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Due diligence a standard of conduct for contracting authorities and business contractors

Laura Treviño Lozano

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Introduction

The concept of due diligence is well-established in international law as a standard of conduct for both businesses and States. Across Pillar I and III, the UN Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework (UNGPs) lay out businesses have a responsibility to respect human rights. A way to operationalise this responsibility is through conducting human rights due diligence. According to the OECD Due Diligence Guidance for Responsible Business Conduct (OECD Guidance) due diligence is a six-step process that allows businesses to identify, prevent, address, and remedy harm their operations may cause or contribute to cause not only against human rights but also the environmental and climate change.¹

On the other hand, States have a duty to protect human rights through preventing and remedying business-related human rights abuses. This duty is set out within the UNGPs’ Pillar I and III. Two ways to operationalise this duty are through conducting due diligence themselves and to request from business to conduct due diligence. While only the latter is recognized by the UNGPs, international law has well established the former as part of the duty of states. The literature points out that, in the context of public procurement, contracting authorities must undertake due diligence and request it from their contractors.²

Nevertheless, the operationalisation of states’ duty through conducting due diligence in the context of public procurement and global supply chains has been underdeveloped.³ The need for further exploration of this duty has been emphasized, particularly regarding the ways in which it applies and interacts with European and national procurement legal frameworks.⁴ Besides, the most widely accepted standards for implementing due diligence, namely the UNGPs and the OECD Guidance, are primarily directed at businesses. The ways in which these frameworks’ principles and six-step process apply to due diligence aimed for public buyers remain unclear. Although there is growing support for implementing due diligence obligations, there is a notable gap in research concerning critical aspects comprising them: prioritisation, leverage and collaboration. These concepts require additional examination, particularly because the recently

¹ OECD, *Due Diligence Guidance for Responsible Business Conduct* (2018). This international standard is the basis for this paper’s analysis with the limitation expressed below in the research methods.

² Claire Methven O’Brien and Olga Martin Ortega, ‘Discretion, Divergence, Paradox: Public and Private Supply Chain Standards on Human Rights’ in Sanja Bogojevic, Xavier Groussot and Jörgen Hettne (eds), *EU Public Procurement Law*, vol 26 (Hart 2019); OECD, *Pilot on integrating OECD Due Diligence into Public Procurement in the Garment Sector* (2022).

³ Laura Treviño-Lozano and Ezgi Uysal, ‘Bridging the Gap between Corporate Sustainability Due Diligence and EU Public Procurement’ [2023] *Maastricht Journal of European and Comparative Law* 1023263X231213335.

⁴ Methven O’Brien and Ortega (n 2) 17.

adopted Corporate Sustainability Due Diligence Directive (CSDDD) explicitly refers to them in the enforcement of its obligations.⁵

The aim of this paper is to cover the existing legal loopholes in theory and practice of contracting authorities' due diligence. To that end, this paper starts by grounding the theory of the first three steps of businesses' due diligence, according to the UNGPs and OECD Guidance. Then, it unpacks their meaning and practical implementation when contracting authorities undertake due diligence, according to forty interviews with public buyers and experts, and focuses on prioritisation, leverage and collaboration.

Research methods

This study used qualitative research methods based on semi-structured questions to forty procurement practitioners at city council and regional levels in Spain and experts on EU and Spanish public procurement and human rights. The sampling method used to select the group of individual population was non-probability non-random sampling.⁶ It is to highlight that this research was not based on due diligence by design. The interviewees were asked six semi-opened questions related to the ways in which contracting authorities are enforcing labour rights in global supply chains through their purchasing practices. The results of this study, however, inform due diligence implementation by contracting authorities taking as a starting point the UNGPs and the OECD Due Diligence Guideline. Yet, the findings are constrained to the first three steps of due diligence, therefore the analysis only covers those three. Finally, the author notes that while the environment and climate change are recognized to be part of the adverse impacts covered by due diligence, notably by the OECD Guidance, this research is focused on human rights only because the social dimension is less developed than the environmental in sustainable public procurement.⁷

The concept of due diligence

Under international human rights soft law, businesses have a “responsibility” to respect human rights, which entails identifying and addressing adverse human rights impacts

⁵ Parliament Resolution Recommendations for Drawing up A Directive of the European Parliament and of the Council on Corporate Due Diligence and Corporate Accountability [2021] OJ C 474/11.

⁶ Samuel J Stratton, 'Population Sampling: Probability and Non-Probability Techniques' (2023) 38 Prehospital and Disaster Medicine 147.

⁷ Jolien Grandia and Peter Kruijen, 'Assessing the Implementation of Sustainable Public Procurement Using Quantitative Text-Analysis Tools: A Large-Scale Analysis of Belgian Public Procurement Notices' (2020) 26 Journal of Purchasing and Supply Management; Kirsi Maria Halonen, 'Is Public Procurement Fit for Reaching Sustainability Goals? A Law and Economics Approach to Green Public Procurement' (2021) 28 Maastricht Journal of European and Comparative Law 535; Joanne Meehan and David Bryde, 'Sustainable Procurement Practice' (2011) 20 Business Strategy and the Environment 94; Ramon Bernal, Leire San-Jose and Jose Luis Retolaza, 'Improvement Actions for a More Social and Sustainable Public Procurement: A Delphi Analysis' (2019) 11 Sustainability.

that their operations and business relationships may cause or contribute to cause.⁸ The UNGPs enshrine this responsible business conduct (RBC), and human rights due diligence constitutes its backbone. Based on the UNGPs and the ILO Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy, the OECD defines human rights and environmental due diligence (RBC due diligence) in the OECD Guidance. This paper refers to “RBC due diligence” when it is conducted by businesses, whereas “due diligence” when it is carried out by contracting authorities limited both to human rights only.

RBC due diligence involves a six-step process in which enterprises 1) embed responsible business conduct into policies and management systems, 2) identify and assess real or potential adverse impacts that businesses’ operations, supply chains and relationships may cause on human rights and the environment, 3) cease, prevent or mitigate adverse impacts, 4) track implementation and results, 5) communicate how impacts are addressed and 6) provide for or cooperate in remediation when appropriate.⁹

In turn, States have the “duty” to protect human rights according to international law.¹⁰ Protection involves a general obligation for States to prevent, and if necessary, to remedy human rights violations caused by themselves or by private entities.¹¹ One way to operationalise this duty, to prevent and remedy, is through conducting due diligence, which involves a “no harm rule”.¹² Conducting due diligence requires the State to implement all reasonable measures to either prevent foreseeable significant damage or minimize harm risk through specific measures.¹³ A breach of this rule occurs if the State where the harm originates fails to act diligently in managing its own activities or those of private entities.¹⁴ One of the main activities of States is public procurement, which is undertaken to acquire supplies, services and works they need to accomplish their functions.¹⁵ These procurement activities can and have been contributing to harm, such as forced labour, worst forms of child labour and exploitative working conditions in supply chains located in third countries.¹⁶ Indeed, one of the causes of harm in third

⁸ Jonathan Bonnitcha and Robert McCorquodale, ‘The Concept of “due Diligence” in the UN Guiding Principles on Business and Human Rights’ (2017) 28 *European Journal of International Law* 899.

