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Sustainability requirements in EU public and private procurement – a right or an obligation?

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1.	INTRODUCTION	57
1.1.	THE SUSTAINABILITY CONCEPT IN PRIVATE AND PUBLIC PROCUREMENT	61
2.	SUSTAINABILITY REQUIREMENTS IN PUBLIC AND PRIVATE CONTRACTS	63
2.1.	SCOPE – COVERAGE – TOPICS.....	63
2.2.	LINK TO THE SUBJECT-MATTER OF A CONTRACT.....	65
2.3.	PROCUREMENT PROCESS.....	69
3.	RIGHTS OR OBLIGATIONS?	73
3.1.	DRIVERS OF INCLUSION OF SUSTAINABILITY ISSUES INTO PROCUREMENT PROCESSES.....	73
3.2.	A RIGHT OR AN OBLIGATION TO CONSIDER SUSTAINABILITY WITHIN PROCUREMENT PROCESSES?.....	77
3.3.	LEGAL RISKS ASSOCIATED WITH INCLUSION OR AVOIDANCE OF SUSTAINABILITY ISSUES	83
4.	CONCLUSION.....	87

ABSTRACT

Procurement is no longer just about buying the cheapest possible supplies or services. Rather, it is understood as a process whereby organisations meet their needs in a way that achieves value for money on a lifetime basis and allows delivering aspects beyond savings, so-called sustainable procurement. This is true both for the public and private sectors. However, there is only limited legal regulation of sustainable procurement, which causes many uncertainties in respect to the possibility to include sustainability concerns into procurement processes as well as consequences of (not) doing so. The article thus focuses on the questions whether pursuing sustainability goals through procurement is an organisation's right or obligation and whether there are any risks of liability associated with pursuing or ignoring sustainability goals. These questions are analysed from the two perspectives of public and private procurement and similarities and differences between the sectors are identified.

We find that in both sectors sustainability topics (i) are increasingly considered and implemented into contracts; (ii) deal with similar issues in both contexts; (iii) cover issues that are linked to the subject matter of a contract, including issues that relate rather to production process than the physical qualities of the delivered goods as such; and (iv) proliferate through all stages of the procurement process. However, the drivers of sustainability procurement and the legal regulation differ substantially. Still, it is found that while there is a right to include sustainability considerations into both public and private procurement processes, there are only contours of the legal obligation to do so. In respect to private procurement, the right to give considerations to sustainability issues is not expressly stated by the applicable law as it is in respect to public procurement (though limitations apply there as well). In fact, in both sectors the right mostly stems from the fact that there is no regulation forbidding this. Quite counter-intuitively then, there seem to be more legal risks associated with the inclusion of sustainability requirements into the procurement process (and inadequate enforcement thereof) rather than with ignoring them.

1. INTRODUCTION

Throughout the last decades, sustainability has become a goal to be achieved both in the public and private spheres. It has been influencing various policies and processes, one of them being procurement. The latter is understood as an organisation's activity of purchasing the goods and services in order to carry out its functions. Nowadays, procurement is no longer just about buying the cheapest possible supplies or services but rather it is understood as a process whereby organisations meet their needs in a way that achieves value for money on a lifetime basis and allows delivering aspects beyond savings. Consequently, there is an expectation both on private (companies) and public (entities) organisations to

implement sustainability considerations and criteria into their procurement processes.

While in many aspects public and private procurements are similar – for example, they constitute a strategic development of an organisation – there are several differences – most obvious in relation to the applicable legal framework, and these become palpable when speaking about sustainability considerations in procurement processes. In respect to the legal framework, it could be argued that in the private sector doing more than the bare minimum required by law is often down to voluntary engagement.¹ Although there are those pushing for increased hard law regulation of Corporate Social Responsibility (CSR), this remains limited. Most of CSR regulation dealing with private procurement has the form of soft law² or meta-regulation.³ This is quite different in the public procurement context, where there is more hard law to lean on. There is no doubt that governments are bound by international treaties to uphold certain sustainability standards and actively prevent law violations such as forced labour, child labour and/or corruption. However, at the same time, in the context of international procurement regimes, sustainable regulatory objectives are often referred to as ‘horizontal’ or ‘secondary’ policies of the procurement process, in addition to the primary objective of achieving the best value for money in the acquisition of the goods and services that comprise governmental necessities.⁴

In light of the common demand to include sustainability criteria in procurement processes in both private and public spheres on the one hand, and the differences outlined above on the other, several questions arise. Firstly, what is the legal status of such requirements; are they enforceable and actually enforced? Secondly, what are the regulatory effects of such requirements? Are they able to affect behaviour of the contractual parties? Thirdly, does the legal environment and framework within which procurement takes place actually support or allow the pursuit of sustainability goals or not? Are the private and public entities legally required to pursue sustainability goals throughout procurement processes? Or can they in fact face a legal liability for doing so? While the

¹ This presumption is problematized in section 3.2 below.

² We adopt the definitions of hard and soft law presented by Abbott and Snidal (Hard law means “...legally binding obligations that are precise (or can be made precise through adjudication or the issuance of detailed regulations) and that delegate authority for interpreting and implementing the law.” Soft law comprises all regulation that is weakened in one or more of the three respects: obligation, precision, and delegation.) See Kenneth W Abbott and Duncan Snidal, ‘Hard and Soft Law in International Governance’ (2009) 54(3) *Int’l Org.* 421, 422.

³ Meta-regulation is understood as regulation that supports companies’ self-regulation.

⁴ Reference to sustainable consideration may be found in: European Public Procurement Directives 2014, WTO Governmental Procurement Agreement 1994 (and revised version) and in UNCITRAL Model Law on public procurement 2011, see further below section 1.1.

issues of the legal status of sustainability requirements, their enforceability and effects have throughout the last decade been in the focus of legal scholars mostly from the private, but increasingly also from the public procurement perspective,⁵ the issue of the legal framework has been addressed only partly within the discourse on the voluntary/mandatory nature of.⁶ Moreover, to the authors' surprise, a comparative perspective between public and private purchasing theory and practice in connection

⁵ For private procurement see e.g. Michael P Vandenberg, 'The New Wal-Mart Effect: The Role of Private Contracting in Global Governance' (2007) 54 *UCLA L. Rev.* 913; Carola Glinski, 'Corporate code of conduct: moral or legal obligation?' in Doreen McBarnet, Aurora Voiculescu and Tom Campbell (eds) *The new corporate accountability: Corporate social responsibility and the law* (CUP 2007) (hereinafter 'McBarnet, Voiculescu and Campbell, *The new corporate accountability*'); Li-Wen Lin, 'Legal Transplants through Private Contracting: Codes of Vendor Conduct in Global Supply Chains as an Example' (2009) 57 *Am.J.Comp.L.* 711; Fabrizio Cafaggi, 'The Regulatory Functions of Transnational Commercial Contracts: New Architectures' (2013) 36 *Fordham Int'l L.J.* 1557; Paul W J Verbruggen, 'Regulatory governance by contract: The rise of regulatory standards in commercial contracts in 'Regulatory Governance'' (2014) 35 *Recht der werkelijkheid* 79; Anna Beckers, *Enforcing corporate social responsibility codes: on global self-regulation and national private law* (Oxford: Hart Publishing 2015), chapter 3; Katerina Peterkova Mitkidis, *Sustainability Clauses in International Business Contracts* (Eleven International Publishing 2015); Louise Vytopil, *Contractual Control in the Supply Chain* (Eleven International Publishing 2015); Cristina Poncibò, 'The Contractualisation of Environmental Sustainability' (2016) 12 *ERCL* 335; A Claire Cutler and Thomas Dietz (eds), *The Politics of Private Transnational Governance by Contract* (Routledge 2017).

For public procurement see e.g. Christopher McCrudden, 'Corporate Social Responsibility and Public Procurement' in McBarnet, Voiculescu and Campbell, *The new corporate accountability*; Antti Palmujoki, Katriina Parikka-Alhola and Ari Ekroos, 'Green Public Procurement: Analysis on the Use of Environmental Criteria in Contracts' (2010) 19 *Review of European, Comparative & International Environmental Law* 250; Phoebe Bolton, 'Protecting the environment through public procurement: The case of South Africa' (2008) 32 *Natural Resources Forum* 1; Dacian C Dragos and Bogdana Neamtu, 'Sustainable public procurement in the EU: experiences and prospects' in Francois Lichère, Roberto Caranta and Steen Treumer (eds), *Modernising Public Procurement: The New Directive* (DJØF 2014); Peter Trepte, 'The contracting authority as purchaser and regulator: Should the procurement rules regulate what we buy?' in Christina D Tvarnø, Grith Skovgaard Ølykke and Carina Risvig Hansen (eds), *EU public procurement - modernisation, growth and innovation - discussions on the 2011 proposals for procurement directives* (DJØF 2012); Roberto Caranta, 'The changes to the public contract directives and the story they tell about how EU law works' (2015) 52 *Common Market Law Review* 391, 2.2 and 2.3; A special issue of the *European Procurement & Public Private Partnership Law Review* on sustainable procurement, *IPPL* 1-13 (2013).

⁶ See e.g. Doreen McBarnet, 'Corporate Social Responsibility Beyond Law, Through Law, for Law' in McBarnet, Voiculescu and Campbell, *The new corporate accountability*, at 12; Halina Ward, 'Legal Issues in Corporate Citizenship' (2003) *Global Ansvar Swedish Partnership for Global Responsibility*, London: International Institute for Environment and Development; Jennifer A Zerk, *Multinationals and corporate social responsibility: limitations and opportunities in international law* (Cambridge University Press 2006) 33-36.

to sustainability requirements is largely missing in academic literature.⁷ The separate treatment of sustainable procurement in the private and public spheres does not reflect the reality that organisations in both sectors face, such as similar questions and obstacles when implementing sustainability requirements into their procurement processes. The new ISO20400 Sustainable Procurement Guidance reflects this, as it is to be used by all organisations, both public and private.⁸ Thus, while there might be some obstacles to the endeavour to compare the public and private in this respect, such as the understanding of sustainability requirements in their connection to the subject matter of a contract,⁹ the authors believe that there is a relevance in this exercise and that the results have the potential to improve the practice by pinpointing the areas where the two spheres can learn from each other and understand the legal theory behind sustainable procurement.

