



**SAPIENS
NETWORK**

Implementing labour rights criteria covering global supply chains in public procurement.

15 May 2024

Laura Treviño-Lozano

Policy Brief



This project has received funding from the European Union's Horizon 2020 research and innovation programme under the Marie Skłodowska-Curie grant agreement No 956696.

Implementing labour rights criteria covering global supply chains in public procurement

Laura Treviño-Lozano, Marie Skłodowska-Curie Fellow, University of Greenwich; SAPIENS.

Key results and recommendations

- Social criteria remain voluntary, locally applied and uniform, as well as restricted by the link to the subject matter of the contract, all of which clashes with labour rights respect in global supply chains.
- Monitoring and means of verification are poorly regulated in procurement legal frameworks.
- Secondary legislation should be adopted to guide on drafting of social criteria when tendering and on monitoring compliance with them when following up the contract performance.

Problem

Abuses of labour rights in global supply chains, including those of contracting authorities, are well-documented and remain a pressing concern. Public bodies can contribute, invertedly, to these abuses through their procurement of goods, but they can also play a significant role in addressing them through their procurement practices. Increasing awareness of labour rights in public procurement in the EU and its Member States has led to some progress in regulating social criteria integration into the procurement process.

The EU Procurement Directive 2014/24 allows public buyers to voluntarily request from contractors to comply with social conditions during the performance of the contracts. One of these conditions, according to Article 202 of the Spanish Law 9/2017, can be to ensure respect of labour rights throughout the supply chain in producing countries. This legal provision jointly with other of a similar nature are little implemented in practice because a robust legal procurement framework at EU, national and local levels supporting labour rights has not been yet consolidated.

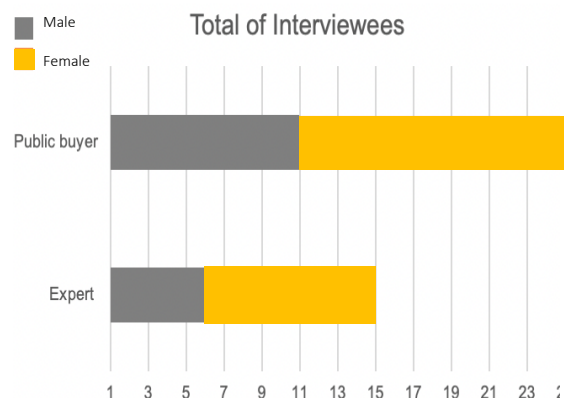
92% of public buyers and experts agree legal support is needed to respect workers' rights in global supply chains.

About the study

This policy brief is based on research on Spain's goods procurement by local public buyers and addresses local procurement policymakers, but has wider implications for EU public buyers and local authorities.

It identifies challenges and solutions for public buyers when implementing EU and Spanish procurement laws related to social criteria inclusion that aim to respect labour rights in global supply chains. Further research is needed to articulate how the recommendations could be implemented in other EU countries, as well as for procurement for services and works.

Forty semi-structured interviews were conducted to public buyers in Spain and experts during February-July 2023. Their responses were coded and analysed; legal support was the topic most interviewees discussed.



Study results

Empirical findings show procurement laws at the EU, national, regional and local levels have considerable gaps. There is a need for further guidance on implementing existing rules at EU and Spanish level, such as those specified in Article 202 of the Law 9/2017. Secondary legislation is pointed out as a possible solution to this need, particularly one that can establish guiding rules to draft social criteria in the pre-tender phase and to monitor compliance with such criteria during the performance of the contract.

Social criteria are voluntary rather than mandatory

The EU and Spanish procurement laws establish social criteria are mainly voluntary, so often, public buyers decide not to include them or to favour other non-economic criteria like environmental.

Social criteria have a local, rather than global scope

Their design is primarily focused on a local scope of application, preventing the inclusion of labour rights compliance beyond the contracting body's borders for worker's rights respect in global supply chains.

Contracting bodies that are including labour rights criteria covering global supply chains are required to do so under secondary legislation named "special instructions". With this legal support, they are requiring transparency from contractors involving the disclosure of the names, contact person, country of operation and addresses of suppliers, focusing on those suppliers at the origin of products or main components and core manufacturing factories.