⁹ OECD, *Due Diligence Guidance* (n1)

¹⁰ Olivier De Schutter, ‘The Typology of States’ Obligations and the Obligation to Respect Human Rights’, *International Human Rights Law* (Cambridge University Press 2010).

¹¹ Marco Fasciglione, ‘Implementing “Responsible Business Conduct” Approaches Under the UN Guiding Principles on Business and Human Rights at the Time of COVID-19’ (2020) 2020 5 *European Papers* 1435.

¹² *ibid.*

¹³ *ibid.*

¹⁴ *ibid.*

¹⁵ Sue Arrowsmith and Peter Kunzlik, *Social and Environmental Policies in EC Procurement Law: New Directives and New Directions* (Cambridge University Press, 2009).

¹⁶ Danwatch, ‘Servants of Servers: Rights Violations and Forced Labour in the Supply Chain of ICT Equipment in European Universities’ (2015); Samuel Lovett, ‘Government to Face Court Hearing over Links

countries producing or extracting supplies has been found on irresponsible sourcing practices, including those of public buyers.¹⁷ By awarding contracts to the lowest bids, contracting authorities put pressure to contractors and suppliers to lower prices, which in many cases is accomplished through undermining labour conditions of workers.¹⁸ Some actions undertaken by businesses to navigate cost-pressures -including private contractors and their supply chains- are maximizing working hours, reducing expenses on wages, benefits, training, infrastructure and equipment.¹⁹ Therefore, actions aimed to mitigate the harm that states' activities may contribute to cause through conducting due diligence take more relevance in the context of public procurement.

Another way to operationalise the states' duty to protect is through regulating business behaviour by requesting them to conduct due diligence. However, the extent of this duty, particularly regarding extraterritorial business' operations and public procurement activities, remains unclear in international law. Soft law, primarily through UNGP2, has emphasized that states should set out clearly the expectation for all business within their jurisdiction to respect human rights across their operations, while noting in its commentary that states are neither required nor prohibited to regulate businesses' extraterritorial activities. A way to set this expectation, according to UNGP3, is through regulation and policies that encourage and require business enterprises to communicate how they address their human rights impacts; noting in its commentary that guidance should be provided to them about the appropriate methods to respecting human rights, including human rights due diligence.

to PPE Supplier Accused of Modern Slavery' *Independent* (UK, 19 May 2022) <<https://www-independent-co-uk.cdn.ampproject.org/c/s/www.independent.co.uk/news/uk/politics/ppe-supplier-high-court-uk-supermax-b2082105.html?amp>> accessed 23 May 2022; Gisela ten Kate, 'Dutch National Policy for Socially Responsible Public Procurement' (27 March 2015) <<https://medium.com/test-publication/dutch-national-policy-for-socially-responsible-public-procurement-e14cb46d7053>> accessed 2 August 2022; Ian Urbina, 'US Flouts Its Own Advice in Procuring Overseas Clothing' [2013] *New York Times*; UNCTAD, 'Trade in Electronic Components Drives Growth in Technology Goods' 11 March 2019 (11 March 2019) <<https://unctad.org/news/trade-electronic-components-drives-growth-technology-goods>>; The Observatory of Economic Complexity, 'Textiles' <<https://oec.world/en/profile/hs/textiles>> accessed 9 August 2023; The Observatory of Economic Complexity, 'Vegetables and Fruit' <<https://oec.world/en/profile/sitc/vegetables-and-fruit>> accessed 9 August 2023; The Observatory of Economic Complexity, 'Rubber Surgical Gloves' <<https://oec.world/en/profile/hs/rubber-surgical-gloves>> accessed 9 August 2023; Robert Stumberg, Anita Ramasastry and Meg Roggensack, 'Turning a Blind Eye? Respecting Human Rights in Government Purchasing' (2014); Théo Jaekel, Arthy Snthakumar, and Swedwatch, 'Healthier Procurement: Improvements to Working Conditions for Surgical Instrument Manufacture in Pakistan' (2015) 978-91-88141-01-9.

¹⁷ Stumberg, Ramasastry and Roggensack (n 26).

¹⁸ Genevieve LeBaron, 'Wages: An Overlooked Dimension of Business and Human Rights in Global Supply Chains' (2021) 6 *Business and Human Rights Journal* 1; Genevieve LeBaron, 'The Role of Supply Chains in the Global Business of Forced Labour' (2021) 57 *Journal of Supply Chain Management* 29.

¹⁹ Stumberg, Ramasastry and Roggensack (n 26); LeBaron (n 28); LeBaron (n 28).

The UNGPs further address the request by states from businesses to conduct due diligence when they have a “nexus” with them. This nexus is established when they own, control, give “substantial support” or contract with businesses according to UNGP4, UNGP5 and UNGP6. Notably, according to UNGP6 this nexus is created through a public contract between public contracting authorities and private contractors. Yet, requiring from these businesses RBC due diligence is only explicitly mentioned in UNGP5, when they are contracted by the state for the provision of services that may impact upon the enjoyment of human rights. Although UNGP6 does not explicitly require contracting authorities to request due diligence from contractors, as part of their duty to protect, the UN Working Group on Business and Human Rights has endorsed such practice in public procurement.²⁰

The uncertainty in the international legal frameworks about the states’ duty to protect through regulating businesses’ behaviour in third countries has fuelled academic debates about the topic. Particularly because international human rights law, does not explicitly establish this obligation neither does it prohibits States from doing so, as it is stated in Commentary to UNGP2.²¹ Discussions in the literature mainly revolve on whether regulation is exercised over businesses headquartered or domiciled in the regulatory state’s territory or rather it can be exercised too over businesses with whom the regulating state has a contractual relationship, regardless of where they are based.²² In the author’s view, it can be argued that States have an “expectation” to protect human rights through control by regulating, amongst other measures, business behaviour in their territory and beyond it; and this regulation could indeed be about due diligence.