The paper thus focuses on the question whether pursuing sustainability goals through procurement is a right or an obligation of public and private organisations and whether there are any risks of liability associated with pursuing or ignoring sustainability goals. In order to answer these questions, the paper firstly analyses the concept of sustainability with the purpose to identify whether the concept is understood similarly or differently in both public and private spheres (1.1). Secondly, sustainability requirements in public and private contracts are examined from the perspective of their scope and topics that they cover (2.1). Further, the paper analyses whether sustainability requirements are connected to the subject matter of a contract and what this actually means (2.2), and identifies where in the procurement process sustainability requirements come into play (2.3). The paper, then shifts the focus to analyse the character of the right and/or obligation to include sustainability criteria into procurement processes (3.2). In order to give a better understanding, it firstly discusses the drivers and legal frameworks of using sustainability requirements in public and private procurement spheres (3.1). The last section concludes the paper, by identifying the similarities and differences between the spheres, and shares some recommendations.

⁷ For a discussion on how public procurement can benefit from the private sphere see Anna Beckers, 'Using contracts to further sustainability?' in Anja Wiesbrock and Beate Sjøfjell, *Sustainable Public Procurement Under EU Law* (Cambridge University Press 2015). For comparison in the US context, see Sarah E Light and Eric W Orts, 'Parallels in Public and Private Environmental Governance' (2015) 5 *Michigan Journal of Environmental and Administrative Law* 1, namely at 46-50.

⁸ ISO 20400:2017, Sustainable procurement – Guidance < www.iso.org/standard/63026.html> accessed 17 May 2017.

⁹ See section 2.2 below.

1.1. THE SUSTAINABILITY CONCEPT IN PRIVATE AND PUBLIC PROCUREMENT

While omnipresent in the public and legal discourse, the concept of sustainability does not have a globally accepted legal definition. National legal systems are not better either; since they have a difficulty delineating the confines of the concept, they often provide either multiple definitions or no definition at all. The concept of sustainability is a sister to the concept of sustainable development. The most cited definition of sustainable development comes from the Brundtland Commission as a development ‘that (...) meets the needs of the present without compromising the ability of future generations to meet their own needs.’¹⁰ The core idea of this definition lies in integrating three areas of development: environmental, social and economic. Despite the further evolution of the sustainability concept,¹¹ it is the triple-bottom line definition that has inspired a wide range of national, international and supranational legal instruments as well as private-made law. For example, Article 3(3) of the Treaty on European Union (TEU) reads as follows: ‘It [the Union] shall work for the *sustainable development* of Europe based on balanced *economic growth* and price stability, a highly competitive social market economy, aiming at full employment and *social progress*, and a high level of protection and improvement of the quality of the *environment*.’¹²

The obligation of the EU to aim for sustainable development is further underlined, in the Europe 2020 strategy for sustainable and inclusive growth, which aims to develop an economy based on knowledge and innovation, to promote a low-carbon, resource-efficient and competitive economy, and to foster a high-employment economy delivering social and territorial cohesion.¹³ According to the Commission, public procurement plays a key role in the Europe 2020 strategy, as it is one of the market-based instruments for the realisation of smart,

¹⁰ UN, Report of the World Commission on Environment and Development: Our Common Future, 20 March 1997, Transmitted to the GA as an Annex to document A/42/427 - Development and International Cooperation: Environment, para 27.

¹¹ A major contribution in this respect is the development of the ‘planetary boundaries’ concept, see Johan Rockström et al., ‘Planetary Boundaries: Exploring the Safe Operating Space for Humanity’, (2009) 14 Ecology and Society 32; and Will Stephen et al., ‘Planetary boundaries: Guiding human development on a changing planet’ (2015) 347(6223) *Science*.

¹² Consolidated Version of the Treaty on European Union (TEU) [2016] OJ C 202/13 (emphasis added). See also the Charter of Fundamental Rights of the European Union [2012] OJ C 326/391, Preamble (‘[The Union] seeks to promote *balanced and sustainable development ...*’, emphasis added) and art. 37 (‘A high level of environmental protection and the improvement of the quality of the environment must be integrated into the policies of the Union and ensured in accordance with the *principle of sustainable development*’, emphasis added).

¹³ European Commission Europe 2020 on a strategy for smart, sustainable and inclusive growth, Brussels, COM (2010) 2020 final.

sustainable and inclusive growth while ensuring the most efficient use of public funds. Reference?

The Preamble to the Directive 2014/24/EU on Public Procurement (hereinafter the Public Sector Directive) states that '[t]his Directive clarifies how the contracting authorities can contribute to the protection of the environment and the promotion of sustainable development, whilst ensuring that they can obtain the best value for money for their contracts.'¹⁴

Consequently, it can be argued that governments can and are encouraged to do business responsibly, take a leadership position in community and consider sustainable issues relevant to its own business operations (including those of its supply networks), and be transparent about their actions in these areas.

It is not only public entities that are encouraged to align their purchasing decisions with the sustainability concept. Private actors, and especially companies are in fact expected to do the same. In the private sphere, we will more often hear about the concept of CSR rather than sustainability.¹⁵ CSR usually refers to conducting business in such a manner where environmental and social interests are protected without undermining the economic prosperity of a company.¹⁶ Despite having independent origins, the concepts of sustainability and CSR have a close connection.¹⁷ They are both based on the triple-bottom line balancing economic, social and environmental interests, though at different levels. CSR is focused on individual business units, approaching the issue from a microeconomic perspective and, thus, constituting one aspect of sustainable development that takes the macroeconomic point of view. Inclusion of sustainability requirements in suppliers' selection and commercial contracts became one of the wide-spread CSR tools.¹⁸

Under the pressure of public policies and increasing legal regulation (through both hard and soft law, international and national law, and public

¹⁴ Directive 2014/24/EU on public procurement, OJ 2014 L 94/65 [hereinafter Public Sector Directive], Recital 91.

¹⁵ Other concepts have developed that comprise the same or similar business activities/strategy, e.g. corporate citizenship or business ethics.

¹⁶ Archie B Carroll, 'Corporate Social Responsibility Evolution of a Definitional Construct' (1999) 38 *Business & Society* 268 (describing the development of the definition of CSR).

¹⁷ Their mutual relationship is the subject of a separate academic discussion with no clear conclusion. For a list of academic articles on the relationship between sustainable development and CSR (until 2006) see Daniela Ebner and Rupert J Baumgartner, 'The relationship between Sustainable Development and Corporate Social Responsibility' (2006), conference paper presented at the Corporate Responsibility Research Conference 2006, 4th-5th September, Dublin, Table 2: Overview of reviewed articles, 10-11. <<http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.485.5912&rep=rep1&type=pdf>> accessed 26 April 2017.

¹⁸ Mitkidis, *supra* note 5, at 13-14.

and private regulation) organisations are expected¹⁹ to make sure that not only they alone conduct business in a sustainable manner, but so do all their business partners, including suppliers and sub-suppliers. That is why private companies are concerned with traditionally public interests, such as labour issues, human rights, environmental protection or anti-bribery activities, and include relevant requirements in their procurement processes and business agreements, and why public procurers do the same in procurement processes concerning contracts which are preliminary commercial ones and as such they are meant to achieve the best value for money.²⁰

2. SUSTAINABILITY REQUIREMENTS IN PUBLIC AND PRIVATE CONTRACTS

2.1. SCOPE – COVERAGE – TOPICS

The topics that are covered within both contexts are similar: labour issues (such as minimum wage and occupational health and safety), human rights protection (such as ban of child and forced labour and freedom of association), environmental protection (such as limitation of water use and the *'ecologic'* origin) and business ethics issues (such as bribery, fair trade labels and conflict of interest). While the catalogue of the covered issues is basically the same within the public and private spheres, the different topics were introduced in the two spheres under varying imperatives and motivations.²¹

In the public sphere, EU law sets out minimum harmonised public procurement rules to create a level playing field for all businesses across Europe. The application of the principles of the internal market (in particular the transparency, equality and open competition) to public contracts ensures better allocation of economic resources and more rational use of public funds. Therefore, it can be noted that public procurement has a strong emphasis on economic benefits for the public budget, awarding contracts based on the highest available quality at the best price under the broadest possible competition. However, public

¹⁹ The word 'expected' is preferred here as a neutral term not implying a legal obligation. That is because a fierce discussion has divided both public and academia into proponents of voluntary and mandatory character of CSR, see supra note 6.

²⁰ Public procurement origins may be accounted to governments' provision of goods and services in their public *dominium* and as such, it supplements the role of a government as a protector of public interest. However, with the development of governments' participation in commercial markets as buyers; the privatization of governmental services and the increased role of outsourcing as well as the establishment of international trade (particularly EU internal market), public procurement is seen as commercial contracting. Nevertheless, it is impossible for governments to renounce their obligation to protect public interests. Consequently, the sustainability agenda in public contracting is given an increased attention over the last decade.

²¹ The motivations are further analysed in section 3.1.

procurement at the national level has throughout history been consistently used as a policy tool for different purposes, such as achieving equal pay for men and women or fighting unemployment.²² For a long time, there was no special label associated with the use of public procurement for achieving broader policy goals. When public entities started to consider environmental protection in their purchasing, the concept of Green Procurement was born and it then paved the way for a more comprehensive concept of Sustainable Procurement that we see nowadays. In brief, we may say that public procurement may be used to support and implement wider policy goals – often referred to as horizontal policies – and to lead by example.²³ It is possible to identify a wide range of contractual clauses which encapsulate the sustainable approach for example an anti-corruption clause:

The contractor undertakes in the fulfilment of the contract to refrain from bribe or otherwise improperly influence government officials, courts and / or private parties. The contractor must also undertake to promptly and fairly inform the client of all circumstances and relationships which may appear as a conflict of interests.²⁴

A work conditions clause:

The contractor must ensure that the employees of the contractor and any subcontractors in Denmark that helps to fulfil the contract, are guaranteed salaries (including benefits), working hours and other working conditions, which are not less favourable than those established for work of the same kind under the Union's collaborative agreements in Denmark, and which are applied throughout Danish territory. The contractor must ensure that the employees of the contractor and any subcontractors inform employees about the labour conditions.²⁵

Sustainable Procurement is understood very broadly and may cover not only all the issues noted above (environmental, human and labour rights, business ethics), but also issues of promotion of innovation or SMEs (small and medium enterprises).