Social criteria have no differentiated approach according to the type of contract

There is little legal guidance on the type of criteria - selection, award, technical specifications and contract performance conditions- that contracting authorities may use according to the type of contract -services, works or supplies-

Social criteria's link to the subject matter is not clearly established

The mandatory link to the subject matter that social criteria must meet is not clearly defined. Contracting authorities often fear lack of compliance with this requisite, and litigation in tribunals. They opt to either not including or copy-pasting "approved" criteria.

Contracting bodies called out for "guidelines, directives and special instructions" that can facilitate the application and enforcement of the laws, which are "necessary for the implementation of social requisites".

“We don't need more directives, but to adopt regulatory norms and comply with them.”

[Anonymous interviewee]

Monitoring the contract has little regulation

The EU and Spanish laws include a handful provisions on how contracts should be followed up at the performance stage. There is no guidance for contracting authorities on the monitoring methods they should apply, their responsibilities in case of non-compliance, and the available resources to verify compliance with social criteria involving global supply chains. Consequently, public buyers often include criteria but do not follow up.

Means of verification for monitoring are few and weak

The EU and Spanish laws primarily rely on self-declarations and labels as means of proof of compliance with social criteria. Frequently, the former are signed by contractors regardless of accuracy, and do not involve subcontractors or suppliers. Contracting bodies employ additional means like audits and allegations*, which are not covered by any of these laws.

*Allegations cover informal or non-governmental claims about labour rights abuses made by third parties, namely, competing tenderers, workers, trade unions, subcontractors, journalists, and NGOs.

Relevance for policymakers

Addressing these legal challenges is paramount to support contracting authorities in meeting human rights and procurement obligations. Secondary legislation must address existing loopholes in EU and Spanish procurement legal frameworks for labour rights inclusion and monitoring in multi-country and multi-tiered global supply chains. Through this procurement regulation, local policy makers can be in a position to influence working conditions abroad, traditionally reserved to national policymakers and achieve better policy-coherence in a bottom-top fashion.

Recommendations

Policy makers should propose and adopt secondary legislation.

Secondary legislation must cover mandatory inclusion of labour rights compliance across global supply chains, and provide clear guidelines on the permissible social criteria, applicable contract types, and methods for monitoring and controlling contract execution, including verification means. To that end, secondary legal provisions should:

1. Establish mandatory and global social criteria

Focus on supplies with large purchase volumes and high risk of human rights abuses and shift current voluntary and domestic social criteria into mandatory and global; seeking support from other public entities and existing legislation. A key criterion should be to improve traceability by identifying suppliers at the product and main component's origin and manufacture. This information will better enable contract monitoring by contracting authorities.

2. Clarify the permissible social criteria

Provide further guidance for contracting authorities on defining the legal meaning of link to the subject matter and identifying legally sound social criteria under national and EU frameworks. Additionally, adopt a differentiated approach to determine applicable criteria based on the type of contract whether for supplies, services or works.

3. Guide the monitoring of the contract performance

Clearly outline easy, effective and accessible contract monitoring methods across global supply chains, including specific tools, approaches such as collaboration with other contracting bodies, and verification means, including audits and allegations. Detail procedures for addressing non-compliance by contractors and suppliers, assign responsibilities and sanctions to contracting authorities for disregarding follow up and allocate the necessary funds for enforcement.

About the author

Laura Treviño-Lozano has a Bachelor's in law, Universidad Panamericana (Mexico), specialization on human rights, Universidad Castilla-La Mancha (Spain), MSc in development studies, London School of Economics (UK), and PhD candidature on human rights and sustainable public procurement, University of Greenwich (UK). She is member of the Sapiens Network; the International Working Group on Ethical Public Procurement; and the Business, Human Rights and the Environment Research Group.

About SAPIENS

SAPIENS is the first training network and academic research project integrating sustainable public procurement as a sub-discipline within the field of sustainable procurement studies. It furthers the understanding of sustainable public procurement in its legal, political and economic context; tackles many currently pressing issues for well-being of our societies and brings together supervisors from fields and professionals relevant to sustainable public procurement.