²⁰ UN Human Rights Special Procedures, Special Rapporteurs, Independent Experts and Working Groups, “Integrating Human Rights in Public Procurement: A focus on Latin America and the Caribbean” https://empresasyderechoshumanos.org/wp-content/uploads/2022/04/INFORMATION-NOTE-on-PP_LAC_EN.pdf

²¹ Methven O’Brien Claire, ‘Are European Home States of Transnational Corporation Responsible for Their Impacts Abroad under the ECHR?’ in Bonfanti Angelica (ed), *Business and Human Rights in Europe: International Law Challenges* (Routledge, Taylor & Francis Group 2019); Fasciglione (n 7).

²² Muthucumaraswamy Sornarajah, ‘Linking State Responsibility for Certain Harms Caused by Corporate Nationals Abroad to Civil Recourse in the Legal Systems of Home States’ in Craig Scott (ed), *Torture as Tort: Comparative Perspectives on the Development of Transnational Human Rights Litigation* (Hart Publishing 2001); Magdalena Sepulveda, ‘Obligations of “International Assistance and Cooperation” in an Optional Protocol to the International Covenant on Economic, Social and Cultural Rights’ (2006) 24 *Netherlands Quarterly of Human Rights* 271; Olivier DE Schutter, ‘Towards a New Treaty on Business and Human Rights’ (2016) 1 *Business and Human Rights Journal* 41; Daniel Augenstein and David Kinley, ‘When Human Rights “Responsibilities” Become “Duties”: The Extra-Territorial Obligations of States That Bind Corporations’ in David Bilchitz and Surya Deva (eds), *Human Rights Obligations of Business: Beyond the Corporate Responsibility to Respect?* (Cambridge University Press 2013); Pribytkova Elena, ‘Extraterritorial Obligations in the United Nations System: UN Treaty Bodies’ in Mark Gibney and others (eds), *The Routledge Handbook on Extraterritorial Human Rights Obligations* (Routledge 2022); Robert McCorquodale and Penelope Simons, ‘Responsibility Beyond Borders: State Responsibility for Extraterritorial Violations by Corporations of International Human Rights Law’ (2007) 70 *The Modern Law Review* 598.

In such context, Augenstein argues states' control in its form of extraterritorial regulation of business corporations through due diligence obligations has gained momentum in European legal frameworks. Due diligence law making has taken two main approaches, namely, parent-based and market-based.²³ The parent-based approach involves regulation of enterprises domiciled in the regulating state such as the EU Non-Financial Reporting Directive 2014/95 of 2014²⁴ and the UK Modern Slavery Act of 2015.²⁵ The regulatory control in both laws is only about disclosure, which has raised concerns about its effectiveness to protect human rights,²⁶ but has also been highlighted as an important driver of supply chain human rights due diligence, particularly regulation with "reporting requirements."²⁷

The market-based approach, in turn, is based on the regulation of corporations that do business in the regulating state, regardless of the place where they are domiciled. Some examples of this model are the Netherlands' Child Labour Due Diligence of 2019²⁸, Norway's Transparency Act of 2022²⁹ and Public Procurement Act of 2023³⁰, Germany's Corporate Due Diligence Obligations in Supply Chains of 2021,³¹ and the CSDDD of 2024.³² This approach is important to public procurement because it entails regulating all

²³ Daniel Augenstein, 'Home-State Regulation of Corporations' in Mark Gibney and others (eds), *The Routledge Handbook on Extraterritorial Human Rights Obligations* (Routledge 2022) 291.

²⁴ Directive 2014/95/EU of the European Parliament and of the Council of 22 October 2014 amending Directive 2013/34/EU as regards disclosure of non-financial and diversity information by certain large undertakings and groups Text with EEA relevance, (5 December 2014) OJ L 330/1.

²⁵ Modern Slavery Act (2015) c.30.

²⁶ Virginia Mantouvalou, 'The UK Modern Slavery Act 2015 Three Years On' (2018) 81 *The Modern Law Review* 1017; Olga Martin-Ortega and Johanna Hoekstra, 'Reporting as a Means to Protect and Promote Human Rights? The EU Non-Financial Reporting Directive' (2019) 44 *European Law Review* 622; Muhammad Azizul Islam and Chris J Van Staden, 'Modern Slavery Disclosure Regulation and Global Supply Chains: Insights from Stakeholder Narratives on the UK Modern Slavery Act' (2022) 180 *Journal of Business Ethics* 455.

²⁷ Lise Smit and others, 'Human Rights Due Diligence in Global Supply Chains: Evidence of Corporate Practices to Inform a Legal Standard' (2021) 25 *The International Journal of Human Rights* 945, 966.

²⁸ Wet van 24 oktober 2019 houdende de invoering van een zorgplicht ter voorkoming van de levering van goederen en diensten die met behulp van kinderarbeid tot stand zijn gekomen (Wet zorgplicht kinderarbeid), Stb. 2019, 401 (2019), <https://zoek.officielebekendmakingen.nl/stb-2019-401.html>.

²⁹ Act relating to enterprises' transparency and work on fundamental human rights and decent working conditions (Transparency Act) LOV-2021-06-18-99 (1 July 2022)

³⁰ Public Procurement Act (Procurement Act) ACT-2016-06-17-73 of 1 January 2017 and corrected 15 June 2023.

³¹ Gesetz über die unternehmerischen Sorgfaltspflichten in Lieferketten (2021), Corporate Due Diligence Obligations in Supply Chains, BGBl I 2021, www.bgbl.de/xaver/bgbl/start.xav?startbk=Bundesanzeiger_BGBl&jumpTo=bgbl121s2959.pdf#_bgbl_%2F%2F*%5B%40attr_id%3D%27bgbl121s2959.pdf%27%5D__1672857385736. See further, M. Krajewski, K. Tonstad and F. Wohltmann, 'Mandatory Human Rights Due Diligence in Germany and Norway: Stepping, or Striding, in the Same Direction?' 6 *Business and Human Rights Journal* (2021).

³² Parliament Resolution Recommendations for Drawing up A Directive of the European Parliament and of the Council on Corporate Due Diligence and Corporate Accountability [2021] OJ C 474/11.

companies that have a “market nexus” with the state. This means all contractors entering to the public market through the award of a public contract, regardless of where their headquarters, operations or supply chains are geographically located.

Notwithstanding this nexus, only the German Law, the Norwegian Public Procurement Act and the CSDDD establish a link between due diligence requirements with an extraterritorial scope on global supply chains and public procurement.³³ Notably, the CSDDD has included public procurement in Article 24, by mandating Member States’ compliance with obligations resulting from the national measures transposing the Directive, or their voluntary implementation. It has explicitly established that transposed regulation qualifies as environmental and social aspects that contracting authorities may consider as part of exclusion grounds, award criteria and contract performance conditions under the Procurement Directive 2014/24/EU.³⁴ The latter presents an interesting avenue that implicates contracting authorities would be regulating not only contractors, but also tenderers by enforcing exclusion grounds and award criteria.