In comparison, private procurement has traditionally been tied to the protection of contractual parties' business interests. Companies started to insert the various sustainability issues into business contracts as a response

²² Christopher McCrudden, *Buying Social Justice: Equality, Government Procurement and Legal Change* (Oxford University Press, 2007) 37-48; for historical development see Christopher McCrudden, 'Using public procurement to achieve social outcomes' 28 *Natural Resources Forum* 257-267.

²³ McCrudden, *supra* note 5, at 94; Sue Arrowsmith, 'A Taxonomy of Horizontal Policies in Public Procurement' in Sue Arrowsmith and Peter Kunzlik (eds), *Social and Environmental Policies in EC Procurement Law: New Directives and New Directions* (Cambridge: Cambridge University Press, 2009) 108-46.

²⁴ SKI's (Danish central purchasing body's) clause from the Annex on CSR applicable to all their public procurements. <<http://csr-indkob.dk/wp-content/uploads/2013/06/Bilag-H-CSR.pdf>> accessed 26 April 2017 (authors' translation).

²⁵ *Ibid.*

to stakeholders' pressure instigated by the attention of the media and the public to ethical issues in business conduct. That is why the visible problems – such as child labour or local pollution - came into focus first, while the attention to invisible, abstract problems – such as CO2 – has been picked up slower, often as a result of a (threat of a) legislative action at the national or international level.

An example of a sustainability clause from a private contract can be found on the supplier management portal of Deutsche Telekom (DT).²⁶ The DT's Corporate Social Responsibility and Anti Corruption Clause is 1,5 page long, this shows the complexity and importance of the issue to the company.²⁷ The provision requires DT's suppliers to follow the company's Code of Conduct and Social Charter next to not only applicable law, but also 'rules' on ethical behaviour, including those on 'human rights, environmental protection, sustainable development and bribery'. According to the provision, the company reserves the right to audit the supplier's and any sub-supplier's compliance with this provision. If a non-compliance is discovered, the supplier should remedy it within a 30-days timeframe, otherwise the contract may be terminated. This type of relational enforcement – in contrast to enforcement through a legal procedure at a court or an arbitral tribunal - is a typical treatment of sustainability issues in supply agreements concluded by European companies.²⁸

2.2. LINK TO THE SUBJECT-MATTER OF A CONTRACT

Sustainability concerns have found their firm position both in the public and private procurement activities. However, their understandings and related discourses have developed differently in the two contexts. While in the private sphere, sustainability contractual clauses were defined as 'provisions [in commercial contracts] covering social and environmental obligations that are not directly connected to the subject matter of a specific contract ...',²⁹ the understanding within public procurement is narrower. In fact, contracting authorities may require special conditions – innovation, environmental, social – relating to the performance of a contract, only if these are 'linked to the subject-matter' of the contract.³⁰ While the possibility of establishing special conditions for the performance of a public contract under EU procurement regime

²⁶ <www.suppliers.telekom.de/irj/portal/smp/aeb> accessed 26 April 2017.

²⁷ Such a long sustainability clause is not common, but also not unusual. The length and specificity of such clauses will depend, among others, on the type of the company, its overall sustainability strategy, the type of contract and the location of the supplier.

²⁸ While sustainability has its place in purchasing contracts across the globe, the practice differ in various geographical regions. For comparison between European and US companies see Mitkidis, *supra* note 5, at 231.

²⁹ *Ibid*, at 75.

³⁰ Public Sector Directive, Arts 67(3) and 70.

is not something new – this possibility existed already under Directives from 2004 – it is a novelty introduced with the 2014 Directives for the requirements for these conditions to be ‘linked to the subject-matter’ of the contract.³¹

The concept of the ‘link to the subject-matter’ has been developed by the Court of Justice of the European Union (CJEU) in its case law regarding award criteria for public contracts. In the Court’s first judgment in this area, the *Concordia* case, where the public entity used environmental considerations, namely the emissions of nitrogen oxide and noise amongst the criteria for the contract award, the CJEU established that: ‘[W]here the contracting authority decides to award a contract ... it may take criteria relating to the preservation of the environment into consideration, provided that they are linked to the subject-matter of the contract’³² These criteria also need to not confer an unrestricted freedom of choice on the public entity; be explicitly mentioned in the contract notice or tender documents; and comply with the fundamental Treaty principles, in particular non-discrimination.³³ Further case law development in this area included the challenge of the awarding criteria when public entity had allocated 45 per cent of the award for bidders’ ability to produce renewable electricity in amounts which exceeded the volume required under the contract (*EVN and Wienstrom* case).³⁴ The CJEU ruled that the focus on capacities of electricity which exceeded the public entity’s requirements doomed the criterion to *not* be linked to the subject matter of the contract.

The concept of the ‘link to the subject-matter’ in public procurement has been subject to criticism, as it practically disables an effective pursuance of the sustainability goals.³⁵ That is due to the fact that the requirement makes it impossible to include general CSR policies to the extent that these address matters beyond the specific needs of the public entity. What it means in practice? It seems that a requirement for a contractor to invest in the local community outside of the specific contract might not be contested on this basis.³⁶ However, contract performance clause directly linked to the activities carried out under the contract, such

³¹ See Directive 2004/18/EC on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts, OJ 2004 L 134/114, Art 26, and Directive 2004/17/EC coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors, OJ 2004 L 134/1, Art 38.

³² Case C-513/99 *Concordia Bus Finland* [2002] ECR I-3609, para 64.

³³ *Ibid.*

³⁴ Case C-448/01 *EVN and Wienstrom* [2003] ECR I-14527.

³⁵ Abby Semple, ‘The link to the subject matter: a glass ceiling for sustainable public contracts?’ in Beate Sjøfjell and Anja Wiesbrock (eds), *Sustainable Public Procurement Under EU Law - New Perspectives on the State as Stakeholder* (Cambridge University Press 2016) Chapter 3.

³⁶ Abby Semple, *A practical Guide to Public Procurement* (Oxford University Press 2015) 197-204.

as obtaining a recycling rate over x per cent of materials disposed during building works; powering a festival only with renewable energy; releasing in open source whatever intellectual property was developed in the contract development, shall be permissible.³⁷

It is worth noting that the understanding of the ‘link to the subject-matter’ concept has expanded systematically from its establishment in the *Concordia* case. During the time of redrafting procurement directives, CJEU dealt with the milestone *Dutch Coffee* case.³⁸ The public entity wanted to include award criteria for a supply contract of tea and coffee vending machines to relate to their organic and fair trade character. In its ruling CJEU confirmed that non-economic criteria which relate to a particular means of production (e.g. organic character) or distribution (e.g. fair trade labels) could be considered to be linked to the subject-matter of a contract.³⁹ In this judgment CJEU expanded the concept of ‘link to subject-matter’ of a contract by underlining that there was no requirement for award criteria to relate to a core characteristic of a product or something which alters its material substance. The newest developments in this area come from the 2014 Public Sector Directive, where, among other things, a definition of the concept can be found which *nota bene* has been influenced by the *Dutch Coffee* case. Accordingly, to Article 67:

Award criteria shall be considered to be linked to the subject-matter of the public contract where they relate to the works, supplies or services to be provided under that contract in any respect and at any stage of their life cycle, including factors involved in:

- a) the specific process of production, provision or trading of those works, supplies or services; or
- b) a specific process for another stage of their life cycle, even where such factors do not form part of their material substance

It is important to read Article 67 in combination with Recital 97 of the Public Sector Directive, which includes certain limitations:

[T]he condition of a link with the subject-matter of the contract excludes criteria and conditions relating to general corporate policy, which cannot be considered as a factor characterising the specific process of production or provision of the purchased works, supplies or services. Contracting authorities should hence not be allowed to require tenderers to have a certain corporate social or environmental responsibility policy in place.

Consequently, combined Article 67 and Recital 97 emphasise that matters considered a public procurement process, and subsequently the contract, must relate to the goods, services or works that are being

³⁷ Public Contracts Regulations (2015) Commentary, Regulation 70 – Conditions for performance of contracts, <<http://pcr2015.uk/regulations/regulation-70-conditions-for-performance-of-contracts/>> accessed 26 April 2017.

³⁸ Case C-368/10 *Commission v. Kingdom of the Netherlands* [2012] ECR I-284.

³⁹ *Ibid*, paras 89–92.

purchased, and cannot concern matters, which fall outside of the scope of procurement relationship and the public contract itself.

The discourse on the link to or disjunction of sustainability requirements from the subject matter of a contract in the private sphere takes a substantially different starting point – the principle of freedom of contract. Private parties are in general not limited in what they can include in their commercial contracts.⁴⁰ Including sustainability provisions, dealing with environmental, human rights, labour or bribery issues, is thus from a contract law perspective not anyhow restricted. However, this does not mean that they will all be enforceable under national and/or international law of contracts. Their enforceability will largely depend on the level these requirements are connected to the subject matter of a contract. If they do not expressly specify the quantity, tangible quality, or manufacturing procedure for the product in question, the enforcement of the provisions via traditional remedies, i.e. specific performance⁴¹ and damages,⁴² is hindered.⁴³

Legal scholars have noted that commercial contracts contain a growing amount of sustainability provisions that are disconnected from the contract's subject matter⁴⁴ and that their aim is rather regulatory than contractual.⁴⁵ This has led to increased focus on such provisions, as their characteristics have been raising many questions both from contract law theory and practice, and eventually distinguishing those as 'sustainability contractual clauses'.⁴⁶ This being said, not all sustainability requirements in commercial contracts are disconnected from the contract's subject matter. For example, there are provisions that require compliance with a specific production process in order for the delivered goods to be marketed under a specific label (e.g. fair trade) or specific reporting and other obligations to be sold on the EU market (e.g. the REACH

⁴⁰ Subject to relatively few mandatory provisions. This is not the same in respect to consumer contracts, where more limitations exist.

⁴¹ Ingeborg Schwenzer and Benjamin Leisinger, 'Ethical Values and International Sales Contracts', in Ross Cranston, Jan Ramber and Jacob Ziegel (eds), *Commercial Law Challenges in the 21st Century: Jan Hellmer in memoriam*, (Stockholm Centre for Commercial Law, Juridiska Institutionem 2007) 265.

