning business and human rights, the revised procurement Directive (24/2014) still falls short in several respects. There is no express connection or reference in the Directive to the CSR strategy and so no overarching guidance on making this link. In the context of the WTO GPA and the prevailing procurement principles of non-discrimination and competition on the one hand, and the business-led, beyond-compliance commitments of the CSR strategy, general requirements for contractors to have particular CSR policies are expressly forbidden. Perhaps more disappointing, although obligations under several international instruments addressing social and environmental obligations are recognised, there is no reference to either the UNGPs or to any other human rights instruments, saving those rights addressed by core ILO conventions. Since the UNGPs are non-binding and do not have the status of the other treaties included in Annex X of the Directive this is perhaps not surprising but the omission of reference to human rights *at all*, even in the recitals, and the further omission of the responsibilities of

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<sup>108</sup> For ILO Conventions and Recommendations see <http://ilo.org/global/standards/introduction-to-international-labour-standards/conventions--and-recommendations/lang--en/index.htm> (last visited 20 August 2015).

<sup>109</sup>We elaborate this argument further with regard to the public procurement of electronic goods in O. Martin-Ortega, O. Outhwaite and W. Rook, Buying Power and human rights in the supply chain: legal options for socially responsible public procurement of electronic goods, 19(3) *The International Journal of Human Rights* 341-368 (2015).

contracting enterprises throughout their supply chains, is an inhibiting factor for public buyers who may have been encouraged to make the link.

There is nevertheless, some scope for linking public procurement contracts with respect for human rights in the supply chain of the goods contracted for; the Directive has increased opportunities for procurement contracts to include 'social considerations' and it is here that the main opportunities lie.

Potentially, social considerations can apply in all phases of the procurement process: the agreed technical specification, the allocation of award criteria and the application of CPCs. Although the subject-matter requirement is a restraining factor (if an understandable one, from the perspective of non-discrimination), references to production processes and trading conditions at any stage of the life cycle of the product greatly enhance the potential for social considerations to include respect for human rights in the supply chain. On the other hand, Commission guidance emphasises that social considerations in this case must apply to staff employed specifically for the production of the goods covered by the procurement contract; this complicates matters where the goods are produced in complex global supply chains and may limit the extent to which the provisions can be used in that way. In addition, when giving examples of social considerations the Directive often seems to focus on the internal aspects of an enterprise's responsibilities –the health and safety of employees for instance – and on more inward focused social considerations such as employment of long-term job-seekers. Despite the changes in the revised CSR strategy, this focus seems to reflect the Commission's emphasis in developing the strategy in connection with internal EU policy objectives rather than, for instance, the Parliament's more outward looking focus, emphasising responsibilities in developing countries.

The best opportunities to incorporate requirements relating to human rights in the supply chain of the goods contracted for lies, it is argued, with the CPCs. Although the same subject-matter requirement applies at this phase the wording surrounding CPCs appears to anticipate their broader application and assumes that they will usually be permissible. In addition, it is at this phase that references to sub-contracting are made and though they are not expansive these provisions offer the clearest acknowledgment of the need for, at the least, transparency in the supply chain of the relevant goods. It is disappointing that the Directive did not take the opportunity to include a reference to the responsibility of suppliers to exercise due diligence over their subcontractors; this would not only have framed the Directive within the developments in CSR and business and human rights, but also provided a way for contracting states to have increased influence over the supply chains of the products they purchase, and to further advance the fulfilment of their own duty to protect human rights.