Given that States have a duty to conduct due diligence, an “expectation” to request RBC due diligence from businesses, as well as potential to cause and contribute to harm through their purchasing practices, they should employ due diligence to prevent, mitigate and redress adverse impacts, amongst other measures.

Embedding responsible business conduct into policies

The first step of RBC due diligence, according to the OECD, is to embed responsible business conduct into policies and management systems. It mainly consists of articulating the enterprises’ commitments to the OECD standards and principles, which are relevant for the enterprises’ own operations, but also of its supply chain.³⁵

In public procurement, this step is translated into the explicit integration of human rights policies related to public procurement or human rights. Such integration should include due diligence obligations to contracting authorities and RBC due diligence for contractors, and if possible, subcontractors, involving their suppliers in tiers further down in the supply chain. In Spain, the National Action Plan on Business and Human Rights of 2017 (NAP) establishes obligations for the government to ensure respect for human rights by companies with whom it conducts public procurement through the “appropriate measures”; explicitly referencing UNGP6.³⁶ It also mandates oversight of

³³ Treviño-Lozano and Uysal (n 3).

³⁴ Parliament Resolution Recommendations for Drawing up A Directive of the European Parliament and of the Council on Corporate Due Diligence and Corporate Accountability [2021] OJ C 474/11.

³⁵ OECD, Due Diligence Guidance for Responsible Business Conduct (2018)

³⁶ Official Bulletin of the State (BOE), 14 September 2017, No.222, p.90394-90395. <https://www.boe.es/boe/dias/2017/09/14/pdfs/BOE-A-2017-10516.pdf>

potential human rights impacts in contracting services both within and outside Spanish territory, mentioning alignment with due diligence explicitly mentioned in UNGP5.

While no explicit provision is given in this policy framework about due diligence neither that conducted by contracting authorities nor contractors, some councils in Spain have included the latter into their procurement guidelines. Notably, the “Guide for the protection and promotion of human rights in public procurement” of the City Council of Barcelona establishes an example of self-declaration involving due diligence from their contractors.³⁷ Besides, the conducted study through interviews reveal that policies supporting human rights in public procurement are not enough in Spain. Consequently, the lack of policies and procurement strategies has negatively impacted human rights integration in procurement practice. For example, interviewees mentioned “If the City Council had a political statement behind government measures instructing, for example, to adopt a code of conduct to respect human rights in the value chain from tier one to the last of them, it would be implemented because this measure is binding and mandatory”.

Besides policies, the study shows legal support is also needed. Generally, interviewees mentioned they have enough legal frameworks, but the ways to operationalise them through, for example secondary legislation, and favourable interpretation of the law on social criteria by tribunals is missing. In contrast, Spanish City Councils that are implementing human rights in public procurement have adopted “special instructions”, which are obligatory rules, considering their inclusion in procurement criteria. For example, some special instructions mandate “the awarded contractor should specify all the suppliers that are part of the supply chain of the product, their names, the contact person and the country where this supplier operates”.

Identifying and assessing real or potential adverse impacts

The second step of RBC due diligence involves identifying and assessing actual and potential adverse impacts to human rights and the environment associated with the enterprises’ operations, products, or services. To that end, the OECD recommends first conducting a “scoping exercise” to identify all areas in which businesses, including their supply chains, have most “likely” or “most significant” risk to cause or contribute to

³⁷ Joaquin Ornos, Agusti Fernandez de Losada, Anna Calvete, Juan Ambros, Guía para la protección y promoción de los derechos humanos en la contratación pública, (2017) The self-declaration includes two provisions involving due diligence: b) It commits to act with due diligence to ensure respect for human rights throughout the performance of the contract, allowing and facilitating the monitoring functions of the contracting entity in charge of its accreditation; c) It commits to act with effective and responsible due diligence to ensure that human rights obligations are taken into account by all subcontracting companies involved in the execution of the contract, and to inform the contracting entity in the event of becoming aware of any non-compliance on its part.

cause adverse impacts.³⁸ Once significant areas of risk are identified, further “in-depth assessment” needs to be carried out to identify and assess specific actual and potential adverse impacts.³⁹

The literature points out that the identification of human rights impacts in the supply chain involves defining the scope and nature of RBC due diligence, and “many companies find it challenging to define their supply chain for the purposes of human rights due diligence”. Also, they find difficult to map the supply chain and traceability or “decoding the chain”.⁴⁰ The wide, intricate and variable conditions of contemporary supply chains present significant challenges for companies that carry out RBC due diligence, notably due to opacity in the supply chain. For example, “first tier suppliers may not wish to disclose information about their own supplies”, they often “protect their own supply chain fiercely”.⁴¹ The RBC due diligence in business practice typically starts with a mapping process to flag suppliers and track the supply chain.⁴² This process also helps in identifying specific points where conducting thorough human rights due diligence becomes challenging.⁴³

In the public procurement domain, it was acknowledged by interviewees that this step of RBC due diligence should be undertaken by contracting authorities because “as consumers they have to analyse and determine what impacts does this consumption produce to determine whether these are desired impacts or not”. Also to be able to fix them if they the desired outcomes are not achieved. One way is through a “comprehensive diagnosis by procurement agencies of their most at-risk sectors, for example for forced labour, and working conditions [...] by risk I mean to people and planet rather than risk to our organisation”. Other contracting authorities have focused not on the sector or geography of the purchased item, but rather on the product that is being bought. Some interviewees called this process “standardised analysis of risk and impact”, whereas others “due diligence”.

Identification of “main impacts” is frequently underpinned by external sources such as reports of civil society organisations or newspapers. In some cases, this initial identification of risks is then translated into tools like index cards that can be used after for future contracts. Contracting authorities also use risk assessments conducted by other public buyers in Spain and in Europe.

³⁸ OECD, Due Diligence Guidance (n1)

³⁹ Ibid.

⁴⁰ Smit and others (n 18) 950.

⁴¹ Smit and others (n 23).

⁴² *ibid.*

⁴³ *ibid.*

Some interviewed experts of this study mentioned certain public buyers outside of Spain also use questionnaires for tenderers and contractors for risk identification in their supply chains. The answers are subsequently assessed against human rights or environmental indicators, and scored as low, medium or high risk. Self-questionnaires help to determine the level of risk they pose for human rights and the maturity of the market and suppliers on this topic. Besides, other contracting authorities use risk identification tools created by governments like the Modern Slavery Assessment Tool, which is “free of charge”, gives “everyone certainty” because it is government-led, and it is “easy to use for public buyers and suppliers”. However, RBC risk identification remains a significant challenge for contracting authorities conducting these assessments.