⁴² Peter Schlechtriem, 'Non-Material Damages – Recovery Under the CISG?' (2007) 19 *Pace International Law Review* 89; Mitkidis, supra note 5, at 226-230.

⁴³ Eva Kocher, 'Private Standards between Soft Law and Hard Law: The German Case' (2002) 18 *International Journal of Comparative Labour Law and Industrial Relations* 265, 270 (pointing out that the courts have been reluctant to recognize CSR production method-related requirements as product characteristics in consumer cases, and it can be expected that the same would happen in business cases as well).

⁴⁴ Lin, supra note 5, at 717; Fabrizio Cafaggi, 'Transnational Private Regulation and the Production of Global Public Goods and Private "Bads"' (2012) 23 *EJIL* 695, 711.

⁴⁵ Cafaggi, supra note 5, at 2.

⁴⁶ Poncibò, supra note 5, at 345; Mitkidis, supra note 5.

regulation).⁴⁷ In these cases, non-compliance with the sustainability criteria would affect the further marketing of the goods and would result in goods' non-conformity, thus they would have to be considered directly linked to the subject matter of the contract.

To reconcile the position of public and private procurement to 'the link to the subject-matter' issue, we may conclude that the two spheres are possibly closer than it seems on the first look.⁴⁸ On the one hand, the definition of sustainability contractual clauses as disconnected from the subject matter of a contract in the private procurement sphere is used only to enable discourse over the issues arising when we experience such disjunction, however, it is not a term coming from legislation. In practice, we experience an increasing amount of sustainability requirements in commercial contracts that are both connected and disconnected from the subject matter of a contract, each bringing a set of legal challenges, some specific to one of the categories, some common to all sustainability requirements. On the other hand, the concept of 'the link to the subject-matter' in the public procurement sphere has been expanding to include e.g. requirements related to the production processes, thus requirements that do not stipulate material qualities of the purchased goods. In sum, we experience convergence between the types of sustainability requirements that can and are included in private and public contracts.

2.3. PROCUREMENT PROCESS

When speaking about sustainability considerations in procurement processes, we certainly do not speak only about contractual clauses. Such considerations may appear in all four phases of the procurement process: the pre-engagement phase, where the organisation defines and specifies what it requires to satisfy its needs (in public procurement that is the pre-tender stage while in private sphere this can be described as the 'planning phase');⁴⁹ the acquiring phase (in public context, in majority of cases, a competitive tender process; in private context the contract negotiation or pre-contractual phase); the contract execution (concluding/signing the actual contract); and contract implementation (contractual parties carrying out their obligations under the contract).⁵⁰ All phases are present in respect

⁴⁷ Regulation (EC) No 1907/2006 concerning the Registration, Evaluation, Authorisation and Restriction of Chemicals (REACH) OJ 2006 L 396/1.

⁴⁸ Beekers, *supra* note 7, at 213.

⁴⁹ The 'planning phase' is here understood as company's identification of its needs and process of specifying of what and how is going to be purchased (formulating the corporate procurement strategy).

⁵⁰ The ISO20400 Sustainable procurement Guidance works with four different stages: Planning (art 7.2); Integrating key elements of sustainable procurement (art 7.3); Selecting suppliers (art 7.4) and Managing the contract (art 7.5). It does divide what we call the pre-engagement (planning) phase in two, while it does not distinguish contract execution as a separate phase. See also the Chartered Institute of Purchasing & Supply (CIPS), Ethical

to every contract. However, the attention to sustainability requirements differs through all of them depending on whether we are talking about public or private contexts. While in the public procurement law, major focus is given to the tender process, in the private contract law, it is the contract execution and implementation that is the centre of attention.

In the public context, the Public Sector Directive provides several opportunities to include sustainable considerations throughout the procurement process. These factors may firstly be considered when specifying the terms and conditions for participation in a public tender. At this qualification stage, bidders may be excluded from participation in a procurement procedure where it can be demonstrated by any appropriate means that a violation of applicable obligations referred to in Article 18(2) of the Public Sector Directive occurred. Article 18(2) refers to 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 to the Directive.⁵¹ The question is whether establishment of such terms is not superfluous. A contracting authority may be unable, on the basis of national laws, to award a contract to a company that is in a breach of laws in the first place. It could potentially deem the contract unlawful irrespective of the fact if compliance with specific laws is included or not in a tender as minimum standard for participation in the public tender. Consequently, it may be the case of reinforcing obligations which already rest on the contractor. Another option is to include as terms or conditions of participation requirements a higher than the minimum legal standard, such as the obligation to ensure liveable wages or the demand of employment of at least one third of the company's capacity by rehabilitated convicts. Of course, all of these terms and conditions must be 'linked to subject-matter' of the contract; therefore requiring general CSR policies is not permitted. In addition, an establishment of too narrow terms for participation in a tender may hinder competition. Consequently, it is advisable to rather implement these elements in the form of a contract performance clause rather than limiting the access to public procurement. Secondly, sustainability may be implemented in tender specifications by using functional characterisation of what is needed, leaving an open door for tenderers to propose new innovative, 'green', socially responsible solutions to the public entity's needs. A practical example may be a functional description stating that a solution is needed to connect point A with point B, without specifying if that shall be a bridge or a tunnel or a ferry connection. It is left for the contractors to define which of the aforementioned solutions, under the specific circumstances of the

and Sustainable Procurement report, 2013, <www.cips.org/Documents/About%20CIPS/CIPS_Ethics_Guide_WEB.pdf> accessed 12 August 2017.

⁵¹ Art 18.2 is also referred to as a basis for refusal of awarding a contract to a bidder who is found to be in violation of before mentioned provisions.

contract, will represent the best quality-price ratio. Another example may be the requirement that products are produced using recyclable materials. Thirdly, sustainable factors may be defined as a part of the most economically advantageous tender (MEAT) award criteria, where they would be weighted in addition to the price offered.⁵² A further approach to the award criteria may include the application of life cycle costing to determine the total cost for purchase, operation, maintenance and finally disposal of a good/ termination of a service.⁵³ Lastly, it is possible to consider sustainability in the contract performance clauses discussed in the previous section. However, the only sustainability related mandatory provision in Public Sector Directive regards public entity obligation to reject an abnormally low tender, where it has been established that the tender is abnormally low because it does not comply with applicable obligations referred to in Article 18(2).

Similarly, in the private contract law context, sustainability considerations have been spotted and analysed in the different stages of the contractual process. It is not uncommon that sustainability requirements are present in the pre-contractual phase, as a part of potential suppliers' screening criteria or as a request to potential suppliers to sign a type of code of conduct.⁵⁴ This can be connected with the requirement imposed on businesses by various soft law instruments to conduct due diligence and mitigate any negative impacts in respect to sustainability issues as soon as possible. For example, the UN Guiding Principles state that: 'Human rights due diligence should be initiated as early as possible in the development of a new activity or relationship, given that human rights risks can be increased or mitigated already at the stage of structuring contracts or other agreements (...).'⁵⁵

⁵² Public Sector Directive, Article 67.

⁵³ Public Sector Directive, Article 68; Dacian C Dragos and Bogdana Neamtu, 'Life-cycle costing for sustainable public procurement in the European Union' in Beate Sjøfjell and Anja Wiesbrock (eds), *Sustainable Public Procurement Under EU Law - New Perspectives on the State as Stakeholder* (Cambridge University Press 2016).

⁵⁴ An empirical study of 56 multinational companies seated in the USA and Europe has found that about one fourth of the studied companies required their suppliers to commit to sustainability requirements in writing prior to entering into an actual supply agreement, see Mitkidis, *supra* note 5, at 154-155.

⁵⁵ Human Rights Council, Report of the Special Representative of the Secretary - General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie: Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework, U.N. Doc. A/HRC/17/31, 21 March 2011 (hereinafter 'Guiding Principles'), para 17; OECD Guidelines on Multinational Enterprises, 2011 edition, Commentary on general policies, para 17. It is worth noting that the Guiding Principles are also applicable to public procurement. They affirm that the "State duty to protect" human rights extends to business-related human rights abuses. Guiding Principles 5 and 6 clarify that this duty

However, the legal effects of such pre-contractual requirements, actions and statements may vary according to the governing law of the final contract. While in civil law jurisdictions, the pre-contractual phase plays an important role in a case of any dispute between the parties helping to establish the intent in respect to the contractual content, in common law countries the *parol evidence* rule as a starting point precludes relying on pre-contractual negotiations and dealings when establishing the content of a contract.⁵⁶ This is possibly a determining factor for the empirical observation that written documents on sustainability considerations appear in the pre-contractual phase more often in the European than in the US context.⁵⁷

When supply agreements are executed between European companies and their suppliers, in the majority of the cases sustainability provisions are included in the final text of the contract. A study conducted in 2010 by the Pace University and the International Association for Contract and Commercial Management reported that almost 80 per cent of the investigated companies stated that they had previously imposed sustainability related requirements upon their business partners.⁵⁸ However, sustainability provisions differ significantly in respect to their inclusion in the contractual text (express provisions, incorporation by reference to codes of conduct or soft law instruments), topics they cover (social, environmental, ethical) and the level of their specificity (vague or specific language). These differences translate into different legal effects and possible risks. For example, it is easier to establish that an express provision forms an integral part of a contract than if a requirement is incorporated by a reference to another document, since such a reference must fulfil some additional formal requirements.⁵⁹

The contract implementation phase is probably the most important, but also the most problematic for all parties involved. Companies

extends to situations where governments enter into commercial relationships, including through public procurement.

⁵⁶ UCC § 2-202 (amended 2002); Restatement (Second) of Contracts § 213 (1981). The *parol evidence* rule is however not applied in a consistent manner throughout the USA, but differences exist among the states. For an overview of these differences, see A Schwartz and RE Scott, 'Contract Interpretation Redux' (2010) 119 Y. L. J. 926.

⁵⁷ Mitkidis, *supra* note 5, at 155.

⁵⁸ Pace University School of Law and IACCM, 2010, The Triple Bottom Line: The Use of Sustainability and Stabilization Clauses in International Contracts, available at <www.iaccm.com> for the association's members (NB the results are based on a survey conducted with companies representing various industries from North America, Middle East, Africa, Europe, Asia and Pacific and include all areas of CSR).

⁵⁹ For example, according to the Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law, 11.10.2011, COM (2011) 635 final (CESL), Art 70(1) the obliged contractual party must be 'aware of them', or the party supplying them must take 'reasonable steps to draw the other party's attention to them, before or when the contract was concluded.'

imposing sustainability requirements on their suppliers have to choose whether and how to enforce them. Suppliers have to choose whether to comply or not. And third parties, which are often the subjects protected by the provisions, may consider enforcing these provisions based on various legal standings, such as third party beneficiaries or false advertising claims.⁶⁰

The public contract implementation phase has been identified as the one which needs much more attention than it has been given over the years. That is due to the fact that while sustainability criteria find their way into public contracts, they are often not (similarly in respect to private contracts) properly enforced. Therefore, the inclusion of sustainability terms and conditions in public procurement gained an infamous name, 'a ticking box process',⁶¹ where there is no follow up upon compliance with them in the contract implementation phase.

3. RIGHTS OR OBLIGATIONS?

Before discussing whether the inclusion of sustainability criteria into public and private procurement processes is a legal right and/or obligation, the drivers for doing so are introduced in section 3.1. This drivers' introduction provides a background for the understanding of the relevant legal regulation or a lack thereof.

3.1. DRIVERS OF INCLUSION OF SUSTAINABILITY ISSUES INTO PROCUREMENT PROCESSES

Public procurement in itself is a complex system of activities that lead to the purchase of works, services and goods. To be able to conduct a good procurement, not only a legal provisions have to be adhered to but also a sound business decision needs to be made, while at the same time the governmental policy pressures, such as sustainability agenda, need to be considered. Further, focusing solely on the legal setting of public procurement, it needs to be underlined how complex it is. The governing setting is shaped by international law, EU law, national laws, governmental policies as well as choices and practices of individual contracting authorities.

On the one hand, public procurement is preliminarily set on economic premises and as such is referred to in national financial acts.⁶² Emphasis is given to efficient spending of tax payers' money through the achievement of value for money in public contracting. At the EU level,

⁶⁰ Beckers, supra note 5, chapters 3-5.

⁶¹See: Mark Plant, 'ISO 14001 An end to box ticking culture for sustainable procurement or just more red tape' (*EcoDesk*, 14 May 2014) <www.ecodesk.com/media/blog/2014/05/19/iso14001-an-end-to-box-ticking-culture-for-sustainable-procurement-or-just-more-red-tape> accessed 1 September 2017.

⁶² See e.g. the Financial Management and Accountability Act 1997 No. 154, 1997 as amended (Australia).

the total public expenditure in procurement amounts to 2.400 billion euro, which accounts to 19.7 per cent of the yearly GDP of the Union.⁶³ The high value of public procurement is a reason for economic interest in it at the EU level. Therefore, the main purpose of establishing EU procurement law is to support the EU internal market and hence the facilitation of an open competition, transparency and non-discrimination.

On the other hand, public procurement carries a delivery of governmental administrative tasks which includes to a certain degree the protection of public interest.⁶⁴ As it was indicated in the previous sections, public procurement has been used for decades as a tool to deliver governmental policies at the national level. Similarly, at the EU level, the sustainable agenda in public procurement gained wider recognition as a part of further EU development, and as such it was identified by the European Commission as a strategic instrument to achieve the EU's objective of a smart, sustainable and inclusive growth.⁶⁵ This led to the modernisation of the EU procurement regime in 2014 with new directives providing for a broader than ever before sustainable procurement toolbox. Both the European and national agendas are underlining the need to strike a balance between an efficient spend of public money and environmental protection and social developments.⁶⁶ It is commonly acknowledged that for the EU's economies to bounce back from the financial crisis, new innovative and cost efficient solutions for spending public money have to be established, jobs need to be created and climate change has to be addressed.

Furthermore, motivations for the inclusion of sustainability considerations into public procurement processes sprung not only from governmental policies but time and time again it has been shown that sustainable procurement is actually a good business where saving can be achieved, for example on the basis of considering life cycle costs of goods and services.

⁶³ European Commission, Public Procurement Indicators 2010, 4 November 2011.

⁶⁴ The subject matter of public procurement includes amongst others high value and high public importance tasks such as services in regards to welfare and health, water and energy, municipal waste and/or infrastructure.

⁶⁵ Communication from Commission, Europe 2020: a strategy for smart, sustainable and inclusive growth, COM (2010) 2010 final.

⁶⁶ United Nations Environment Programme (UNEP), Sustainable Consumption and Production Branch (2012) <www.unep.fr/scp/procurement/whatisspp/> accessed 26 April 2017; European Commission, Sustainable public procurement <http://ec.europa.eu/environment/gpp/glossary_en.htm> accessed 26 April 2017; GA A/68/970, Report of the Open Working Group of the General Assembly on Sustainable Development Goals, 12 August 2014; DEFRA, *Procuring the future: sustainable procurement national action plan: recommendations from the Sustainable Procurement Task Force* (DEFRA 2006), at 10; European Commission, *Buying social: a guide to taking account of social considerations in public procurement*, IP/11/105, 28 January 2011.

Some of the drivers for the inclusion of sustainability concerns into public procurement processes are observed also in respect to private procurement. First of all, the EU's policies not only drive the actions of the EU, but also of the business sector. Policies can be turned into laws (both hard and soft). Such a threat of future regulation together with existing national, EU and international law, or a lack thereof, can be subsumed under the headline of regulatory drivers.⁶⁷ From existing regulation, we may note the CSR Reporting Directive, under which large companies are expected to report annually on their CSR performance.⁶⁸ While the Directive does not specifically ask the companies to report on the inclusion of sustainability criteria into their procurement processes, it is one aspect that companies regularly report on. An example of driving sustainability conduct through a lack of regulation can be any area that is regulated by international law, such as the ban of child labour, which is not fully implemented and/or enforced by states on the one hand and does not bind private parties operating across borders on the other.⁶⁹ In fact, this is the situation in the most discussed CSR areas such as human rights or bribery. In regard to expectation of new regulation, carbon labelling has been perceived by some companies as a driver for implementing demands for reduction and/or reporting of CO2 emissions levels by their suppliers.⁷⁰ However, laws and regulation can also be felt as a barrier to private sustainable procurement. Especially, the tension between corporate supply chain sustainability policies and free trade provisions is often highlighted.⁷¹

As in the case of public procurement, cost saving is seen as an important driver for sustainable private procurement. It has been argued and observed that by successful implementation of sustainability criteria into procurement processes, companies may achieve cost savings in respect to operational and material flows.⁷² Another resources related driver concerns companies' reputation. By implementing sustainability

⁶⁷ Andrew J Hoffman, *Competitive Environmental Strategy: A Guide To The Changing Business Landscape* (Island Press 2000) part II, chapter 2.

⁶⁸ Directive 2013/34/EU on the annual financial statements, consolidated financial statements and related reports of certain types of undertakings, OJ 2014 L182/19 (Directive 2013/34/EU), Art 19a.

⁶⁹ This has been described as 'regulatory gaps' or 'governance deficit', see e.g. Peter Newell, 'Managing multinationals: the governance of investment for the environment' (2001) 13 *Journal of International Development* 907, 908.

⁷⁰ Olga Chkanikova and Oksana Mont, 'Corporate Supply Chain Responsibility: Drivers and Barriers for Sustainable Food Retailing' (2015) 22 *Corporate Social Responsibility and Environmental Management* 65, 76.

⁷¹ See the contribution of Carola Glinski in this issue. See also United Nations Environment Programme and the World Trade Organisation, Report: Trade and Climate Change, 2009, 99; Mark A Cohen and Michael P Vandenberg, 'The potential role of carbon labelling in a green economy' (2012) 34 *Energy Economics* S53, S59-S60.

⁷² Chkanikova and Mont, *supra* note 70, at 76.

requirements into procurement processes and reporting on the same, companies are boosting their image as ethical and sustainable companies.⁷³ As such, private companies may become more competitive on both private and public markets. Sustainable procurement may thus both save costs and escalate incomes of companies.

Market drivers are then often cited as the most urgent ones for the inclusion of sustainability concerns into private procurement processes. They include customers' and peer pressure. Firstly, there is a presumption among businesses that consumers demand sustainable behaviour in the production chain and will punish the companies if they find otherwise, e.g. by boycotting their products. In order to satisfy this demand, companies often seek to attach a specific sustainability label to their products.⁷⁴ In order to ensure that the products fulfil the requirements set by the specific labelling scheme, companies must pass appropriate requirements on their suppliers and this most often happens within procurement processes.⁷⁵ Secondly, customers' sustainability policies may be seen as another driver. If a company is a tier of another company's supply chain, it can be expected that it will be asked not only to act responsibly itself, but also to pass the requirements on its own suppliers.⁷⁶ Quite naturally then, public sustainable procurement is a driver for implementing sustainable concerns within private spheres. If a company has the ambition to become a contractor to a public entity, it (and arguably its sub-suppliers) must live up to the requirements imposed by the public institution within the public procurement process. Finally, sustainability requirements come into private procurement processes under the peer pressure. CSR as competitive advantage or otherwise referred to as 'strategic CSR' has been widely discussed by academia and practitioners.⁷⁷ Peer pressure can however materialise not only through the effort of getting a competitive advantage, but also through regulatory efforts at the industrial level. Various industry self-regulatory initiatives, such as the Bangladesh Accord,⁷⁸ expect the participating companies to consider sustainability issues throughout their procurement processes. While such industrial regulation is based on a voluntary basis, participation is often a precondition for membership in an industrial or relevant business association.

The final set of drivers for the inclusion of sustainability concerns into both public and private procurement processes, can be labelled as

⁷³ Mark Rowe, 'Reputation, Relationships and Risk: A CSR Primer for Ethics Officers' (2006) 111 *Business and Society Review* 441.

⁷⁴ E.g. fair trade label or ecologic origin label.

⁷⁵ Cafaggi, *supra* note 5, at 1561.

⁷⁶ IACCM, *supra* note 58.

⁷⁷ Michael E. Porter and Mark R. Kramer, 'The Link Between Competitive Advantage and Corporate Social Responsibility' (2006) 84 *Harvard Business Review* 78.