Prioritisation

UNGP17 sets the foundational principles of due diligence. Commentary of UNGP17 establishes that when businesses have numerous entities in their value chains, it may not be possible to conduct due diligence on all potential adverse human rights impacts. In such cases, businesses should identify the areas where the risk of adverse impacts is “most significant” and prioritise those for due diligence. The OECD Due Diligence Guideline addresses prioritisation mainly in the second step of the due diligence process. It further clarifies decision-making in determining the most significant impacts and the stages in which prioritisation is relevant for due diligence.⁴⁴

The most significant impact is based on the severity and likelihood of impacts. Severity involves assessing the scale related to the seriousness of the impact, the scope involving the reach of the impact, and the impact’s irremediable character. All of which are always context specific, but severity is “a greater factor than likelihood” when prioritising.⁴⁵ For example, if the impact is the right to life, which is irremediable, this might be prioritised over another one of less severity, even if it is more likely to happen.

Both frameworks recommend prioritisation during the second and third steps of due diligence.⁴⁶ During the second step, there is an “initial prioritisation” deriving from a “broad scoping” in which most likely and significant risks are identified in all areas of the business, its operations and supply chains. A “secondary prioritisation” follows and results from the more “in-depth assessment” of the outcomes of the “initial prioritisation”. In the third step, prioritisation is suggested when seeking to prevent and mitigate those adverse impacts.⁴⁷

⁴⁴ OECD, Due Diligence Guidance (n1)

⁴⁵ Ibid.

⁴⁶ João Teixeira de Freitas, ‘Prioritisation under Value Chain Due Diligence’ [2024] European Journal of Risk Regulation 1.

⁴⁷ Ibid.

In public procurement, the concept of prioritisation by contracting authorities when carrying out due diligence is underdeveloped in the literature. The study findings show prioritisation is undertaken by contracting authorities according to “the sectors with higher or more widespread human rights abuses in global supply chains” or “certain sectors that are more prone to these kinds of issues” from which they are sourcing products. Mentioned examples include sectors like mining, garment and electronics. One interviewee mentioned “the first step is always prioritisation [...] from the perspective of a public buyer, we know that capacity is always a bit scarce and so I think prioritising can really help to have a better impact”.

Other contracting authorities focus on the type of risk that is of “more interest” according to their organisation’s agendas, which is politically defined. For example, “if you are interested in those three elements, forced labour, child labour and working conditions you say okay, which are the sectors where these risks of interest are more prone in global supply chains?” Besides, prioritisation is determined by the size of procurement related to “a large volume” of supplies or “recurring purchases” or where their procurement can have a “bigger” impact together with the market maturity to deliver those products or services.

An example of food procurement was shared by a City Council where “six types of fair trade products, which were normally consumed in the City Council, were selected.” In the implementation process this interviewee shared: “we understood that products consumed on a regular basis within the contracts had a higher priority. In this case, it was catering contracts, and then those that the market had identified as fair trade [...] coffee, cacao, cookies and certain juices were consumed regularly and had market availability.” So, these were the ones selected for responsible public procurement.

Other contracting authorities suggested a mixed approach considering the likelihood the of risk of the purchased products jointly with type of products or sectors they regularly buy from. One interviewee mentioned “I think I would start by looking back at what I've been purchasing and to what extent are certain issues reported or likely. Then I have to figure out the ways in which we can frame the bid, but also work with the supplier to the extent possible to improve this situation.” Likewise other interviewee mentioned “it is important to be very mindful of how these risks unfold in the specific purchase that we are looking at, but then also work with the suppliers in taking steps to alleviate them”. Whatever the approach, prioritisation was identified by several interviewees as key. Notably, one mentioned “you will not be able to manage all through clauses. Therefore, you must focus on what is bigger”.

Cease, prevent or mitigate adverse impacts

The third step of RBC due diligence process involves ceasing, preventing and mitigating adverse impacts.⁴⁸ It covers mainly two actions either stopping the activities that are causing/contributing to adverse impacts on RBC issues or mitigate them, based on the previous prioritisation, notably through a plan.⁴⁹ The results may include the continuation of the relationship, temporarily suspending the relationship or disengagement.⁵⁰ Termination is suggested when mitigation has failed or is not possible to undertake; or may also depend on the severity of the adverse impact.⁵¹

In public procurement, this step is mainly the procurement measures undertaken either in the decision-making during the tender or in the terms of the contract during the contract award. An interviewee highlighted contracting authorities “are doing risk analysis and then trying to translate human rights into the language of public procurement”. Likewise, another one mentioned contracting authorities “prioritise where they think they can have an impact, and then draw criteria and certificates”. An expert referred that other contracting authorities in Europe identify the risks for certain categories, prioritise and then they “know” the requirements they need to include in their contracts.

In the abovementioned example of food procurement, the interviewee further expressed once the products with market availability and regular consumption were identified and prioritised they drafted contractual measures: “it was compulsory, for all contracts in which these types of products were consumed, to include in the tender documents of technical specifications at least one Fair Trade product [...] also the obligation to include as an award criterion in the tender documents of particular administrative clauses [...] and add more fair trade products to the tender.”

Notably, a general measure undertaken or suggested to undertake by contracting authorities was to request their contractors to map and disclose supply chain information, which resonates with how the literature points out that business’ due diligence usually starts. Approximately one-third of the interviewees discussed traceability issues. Traceability requirements in public procurement involving transparency of the supply chain focused on contractors’ disclosure of the country and/or city where the purchased products or its main components were sourced, produced or manufactured. In more developed cases they had to reveal even the exact address, for example, of the factories of product manufacturing. The focus of disclosure

⁴⁸ OECD, Due Diligence Guidance (n1)

⁴⁹ Ibid.

⁵⁰ Ibid.

⁵¹ Ibid.

was also part of a prioritisation exercise. For example, one interviewee mentioned “One IT equipment can have 20,000 components. At the moment we are working with the equipment”; “We of course, request the factories where these computers are produced [...] look for the most basic components in order to work on each one of them, for example we used to ask for the battery, an essential component of electric cars”.

Additionally, requirements involved disclosing who was part of the supply chain by identifying the supplier’s name and contact person. While information about the identity of subcontractors was commonly accessible, especially in contracts for works, the identities of workers carrying out the contracts were typically not known, even under direct oversight by contracting authorities. Occasionally, workers’ identities were requested to ensure quality workmanship or for logistics such as security checks. However, monitoring and protecting workers' rights was not a primary goal of this identification.