⁷⁸ The Accord on Fire and Building Safety in Bangladesh, <<http://bangladeshaccord.org>> accessed 26 April 2017.

‘social drivers’. These might include NGOs’ campaigns, media attention (negative publicity) and pressure exerted by science and new knowledge. It is especially the first two that influence the adoption of the sustainable procurement attitude by both sectors. NGOs’ campaigns often lead to negative publicity in respect to unethical behaviour within international supply chains.⁷⁹ By adoption of the sustainability approach in procurement activities, companies and public entities try to protect themselves from such negative attention.

3.2. A RIGHT OR AN OBLIGATION TO CONSIDER SUSTAINABILITY WITHIN PROCUREMENT PROCESSES?

This part of the article focuses on the regulatory drivers and barriers for the inclusion of sustainability concerns into procurement processes in order to answer two questions: Do organisations have the right to include sustainability requirements into their procurement processes? And do they have the obligation to do so?

In respect to the first question, the answer in both public and private spheres is a definite ‘yes’. There is no doubt at this point in time that the inclusion of sustainable considerations in public procurement is not only permitted but also highly promoted by numerous wide spread policies and revamped EU procurement directives as well as established CJEU case law.⁸⁰ Consequently, it can be stated that it is a right of contracting authorities – within the limits of the ‘link to subject-matter’ of a contract – to consider sustainability in public procurement.⁸¹ Similarly, as national

⁷⁹ Danwatch exposed human rights violations and forced labour in IT supply chains, at electronics factories that produce servers for brands Danish universities (public buyers) most often used see: Danwatch & Goodelectronics, *Servants of Servers: rights violations and forced labour in the supply chain of ICT equipment in European universities* (2015), <www.danwatch.dk/en/undersogelse/servants-of-servers/?chapter=1> accessed 1 September 2017; Plastic gloves purchased through public procurement in the health-care sector in Denmark have been documented to contain rubber from plantations relying on forced labour see: Danwatch, <<https://www.danwatch.dk/en/undersogelse/har-du-husket-gummiet/>> accessed 1 September 2017.

⁸⁰ Beate Sjøfjell and Anja Wiesbrock (eds), *Sustainable Public Procurement Under EU Law - New Perspectives on the State as Stakeholder* (Cambridge University Press 2016); Roberto Caranta and Martin Trybus, *The Law of Green and Social Procurement in Europe* (Djøf 2010); Sue Arrowsmith, ‘The Purpose of the EU Procurement Directives: Ends, Means and the Implications for National Regulatory Space for Commercial and Horizontal Procurement Policies’ (2012) 14 *Cambridge Yearbook of European Legal Studies* 1; Peter Kunzlik, ‘Neoliberalism and the European Public Procurement Regime’ (2013) 15 *Cambridge Yearbook of European Legal Studies* 283.

⁸¹ Even though there are opinions that sustainable policies have no place in EU contracts, it could be argued that their numbers are decreasing. For a critique see: Albert Sánchez Graells, ‘Truly Competitive Public Procurement as a Europe 2020 Lever: What Role for the Principle of Competition in Moderating Horizontal Policies?’, UACES 45th Annual

and international law of contracts is based on the principle of contractual freedom, private parties may freely (subject to a limited number of mandatory provisions) decide on what they want to include in their contract. And as in the public sphere, considering sustainability issues in commercial contracts is not only allowed, but also advised by various policy and soft law instruments.⁸²

The answer to the second question - whether on the basis of existing law organisations are obliged to pursue sustainable objectives within their procurement processes – is not as straightforward and the answer differs for the two spheres.

In the context of public procurement, it is necessary to investigate the legal status of sustainability in EU law. In the context of private procurement, the topic relates closely to the voluntary/mandatory basis of CSR.

The Lisbon Treaty identifies sustainable development as an overarching objective that shall be applied as a guiding principle for all areas of EU law and policy as well as it establishes a wide understanding of an internal market which is to serve non-economic objectives too.⁸³ Both Article 3(3) TEU as well as the Treaty's preamble express the EU's and its Member States' determination to pursue sustainable development.

Even though it is often agreed that Article 3 TEU is more than a mere policy objective, as well as the fact that there is a growing recognition of sustainable development as a general principle of international law, it would be too farfetched to derive a positive obligation of pursuing sustainability goals in the context of public procurement.⁸⁴

At this point, it is relevant to distinguish between the legal status of two aspects of sustainable development, namely the social considerations and environmental protection. That is due to the fact that they hold different legal statuses in EU law in general and in the context of public procurement in particular. While environmental considerations are seen as more objective and therefore easier to justify in the context of public procurement, social considerations are seen as a potential smoke screen for preferential treatments of local suppliers. In regard to environmental protection, it can be said that there is a stronger legal bite to it. That is

Conference, Bilbao, Spain, September 2015 <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2638466> accessed 26 April 2017.

⁸² See for examples infra notes 103-107 and accompanying text.

⁸³ TEU, Arts 3 and 21; Consolidated version of the Treaty on the Functioning of the European Union (TFEU) (2016) OJ C 202/47, Arts 11 and 191; and Charter of Fundamental Rights of the European Union, OJ 2016 C 202/389, Art 37.

⁸⁴ Important factor is also that the provisions are addressed to the Union and not to individual Member States. See David Grimeau, 'The Integration of Environmental Concerns into EC Policies: A Genuine Policy Development?' (2000) 9 *European Envtl. L. Rev.* 216; Christina Voigt, 'Article 11 TFEU in the light of the principle of sustainable development in international law' in Beate Sjöfjell and Anja Wiesbrock, *The greening of European business under EU law: taking Article 11 TFEU seriously* (Routledge 2015).

mainly due to the legally binding obligation of Article 11 TFEU which states that: 'Environmental protection requirements *must* be integrated into the definition and implementation of the Union's policies and activities, in particular with a view to promoting sustainable development.'⁸⁵

Nevertheless, there is a significant ambiguity as to the precise scope and effects of the obligations arising from this provision and unfortunately there is no further clarification provided by other provisions in the EU's treaties or CJEU case law.⁸⁶ Since Article 11 TFEU is addressed to the EU institutions, it has been argued that the EU legislator is bound by the obligatory requirements of environmental integration when setting the secondary legislation and policies (including public procurement), while the legal implications for the Member States are less explicit.⁸⁷ The EU legislator already made it obligatory on several occasions to apply green procurement in areas such as the energy and transport sectors.⁸⁸ Similarly at the national level, some Member States have made environmental purchasing of specific categories of goods and services (or even all purchases) obligatory for their central governments, but such provisions are generally solely recommendations for local authorities.⁸⁹

However, it seems doubtful that the EU legislator has to introduce environmental standards as an obligation to all public procurements. This is due to the fact that, firstly, it would not seem in line with the requirement of an integrated approach to the triple bottom line sustainable development. Secondly, it would prioritise environmental policy over other facultative policies (social considerations) and procurement principles such as equal treatment and open competition, rather than balancing the various facultative considerations. Finally, from a practical perspective, public procurement market significantly differs in its types, sizes and composition and, thus, applying the mandatory approach would be just unfitting and inappropriate in general. Wiesbrock argues that Article 11 TFEU potentially obliges EU legislators to ensure that contracting authorities in their procurement will not entirely ignore the

⁸⁵ TFEU, Art 11 (emphasis added).

⁸⁶ Anja Wiesbrock, 'An obligation for sustainable procurement? Gauging the potential impact of Article 11 TFEU on public contracting in the EU' (2013) 40 *Legal Issues of Economic Integration* 105, 105.

⁸⁷ *Ibid*, at 109.

⁸⁸ Directive 2006/32/EC on energy end-use efficiency and energy services, OJ 2006 L 114/64; Regulation (EC) No 106/2008 on a Community energy-efficiency labelling programme for office equipment (recast version), OJ 2008 L 39/1; Directive 2009/28/EC on the promotion of the use of energy from renewable sources, OJ 2009 L 140/16; Directive 2010/31/EU on the energy performance of buildings, OJ 2010 L 153/13; Directive 2009/33/EC on the promotion of clean and energy-efficient road transport vehicles, OJ 2009 L 120/5.

⁸⁹ European Commission, National GPP Action Plans (policies and guidelines), <http://ec.europa.eu/environment/gpp/action_plan_en.htm> accessed 26 April 2017.

issues of environmental policy.⁹⁰ This could be done by applying a general rule requiring contracting authorities to consider environmental factors and if it is decided that they do not have a place in a tender, contracting authority would need to provide an explanation in the tender documents. Still, this is not the case under the current status of law, even though the same methodical approach is applied in the context of the division of contracts into lots with the aim to promote the participation of SMEs at the EU level, or in the context of application of MEAT at the national level, for example in Netherlands.⁹¹

In comparison to environmental considerations, social considerations in EU public procurement are often perceived through a negative lens, as a type of considerations that on the one hand are contradictory to the economic objectives of the EU procurement system and smoke screens for preferential treatment, and on the other hand are too burdensome on contracting authorities, limiting their flexibility and requiring a disproportionate amount of resources.⁹² That can be seen through the fact that out of 253 amendments tabled by the EU Parliament, mostly from a social protection angle, the Council and the Commission rejected the majority of these in the process of modernising the EU procurement directives. Consequently, social considerations in EU public procurement are almost fully facultative. Article 18(2) of the Public Sector Directive binds Member States to ‘take appropriate measures to ensure that in the performance of public contracts economic operators comply with applicable obligations in the fields of environmental, social and labour law established by Union law, national law, collective agreements or by the international environmental, social and labour law provisions listed in Annex X.’⁹³

Even though Article 18(2) provides a very general duty, it is a basis for more detailed rules. In regard to the latter, the Directive creates a set of facultative options, for example a discretion for a contracting authority to reject a tender which does not comply with laws referred to in Article 18(2).⁹⁴ The solo obligation present in the context of social considerations under the Directive that is addressed to contracting authorities is the obligation to reject abnormally low tender, where the low price or cost is due to non-compliance with the laws referred to in Article 18(2), and explanation has been sought from the contractor in question.⁹⁵ Two further obligations are addressed to a) Member States to ensure that where national law provides for joint liability between main contractors and

⁹⁰ Wiesbrock, *supra* note 86, at 109.