On the other hand, the identities of deeper-tier suppliers, such as those supplying significant construction materials or machinery, were sometimes sought, though this was not standard for accessory supplies. Information on suppliers up to three tiers down the chain was requested in a few cases, with identification and control being easier in industries with fewer suppliers. For example, in the textile industry, one interviewee mentioned “it was already recognized that there was very high risk of adverse social impacts, so the clause directly demanded a list of all the suppliers involved in the supply chain of the production of this uniform.” This was embedded in the special instructions which made “obligatory to apply in all tenders that the City Council undertakes regarding uniforms.”

Leverage

Besides prioritisation, leverage is another key concept of RBC due diligence. Commentary of UNGP19 outlines various factors that enable a company to influence its supply chain, including direct control, contractual terms, company’s volume and future business with that supplier, reputation, and collaboration. The latter can take place with other businesses or local governments related to the supplier. The OECD Due Diligence Guidance highlight in the third step of the due diligence process that leverage needs to be used to mitigate adverse impacts.

Although leverage is not introduced in the State’s duty to protect, it is a very important element when grounding the operationalisation of such duty in the context of public

procurement.⁵² Martin-Ortega argues leverage is dual because it covers the one that the public buyer has towards its contracted supplier, either a retailer or the brand, and the one that contractors have over their own subcontractors and suppliers.⁵³ The use of contract conditions in public contracts, relying on leverage, to request from contractors due diligence requirements is feasible in public procurement because it “provides the necessary flexibility to allow a progressive process of responsibility and supplier engagement, from disclosure to establishing a clear obligation of result”.⁵⁴

For contracting authorities, leverage is the overarching argument that has justified public procurement’s pursuit of social goals. Given the high value of public spending in procurement, sometimes up to 14% of their GDP, governments are large-scale buyers with a high purchasing power in a position to influence and drive more sustainable markets in the production and consumption of goods and services.⁵⁵ Nevertheless, the extent of leverage varies among contracting entities since they do not all purchase from the same suppliers and have different purchasing needs and budgets.

The findings of the study show that the size of the procurement body, ultimately reflecting more human and financial resources, is relevant for exercising leverage. Notably, all interviewed procurement practitioners were from local contracting authorities, which may have less resources than, for example, a central or national purchasing body. In such scale, larger local procurement bodies, with more staff and budgets, tend to have greater “leverage” and “influencing capacity” over contractors, enabling them to design, demand and oversee compliance with social criteria more effectively than smaller local contracting entities. Social criteria are more frequently found in larger contracts involving higher public spending. Some interviewees further stressed that differentiated responsibilities should be considered based on the size and capacity of procurement

⁵² Olga Martin-Ortega, ‘Public Procurement as a Tool for the Protection and Promotion of Human Rights: A Study of Collaboration, Due Diligence and Leverage in the Electronics Industry’ (2018) 3 *Business and Human Rights Journal* 75, 85.

⁵³ *ibid.*

⁵⁴ *ibid.* 90.

⁵⁵ Olga Martin-Ortega and Claire Methven Methven O’Brien, ‘Advancing Respect for Labour Rights Globally through Public Procurement’ (2017) 5 *Politics and Governance* 69; Sue Arrowsmith, ‘A Taxonomy of Horizontal Policies in Public Procurement’ in Peter Kunzlik and Sue Arrowsmith (eds), *Social and Environmental Policies in EC Procurement Law: New Directives and New Directions* (Cambridge University Press 2009); Tünde Tátrai and Orsolya Diófási-Kovács, ‘European Green Deal – the Way to Circular Public Procurement’ [2021] ERA Forum; Colette Russell and Joanne Meehan, ‘Exploring Legitimacy in Major Public Procurement Projects’ (2014) 14 *Journal of Public Procurement* 495; Maria Anna Corvaglia and Kevin Li, ‘Extraterritoriality and Public Procurement Regulation in the Context of Global Supply Chains’ Governance’ (2018) 2 *Europe and the World: A Law Review*; Kim Loader, ‘Is Public Procurement a Successful Small Business Support Policy? A Review of the Evidence’ (2013) 31 *Environment and Planning C: Government and Policy* 39; Fiona McGaughey and others, ‘Public Procurement for Protecting Human Rights’ (2022) 47 *Alternative Law Journal* 143; Marta Andrecka and Kateřina Peterková Mitkidis, ‘Sustainability Requirements in EU Public and Private Procurement – a Right or an Obligation?’ [2017] *Nordic Journal of Commercial Law* 56.

bodies. Specifically, one mentioned: “I believe it is in big contracts, those that cover millions of euros, where there is capacity to impose these requirements through public procurement, but not the smaller ones”, like “a City Council with less than 1000 inhabitants”.

In the case of contractors, the literature remarks that flexibility is key when exercising leverage by contracting authorities because the contractor can be a brand, who will have “relatively more control over the supply chain” than a reseller.⁵⁶ The size of contractors was also relevant in the findings of the study, which ranged from SMEs to larger corporations. Often, public buyers procure from small retailers or wholesalers who they argued have typically minimal control over brands. Concerned that imposing additional requirements might deter SME participation in public tenders, public buyers sometimes hesitate. Often contracting authorities prefer purchasing “locally” from nearby small businesses to mitigate the risk of abuses “in those third countries”, presuming these entities’ supply chains are also within Spain -although this is frequently not the case. Nevertheless, an expert mentioned in other countries in Europe contracting authorities in such situations have supported SMEs by reaching out brands directly to ensure labour standards are met or providing training. Furthermore, the expert said monitoring certain SMEs may sometimes be easier due to their often less complex supply chains.

Finally, the study reveals that, in the context of public procurement, prioritisation jointly with leverage are key to define the contractual clauses aimed to mitigate adverse impacts of procured supplies or services. One interviewee referred “If I identified this risk then what is your leverage? You identify this leverage, well, here are five suggested contractual clauses you can use, or here are five requirement definitions you could use. I think when you get to that stage, it isn’t that burdensome.” When translating requirements into the tender documents and contracts, public buyers need to know “the capability of the market”, which is crucial too in defining the human rights requirements.

Collaboration

Collaboration is raised too across the UNGPS when conducting RBC due diligence. Commentary to UNGP19 suggests collaboration is a way to increase leverage of companies regarding their supply chains. It is more visible in the UNGPs related to access to remedy than to identify, mitigate and address adverse impacts.⁵⁷ The OECD Due

⁵⁶ Martin-Ortega (n 51).