⁹¹ Aanbestedingswet 2012, Art 2.115.

⁹² Anja Wiesbrock, ‘Socially responsible public procurement’ in Beate Sjøfjell and Anja Wiesbrock (eds), *Sustainable Public Procurement Under EU Law - New Perspectives on the State as Stakeholder* (Cambridge University Press 2016) 91.

⁹³ It is worth noting that the article also includes the environmental protection aspect.

⁹⁴ Public Sector Directive, Art 56(1), but also discretions under Art 57(4) and Art 71(6)(b).

⁹⁵ Public Sector Directive, Art 69(3).

subcontractors, the relevant rules are applied in compliance with the laws mentioned in Article 18(2);⁹⁶ and b) a competent national authority to ensure compliance by subcontractors with laws from Article 18(2).⁹⁷ As Article 18(2) is a vaguely worded provision addressed to Member States, it means that progress and enforceability of this provision will depend on the political will and incentives in national implementation.⁹⁸

In the private sphere, the principle of contractual freedom again dictates the answer, which must instinctively be ‘no’, there is no positive legal obligation requiring companies to include sustainability requirements in their procurement processes. However, the answer is not as simple and obvious as it may seem on the first glance, but follows from the discussion on the nature of CSR. CSR was traditionally defined as voluntary business measures going beyond law. For example, in its Green Paper on CSR from 2001, the EU stated: ‘Most definitions of corporate social responsibility describe it as a concept whereby companies integrate social and environmental concerns in their business operations and in their interaction with their stakeholders on a *voluntary basis*.’⁹⁹

This understanding has been increasingly questioned and criticised as being inaccurate and even misleading.¹⁰⁰ There are several reasons to support this. Firstly, most issues generally subsumed under the CSR umbrella, for instance bribery or child labour are already regulated by international law.¹⁰¹ While international law is in general not directly applicable to companies, the rules are simply not new and have been internalised also by the private sphere. As a result, practices such as the use of child labour clearly fall out of what is considered moral behaviour.

Furthermore, defining CSR as voluntary activities beyond law is impractical. It assumes that there is a clear definition of law and that all

⁹⁶ Public Sector Directive, Art 71(6)(a).

⁹⁷ Public Sector Directive, Art 71(1). The competent national authorities may include labour inspection agencies or environment protection agencies.

⁹⁸ For example, Poland, in its transposition of the Public Sector Directive, has obligated its contracting authorities to require from their contractors and subcontractors to conclude employment contracts with the persons involved in the execution of the public contract. The purpose of this is to stop the practice of entering into civil law contracts where the person involved has a less favorable legal status (e.g. due to the lack of entitlement to holiday, lack of protection of wages, liability for compensation etc.).

⁹⁹ Commission of the European Communities, Green Paper: Promoting a European framework for Corporate Social Responsibility, 18.7.2001COM (2001) 366 final (emphasis added).

¹⁰⁰ For early criticism see *supra* note 6.

¹⁰¹ Doreen McBarnet and Marina Kurkchyan, ‘Corporate social responsibility through contractual control? Global supply chains and ‘other-regulation’ in McBarnet, Voiculescu and Campbell, *The new corporate accountability*, at 67 (‘As one interviewee put it: ‘99 per cent of our requirements are legal requirements; they are not set by us. They are included in our code, 99 per cent or even 100 per cent of them are legal requirements that should be observed anyway’’).

legal obligations are of a binding nature. That is however not always true. Hard law can have soft content and soft law may produce hard obligations.¹⁰² There is plenty of soft CSR initiatives that may not expressly require companies to include sustainability issues into their contracting practice, but in fact impliedly rely upon the same. For example, while the Guiding Principles do not mention contractual control as a tool to be used, Professor Ruggie elaborated on the same in several accompanying documents.¹⁰³ Similarly, the commentary to the OECD Guidelines for Multinational Enterprises state that ‘enterprises can also influence suppliers through contractual arrangements such as management contracts, pre-qualification requirements for potential suppliers.’¹⁰⁴ The ISO 26000 then works more clearly with contracts as a tool to influence suppliers’ behaviour. It refers to the possibility of a company to decide with whom to conduct business,¹⁰⁵ setting sustainability contractual provisions¹⁰⁶ and in general integrating ‘ethical, social, environmental and gender equality criteria, and health and safety, in [their] purchasing, distribution and contracting policies and practices to improve consistency with social responsibility objectives.’¹⁰⁷

While all these CSR related regulations (and those are merely a fragment of all existent ones) are only in the category of soft law, they create a significant pressure on companies to use their procurement processes in the quest for global sustainability. Also, while we may discuss whether the substance is voluntary, the operationalisation of CSR cannot do without law. Companies are in fact obliged by law to implement CSR

¹⁰² E.g. Regulation (EC) No 1221/2009 on the voluntary participation by organisations in a Community eco-management and audit scheme (EMAS), OJ 2009 L 342/1 is based only on voluntary participation, while the UN Global Compact <<https://www.unglobalcompact.org>> accessed 26 April 2017, has aspects of reporting and enforcement that are often perceived by participating companies as ‘hard’.

¹⁰³ UN GA, Human Rights Council, Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and other Business Enterprises, John Ruggie: Promotion and Protection of all Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development: Clarifying the Concepts of “Sphere of influence” and “Complicity”, U.N. Doc. A/HRC/8/16, 15 May 2008; UN Mandate of the Special Representative of the Secretary-General on Human Rights and Transnational Corporations and other Business Enterprises, The Corporate Responsibility to Respect Human Rights in Supply Chains, 10th OECD Roundtable on Corporate Responsibility, discussion paper, 30 June 2010.

¹⁰⁴ OECD Guidelines for Multinational Enterprises, 2011 edition, Commentary on General Policies, para 21.

¹⁰⁵ International Organisation for Certification, ISO 26000:2010, Guidance on social responsibility (ISO 26000), paras 5.2.3 and 6.3.5.2.

¹⁰⁶ ISO 26000, para 7.3.3.2.

¹⁰⁷ ISO 26000, para 6.6.6.2.

into different procedures. CSR reporting and obligations in respect to products' labelling can serve as examples here.¹⁰⁸

Looking at these legal arguments combined with the factual drivers for CSR, it has become simply redundant to discuss the voluntary/mandatory nature of CSR. This is also reflected in the change of the EU's CSR definition. In the Renewed Strategy for CSR from 2011 states: "The Commission puts forward a new definition of CSR as "the responsibility of enterprises for their impacts on society". Respect for applicable legislation, and for collective agreements between social partners, is a prerequisite for meeting that responsibility."¹⁰⁹

Based on the above, it could be argued that it is a legal right and a morally based obligation to include sustainability requirements into private procurement processes and that the obligation is becoming increasingly legalised despite the principle of contractual freedom that governs the area of law of contracts.

3.3. LEGAL RISKS ASSOCIATED WITH INCLUSION OR AVOIDANCE OF SUSTAINABILITY ISSUES

As the previous section indicates, under the current status of EU procurement law and commercial contract law, there is no positive obligation to include sustainability considerations in either public or private procurement processes. Therefore, from a legal standpoint there will be no (direct) legal risks associated with the avoidance of such considerations.

For example, even though there is a risk of divergent interpretation of what is an *'appropriate measure'* under Article 18(2) of the Public Sector Directive, the legal consequences are unclear. The Commission could potentially bring an action against a Member State for noncompliance with Article 18(2), but it is highly doubtful that a private entity could bring a case against a contracting authority on this basis. It seems that the only door open for a disgruntled contractor – against a contracting authority – that may be associated with sustainable considerations, is in a case of abnormally low tender. That is if the contracting authority will not reject abnormally low tender where the low price or cost is due to non-compliance with the environmental, social and labour law and collective agreements applicable under Article 18(2), and explanation has been sought from the contractor in question. Under such circumstances, a

¹⁰⁸ See Directive 2013/34/EU, Art 19a; and Directive 2010/30/EU on the indication by labelling and standard product information of the consumption of energy and other resources by energy-related products, OJ 2010 L 153/1.

¹⁰⁹ Communication from the Commission, A renewed EU strategy 2011-14 for Corporate Social Responsibility, COM (2011) 681 final, 3.1.

disgruntled contractor may sue for damages on the basis of the Remedies Directive.¹¹⁰

Companies may then face liability for omitting to include sustainability requirements into their private procurement processes only indirectly. As already mentioned, in order to publicise the adherence to certain sustainability standards, companies attach specific labels to their products (such as a Fair Trade label) or seek to obtain a relevant certification (such as EMAS). Such labelling and certification schemes require the company to assure that its products are produced in a specific way or that a set of standards are observed by the company and all its suppliers. In order to legally secure compliance with these requirements, companies have to include adequate sustainability requirements into their procurement processes and contracts. If they fail to do so, they might face a liability stemming from the certification agreement.¹¹¹ Similarly, this may happen if a company participates in an industrial association or agreement, such as the Bangladesh Accord¹¹² or the Business Social Compliance Initiative.¹¹³ While they do not specifically require the participants to use contracts to further sustainability goals, they speak about procurement processes, and namely about the process of suppliers' selection.

Second consideration must be given to legal risks associated with the inclusion of sustainability considerations within procurement processes. While there is a clear right to pursue sustainability goals through procurement, this may expose organisations to multiple legal risks.

In the public sector, if a contracting authority exercises its right and includes sustainability considerations at any step throughout public procurement, these considerations will be scrutinised against the 'link to the subject-matter' of the contract as discussed in previous sections. If there is any doubt upon their 'link to subject-matter', the contractors participating in the tender may challenge the contracting authority based on the Remedies Directive, which may lead to the cancellation of the procurement process, invalidity of the concluded contract or pay out of damages.

Another risk that is associated with the inclusion of sustainability considerations relates to limited possibilities of a future contract amendment under the EU Public Procurement rules. That is not an issue specifically linked to sustainability contractual clauses or considerations, but an issue applicable to a need for substantial changes to the awarded contract in general. For example, a contracting authority may wish to change the contractor to whom a public contract was awarded. This may

¹¹⁰ Directive 2007/66/EC amending Council Directives 89/665/EEC and 92/13/EEC with regard to improving the effectiveness of review procedures concerning the award of public contracts, OJ 2007 L 335/31.

¹¹¹ Cafaggi, *supra* note 5, at 1601.