⁵⁷ For example Commentary to UNGP25 establishes improvement of remedial functions of state-based judicial and non-judicial grievance mechanisms through collaborative initiatives; Commentary to UNGP29 establishes operational level grievance mechanisms can be typically managed by enterprises themselves or in collaboration with other stakeholders; and UNGP30 establishes that multi-stakeholder and other collaborative initiatives should ensure effective grievance mechanisms are available for example through

Diligence Guideline establishes many of its recommendations may be carried out in collaboration with others such as industry actors, trade unions, governments, intergovernmental institutions or multistakeholder initiatives.

Overall, there are two main issues that businesses should bear in mind when collaborating with others for RBC due diligence purposes: competition law and the initiative's credibility.⁵⁸ Particularly, the OECD stresses that businesses should assess and determine the latter. To that end, they must consider whether the initiative has a robust grievance mechanism for stakeholders to report concerns without fear and retaliation, alongside processes for stakeholder consultation and timely communication of impacts.⁵⁹ Also, amongst others, the initiative should have in place regular evaluations of its effectiveness, transparency about its governance and operations, and management of potential conflicts of interest.⁶⁰

If businesses lack sufficient leverage, the OECD's framework recommends them to improve it through collaborating with other stakeholders, for example, to establish joint policies, codes of conduct or contracts.⁶¹ Notably, collaboration is key for SME's due diligence, because it can improve its effectiveness by allowing knowledge about sector-specific risks and solutions, facilitate cost-sharing and savings, enhance influence over shared business connections, and streamline the process for all involved parties.⁶²

In the context of public procurement, the literature similarly points out that collaboration, through multistakeholder initiatives like Electronics Watch, is strongly linked with a positive increase of both public buyers and contractors' leverage over their respective suppliers.⁶³ The study echoes the literature and the OECD's Due Diligence Guidelines, particularly of collaboration during the second step of the process.

Collaboration was pointed out to be useful for risk identification through obtaining information from third parties, notably civil society organisations, and by sharing risk assessments, knowledge and tools with peers from the same contracting authority and from other contracting authorities in Spain and Europe. Several references exemplified the latter through mentions like "I have several colleagues and we exchange information and questions" or "I ended up going to the human resources department" to find out

codes of conduct, performance standards, global framework agreements between trade unions and transnational corporations.

⁵⁸ OECD, Due Diligence Guidance (n1)

⁵⁹ Ibid.

⁶⁰ Ibid.

⁶¹ Ibid.

⁶² Ibid.

⁶³ Martin-Ortega (n 51).

which documents I needed to request to verify compliance with social security requirements in Spain.

Also, collaboration is used for sharing contractual clauses and monitoring efforts with other contracting authorities, reflecting on the third step of due diligence process when defining and implementing measures to cease, prevent or mitigate adverse impacts. One interviewee highlighted collaboration is crucial to manage global supply chains by stressing “either a collaboration is created, uniting forces between different contracting authorities that identify the risks together, harmonise or standardise the requirements that will affect the supplier in that supply chain, or it will be impossible to put into practice something really impactful”.

In particular, one interviewee suggested international collaboration between several contracting authorities in Europe: “So, I can rely on information from another contracting authority in a different jurisdiction”. For example, collaboration to use the results of audits in the supply chain for future grounds for exclusion. An interviewee said that abuses to labour rights at a Spanish farm, which was part of a public contract’s supply chain, were uncovered following an audit. The results were only useful to the contracting authority who conducted the audit and to that public contract specifically. However, “what happened with this supplier should be used to prevent the rest of the contracting authorities within Spain, Sweden or France, from contracting with” this supplier.

Collaboration jointly with harmonisation and to some extent standardisation was emphasised as a valuable resource that could not only help contracting authorities in managing contracts effectively but also benefit contractors and their suppliers. One interviewee stressed: “It is impossible for the supplier! [...] One [contracting authority] asks them for data in one way, the other [contracting authority] in another way, [...] a company that is part of the supply chain of fifteen large companies has to fill in fifteen questionnaires, to do fifteen audits. Maybe though this way, with one [contracting authority] sharing the data between them is enough”.

Likewise, another procurement practitioner mentioned “more effective line of work can be established if public buyers ask the same questions and make the same decisions about suppliers [...] suppliers can also act better if they can comply with several public buyers with one action because currently each one asks a different question.” Others further highlighted the importance of harmonisation and collaboration by mentioning “now the big challenge is also that, at least, there are some sectors where suppliers are more or less the same, or at least located in a very specific geographical area. And buyers are never the same [...] There’s many buyers buying for a significant amount in the EU, but

they all buy separately. So, the impacts can be generated also by harmonising and aligning a little bit practice. But this is very difficult.”

In the same way that the OECD encourages SMEs to collaborate to increase their leverage, it was suggested by interviewees that small public buyers, such as the ones of the sample of interviews, should collaborate for the same purpose. Through collaboration, small contracting authorities could increase their leverage to impose RBC requirements and monitor them, but also have savings through joint purchases and cost-sharing. In the particular case of Spain, collaboration takes even more relevance because its “procurement is massively decentralised [...] most of procurement awards are below state level [...] So, it would be difficult for non-centralised purchases to actually do something meaningful in terms of protection of human rights because it will not be able to exercise that market shaping”.

Another procurement practitioner highlighted “if all public buyers, in all their purchases, demanded these conditions, the transformation would be much faster [...] nobody dares to do this [...] those of us who dare are few, and we are the big ones. This practice needs to be more widespread, more protected. If all public contracts required these conditions, we would not be able to eliminate and eradicate these practices, but we would certainly be able to reduce them.”

The complexity of collaboration seems to depend on the specific context and sector involved. However, in sectors like garments, where the supply chains are well-defined, collaboration is suggested to be more straightforward. “For example, uniforms that are all made in China, they all come from the same supply chain. We obviously know that there are problems in this industry. So, if everyone had the same message, certainly, they would have more pressure on suppliers.” In turn, if RBC criteria are not expanded to other contracting authorities’ contracts, one interviewee remarked, at “the end contractors will go to the public buyer next door who will award them the same contract without requesting to comply with the code of good practice”.

Ultimately collaboration in its form of joint procurement to include RBC criteria, for example to procure energy services with a green label with other contracting authorities increased their leverage which consequently led to better contractual conditions like more competitive prices. To that respect another interviewee also mentioned “Maybe procuring together could also increase their bargaining power when it comes to discussing with the market.” In addition to savings, the division of work and cost was also mentioned, notably one interviewee said: “if you share the burden, the work is less demanding [...] turning what is unattainable into something feasible and manageable.”