¹¹² *Supra* note 78.

¹¹³ Business Social Compliance Initiative <www.bsci-intl.org> accessed 26 April 2017.

be due to the fact that the contractor is unreliable and does not respect the sustainability terms and conditions originally agreed on. This can be a problem from a procurement perspective, as the rules may affect the situation again and trigger a requirement for a fresh competition. Under the EU procurement law, a substantial change of a contract will as a general rule require its retendering. Therefore, any change to already awarded contract, that is a change associated with the inclusion of sustainability contract performance clauses, will need to be scrutinised against Article 72 of the Public Sector Directive on contract modifications and concept of substantial change included therein.¹¹⁴

In the private sphere, due to the principle of contractual freedom, there is no direct legal risk associated with the inclusion of sustainability considerations at any point during the procurement process. However, many efforts have been made to establish various types of legal liability, if companies impose sustainability requirements on their suppliers and afterwards do not enforce those or a breach occurs. As will be seen below, although this liability in theory exists, it has only been possible to establish such liability in a very limited number of cases in the EU and worldwide.¹¹⁵

First of all, companies may face liability for false advertisement. In April 2010, the German retailer Lidl was taken to court for using the following statement in its advertising: ‘We trade fairly! Every product has a story. It is important to us who writes this story. Lidl advocates fair working conditions on a global scale. Therefore, at Lidl, we contract our non-food orders exclusively to selected suppliers and producers that are willing to comply with and can demonstrate their social responsibility (...).’¹¹⁶

While the company indeed imposed sustainability contractual requirements on its suppliers, a number of breaches in the company’s supply chains were disclosed. The case was settled out of court. Lidl had to retract the statements from its advertising (which is hardly an adequate sanction and does not solve the issue of unfair working conditions in the retailer’s supply chain).¹¹⁷

In this respect, it will be interesting to see if new disclosure oriented legal requirements imposed by EU law as well as some national laws on certain types of companies in respect to their sustainability related activities in supply chains, such as the Non-financial Disclosure Directive,

¹¹⁴ The definition of what is a substantial modification follows from the *Presstext* case and is now codified in Public Sector Directive, Art 72(4).

¹¹⁵ From the latest cases from outside of EU, see e.g. *Monica Sud v Costco Wholesale Corporation, et al.* Original claim <www.cpmlegal.com/media/news/222_Costco%20Prawns%20Complaint.pdf> accessed 17 April 2017.

¹¹⁶ Hamburg Consumer Protection Agency’s case against Lidl, <www.ecchr.eu/en/our_work/business-and-human-rights/working-conditions-in-south-asia/bangladesh-lidl.html> accessed 4 April 2017.

¹¹⁷ For a prominent case from the US jurisdiction on the same, see *Nike, Kasky v. Nike, Inc.*, 45 P.3d 243 (Cal. 2002) and *Nike, Inc. v. Kasky*, 539 U.S. 654 (2003).

the DK reporting act or the UK Modern Slavery Act OK, will lead to more litigation. While none of them explicitly prescribe how companies should implement sustainability into their operation, using contracts to further the goals of these legal acts is a natural tool to use. In this regard, some law and consultancy firms warn companies to guard what is exactly disclosed, as this could be picked up by activists and consumers to base their claims on.¹¹⁸

Second possibility of legal risks connected with the use of sustainability requirements in private procurement is opening up to third party beneficiaries claims. However, these claims are rarely successful in general, and to the authors' knowledge there has been no success of such claims in respect to sustainability requirement.¹¹⁹ This limited applicability of third party beneficiaries doctrine stems from the fact that contract law treats a contract as a discreet agreement between the contractual parties and only allows the interference of a third party if it has a strong relation to the contract. While differences exist between jurisdictions, there are features of the third party beneficiaries doctrine that are common to most. The contractual parties must *intend* to confer a *specific right* to a third party and such third party must be *identified or identifiable*.¹²⁰ Although these conditions prove to be difficult to be fulfilled in respect to sustainability requirements,¹²¹ companies often take preventive steps and include a no-third-party-beneficiary clause into their contracts.¹²²

Another effort to establish legal liability in respect to sustainability requirements tried to use the unilateral contract doctrine. Usually, this would come into question where there are no clear sustainability contractual clauses, but a suppliers' code of conduct or a sustainability report covering the issue of a supply chain's sustainability. Third parties,

¹¹⁸ For example, similarly in the US, law firms warn companies in the same way in respect to the California Supply Chains Transparency Act. See e.g. Squire Patton Boggs, 'Wakeup Call to Supply Chain Managers and Compliance Officers of Companies Doing Business in the USA', <www.squirepattonboggs.com/~media/files/insights/publications/2015/08/significant-conflict-minerals-ruling-and-recent-california-transparency-in-supplychains-act/conflict-minerals-california-transparency-act.pdf> accessed 26 April 2017; (stating 'Be careful: All supply chain transparency and ethic sourcing disclosures to the public, to customers, and to suppliers will receive increased scrutiny by NGOs, consumers, activists, and plaintiffs' law firms going forward.')

¹¹⁹ Third party beneficiaries claim was discussed within the US case *Doe v. Wal-Mart Stores, Inc.*, 572 F.3d 677 (9th Cir. 2009).

¹²⁰ Principles of European Contract Law, Art 6:110, and CESL, Art 78 (NB CESL proposal has been withdrawn).

¹²¹ Beckers, *supra* note 5, at 3.2.3.

¹²² Such clause may for example read: 'No Third Party Beneficiaries. This Agreement shall not confer any rights or remedies upon any Person other than the Parties and their respective successors and permitted assigns.' The example taken from <www.lawinsider.com/clause/miscellaneous/no-third-party-beneficiaries> accessed 17 April 2017.

such as employees of a supplier could then claim that a contract was concluded between them and the sourcing company based on such unilateral statement. This tactic was tested in the USA, but did not succeed due to vagueness of a suppliers code resulting in an absence of a clear promise.¹²³ In the European context, it can be expected that it would be even harder to establish an existence of a unilaterally made contract, as plaintiffs would have to prove not only the existence of a clear promise, but also the intention of the company to be bound by the statement.¹²⁴

As a final point in this section, it must be stated that a major risk connected with *both* pursuance and avoidance of sustainability requirements in private procurements processes is rather reputational (and arguably consequently also financial) than legal. Though, such other risks are outside the scope of this paper, possible reputational (and financial) risks may turn into legal risks through the liability of companies' directors. If a company is found to ignore sustainability issues or to breach its due diligence duties under a legal rule or a soft-law instrument by not considering sustainability requirements in its procurement processes, and consequently suffers a financial loss, the directors may be found to be in breach of their duty of care towards shareholders. However, the same may happen if a company pursues sustainability goals through its procurement processes and this turns to be too costly or one of the legal risks described above materialises.

4. CONCLUSION

Sustainability topics in public and private procurement (i) are increasingly considered and implemented into contracts; (ii) deal with similar issues in both contexts; (iii) cover issues that are linked to the subject matter of a contract, including issues that relate rather to the production process than the physical qualities of the delivered goods as such; and (iv) proliferate through all stages of the procurement process. Consequently, it may be noted that the two spheres are possibly closer to each other than it seems at the first look. At the same time, the drivers for inclusion of sustainability consideration into public and private procurement processes come from different sources and the legal framework regulating the two spheres substantially differs. While the acknowledgment of sustainability issues within procurement processes have been steered by different development, the drivers in both public and private spheres can be classified into four categories: regulatory (policy), resource, market and social drivers.¹²⁵ Most importantly for this paper, the two spheres obviously influence each other in respect to sustainability

¹²³ *Doe v. Wal-Mart Stores, Inc.*, supra note 119.

¹²⁴ See Study Group on a European Civil Code and the Research Group on EC Private Law (Acquis Group), 2009, Principles, Definitions and Model Rules of European Private Law, Draft Common Frame of Reference (DCFR), Outline Edition, Art 4.301.

¹²⁵ Hoffman, supra note 67.

topics. Public procurement acts as one natural driver for the development of private procurement, as private contractors must live up to public procurement rules and requirements if they want to supply to public institutions. Private procurement then has developed an intricate best practice in respect to implementation and enforcement of sustainability requirements, which serves as an inspiration to the public sphere, where the focus has until now been on the pre-award phase.¹²⁶

Further, as described in the introduction to this article, the focal concern of this article with regard the questions of whether pursuing sustainability goals through procurement is a right or an obligation of public and private organisations and whether there are risks of liability associated with either pursuing or ignoring sustainability goals in procurement processes.

In summary, it may be concluded that while the right to include sustainability concerns in procurement processes stands firm both in the public and private areas, the authors can only see contours of the legal obligation to do so. There seems to be a slow but consistent push from various stakeholders to establish such a legal obligation. However, in the view of the economic and business needs that are the driving forces in procurement, the position of the public contracting authorities balancing multiple public interests, and the overarching principle of contractual freedom in commercial contracting, it does not seem plausible to directly legally require either public or private organisations to include sustainability requirements into their procurement processes. An indirect legal push is, however, a possibility, which is increasingly used by various regulators.¹²⁷ When it comes to the risks of liability, looking at the discussions from both the sectors, it seems that more legal risks are in fact associated with the inclusion of sustainability requirements into procurement process (and inadequate enforcement thereof) rather than with ignoring them. Considering the lack of a positive legal obligation in this respect, this is a counter-intuitive conclusion. Surprisingly, this fact has not discouraged organisations from exercising their contractual control over their suppliers to further sustainability goals, this showing to the power of resources related and market drivers of sustainable procurement. The legal framework of public procurement and commercial contracts should aim for 'giving teeth' to sustainability regulations (mostly soft law) and for the enforcement of organisations' promises in respect to sustainability issues, while making sure that those organisations following the trend of inclusion of sustainability concerns into procurement processes are not punished but supported through law. It might thus be necessary, rather than establishing a legal obligation to

¹²⁶ Beckers, *supra* note 7, at 217.

¹²⁷ An example here can be the US Foreign Corrupt Practice Act (The Foreign Corrupt Practices Act of 1977, as amended, 15 U.S.C. §§ 78dd-1, et seq.) or the UK 2015 Modern Slavery Act.

include sustainability issues into procurement processes, to provide new solutions to their legal enforcement.