The current landscape of collaboration in Spain, however, is often undertaken by individuals and not by their organisations. One interviewee remarked “this is being a work coming from scholars from Universities and public buyers, not from a regulatory or public power impulse”. Collaboration often takes place in informal schemes, for example, one interviewee mentioned: “we are a small group of people with awareness to pushing forward this, but there is not yet a global movement in this area.” Another one suggested there could be more formal collaboration structures like “signing collaboration agreements” between contracting authorities or with other stakeholders. In addition to collaboration being individually led, it was mentioned that contracting authorities in Spain are not coordinated either with contracting authorities in the country or in other EU member states.

Furthermore, something that is not explicitly remarked by the OECD Guidelines is collaboration to “socialise” amongst key stakeholders RBC initiatives aimed to be integrated in public procurement. For example, in the case study above-mentioned of food procurement, the interviewee mentioned implementation involved “workshops so stakeholders could know the policy change regarding fair trade products [...] businesses NGOs and fair trade certifiers were invited too.”

Discussion and concluding remarks

This paper enlightens international frameworks about the dual nature of due diligence in public procurement. One is due diligence that contracting authorities undertake, as part of their duty to protect. The other is RBC due diligence that contracting entities request from their contractors, as part of their “expectation” to regulate businesses behaviour. The analysis demonstrates that regulation extends to all business within and beyond national borders when the regulating state has a “market nexus” with them through public procurement, whether via a bid or a public contract. Consequently, states’ regulation are not dependent on where businesses’ headquarters, operations, and supply chains are geographically located, which is the approach that the most recent legal developments on due diligence obligations have adopted.

The first step of RBC due diligence can be translated into explicit integration of human rights into policies related to public procurement, involving both contracting authorities and contractors’ obligations. While this has been made in Spain through their NAP, and procurement guidelines in a City Council, it has not been set widely across all policies, particularly those setting the objectives and strategies of public procurement.

Additionally, distinct from RBC due diligence, contracting authorities need appropriate legal frameworks besides policies because they, unlike businesses, need to justify their public spending in public procurement laws. Therefore, they have less scope of action

that businesses regarding due diligence. In particular, they are limited if actions like due diligence are not well established in the law as part of their procurement obligations. In the context of Spain, secondary law-making explicitly including human rights and due diligence-related obligations, together with favourable interpretation of the tribunals of social criteria integration are urgently needed for due diligence implementation. Currently good practice involves guidelines with considerations related to RBC due diligence like Barcelona's, but also to contracting authorities' due diligence.

RBC due diligence first step also encourages for RBC integration into businesses management systems, which could equally translate into its integration into public procurement bodies' contract and risk management systems. Yet, this was not reflected in the findings of this study. Further research is needed to determine the conditions under which such systems could be set out and operationalised.

The second step of RBC due diligence is translated into contracting authorities undertaking a similar process to the "scoping exercise" with their own supply chains. It is mainly based on external sources of information like reports, news or risk assessments of sectors or products made by other contracting authorities. Prioritisation is key at this point for public buyers. Unlike the OECD Guidance recommending to base prioritisation on likelihood and severity of adverse impacts, contracting authorities rely on likelihood and two other factors: type of risk -with more interest to their political agendas- and the size of procurement -how much is spent and how often-. Notably, the size of procurement was strongly linked with the leverage contracting authorities have over their contractors to request particular actions, which enlightens international RBC due diligence standards. Furthermore, mixed approaches of two or more of the above-mentioned elements to prioritise were also found.

The following "in-depth assessment" of RBC due diligence during the second step was not found to be a practice carried out by contracting authorities in Spain. But it was pointed out as a practice that other European procurement bodies are undertaking through self-questionnaires, which would be similar to RBC "in depth assessment" because it allows a deeper evaluation of the risks of adverse impacts of a tenderer or contractor who is ultimately answering the questions.

Third step of due diligence is mainly reflected in the procurement measures undertaken either in the decision-making during the tender, for example to exclude a tenderer, or in the terms of the contract during the contract award. For example, to request RBC due diligence-related obligations to the contractor within the clauses of the contract.

In this third step, contracting authorities mentioned it is possible to request from a contractor to conduct RBC due diligence, which is related to the measures they should

implement to mitigate adverse impacts deriving from their own due diligence. The most widespread measure was to request contractors to map and disclose their suppliers' identity, which is typically how the literature points out that RBC due diligence process starts with. Disclosure is mainly focused on the first tiers of the supply chain or suppliers at production or manufacture level, as well as on major supplies or components.

Market maturity -besides results of the second step of due diligence, leverage and prioritisation- defines the third step of due diligence. In particular, it shapes the contractual measures that contracting authorities impose to contractors. This finding suggests the leverage that public buyers have over their contractors is strongly dependent on the market readiness. So, even if a contracting body has significant leverage over its contractor, compliance may still be unattainable if the market is unprepared to meet specific requirements, such as conducting RBC due diligence.

Notably buying "local" was one measure adopted by contracting authorities to mitigate risks of adverse impacts often occurring in third countries. This is attained through green criteria like carbon net zero or "proximity" products in short supply chains avoiding in that way the prohibition in the procurement legal framework to favour local businesses. This is relevant because buying a product from a local shop or retailer will not necessarily mean that the supply chain remains within the same territory as the retailer is based, in this case to Spain. This denotes a poor understanding of procurement practitioners of global supply chains that could be addressed through professionalisation and awareness-raising.

Furthermore, the OECD embraces collaboration as a good practice, particularly for SMEs, to increase their leverage over suppliers. This study shows that collaboration could in the same way increase the leverage that small contracting authorities, like the ones interviewed, have over their contractors. According to the OECD, collaboration is carried out to accomplish many of its recommendations for RBC due diligence. In the context of public procurement, it mainly takes place in the second and third steps of contracting authorities' due diligence.

Collaboration has been particularly useful to share risk assessments, social criteria and possible verification means as well as monitoring results, such as audits. Typically, it takes place between contracting authorities, and between contracting authorities and civil society organisations. Notably, no assessment of initiatives' credibility was found in this study, as the OECD suggests needs to be done when undertaking collaborative approaches, which would be eventually necessary to do.

Finally, collaboration could positively impact the burden and costs that undertaking due diligence together with requiring and verifying RBC due diligence could entail, echoing

the OECD Guidance's remarks. So that the work of one contracting body could serve other public buyers and one action of the contractor can be used to comply with multiple contracting authorities, not only in Spain but widely in EU member states subject to the same public procurement rules. Yet, coordination in Spain is very poorly developed. Finally, the study shows that collaboration in its form of joint procurement can also increase public buyers' purchasing power not only to impose RBC requirements to business but also to obtain more competitive prices. Further research would need to be made to determine the conditions under which this is possible and measure its effectiveness and overall cost-savings.