



Article

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Sustainability Clauses in ‘Public’ Contracts

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Abstract: Under the Public Sector Directive, public buyers are allowed to include sustainability considerations in their purchasing decisions within the limits of the principles of procurement. This framework allows criteria linked to the subject matter to be contractualised. Though different criteria are widely employed in public procurement within the umbrella of sustainable public procurement, the literature mostly focuses on stages leading to the contract award instead of considering the public contract as a document incorporating contractual obligations. On the other side, green and social commitments in (business) contracts are considerations that are not necessarily linked to the subject matter. Though their value is acknowledged, their enforcement proves to be challenging due to the restraints of contract law. By using European contract law as a reference point, this paper compares sustainability clauses in business contracts to sustainability clauses in public contracts – to determine whether the EU regime applicable to public contracts offers solutions to these hurdles.

Keywords: sustainable public procurement; public contracts; sustainable contracting; sustainability clauses

Résumé: En vertu de la directive sur le secteur public, les acheteurs publics sont autorisés à inclure des considérations de durabilité dans leurs décisions d’achat, dans la limite des principes de passation des marchés. Ce cadre permet de contractualiser des critères liés à l’objet du contrat. Bien que différents critères soient largement utilisés dans les marchés publics dans le cadre des marchés publics durables, la littérature se concentre principalement sur les étapes menant à l’attribution du contrat au lieu de considérer le contrat public comme un document incorporant des obligations contractuelles. Par ailleurs, les engagements écologiques et sociaux dans les contrats (d’entreprise) sont des considérations qui ne sont pas

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nécessairement liées à l'objet du contrat. Bien que leur valeur soit reconnue, leur mise en œuvre s'avère difficile en raison des contraintes du droit des contrats. En utilisant le droit européen des contrats comme point de référence, cet article compare les clauses de durabilité dans les contrats commerciaux aux clauses de durabilité dans les contrats publics – afin de déterminer si le régime européen applicable aux contrats publics offre des solutions à ces difficultés.

Zusammenfassung: Unter dem EU-Regelwerk zum öffentlichen Auftragswesen ist es diesen Auftraggebern gestattet, Nachhaltigkeitsaspekten Gewicht einzuräumen bei ihren Vergabeentscheidungen – im Rahmen der allgemeinen Prinzipien des öffentlichen Auftragsrechts. Dieser Rahmen erlaubt eine vertragliche (insoweit individualisierte) Ausgestaltung der Vergabekriterien. Obwohl gewisse (Nachhaltigkeits-)Kriterien üblich sind und die diesbezügliche Praxis dominieren, fokussiert sich das Schrifttum primär auf die Phase, die zur Vergabeentscheidung führt, und kaum auf den Vertrag selbst mit seiner Vertragspflichtenstruktur. Umgekehrt sind jedoch ökologische und soziale (Nachhaltigkeits-)Aspekte keineswegs notwendig solche, die mit dem eigentlichen Vertragsgegenstand und -ziel in direktem Zusammenhang stehen. Obwohl die Bedeutung solcher (Nachhaltigkeits-)Aspekte anerkannt ist, wirft daher ihre Durchsetzung aufgrund der Schwächen des Vertragsrechts bei der Durchsetzung erhebliche Probleme auf. Der vorliegende Beitrag unterzieht, indem er sich auf das Europäische Vertragsrecht als Maßstab stützt, die verschiedenen Hauptklauseltypen mit (Nachhaltigkeits-)Aspekten in öffentlichen Aufträgen einer vergleichenden Analyse und zwar dahingehend, wie gut Durchsetzungsschritte tatsächlich unternommen werden können.

1 Introduction

Traditionally, governance is a concern in the public sphere, rather than the private sphere. However, public international law cannot directly regulate global supply chains, as the rules arising therefrom are addressed to states.¹ The applicability and enforcement of national laws incorporating the obligations of states are limited to their own territory and subjects.² Due to their differing levels of ambition, the laws of states are seen merely 'as a commodity' and become a determining factor for

1 K. McCall-Smith and A. Rühmkorf, 'From International Law to National Law – The Opportunities and Limits of Contractual CSR Supply Chain Governance', in V. Ulfbeck, A. Andhov and K. Mitkidis (eds), *Law and Responsible Supply Chain Management Contract and Tort Interplay and Overlap* (Oxford: Routledge, 2019) 21.

2 K. Peterková Mitkidis, 'Sustainability Clauses in International Supply Chain Contracts: Regulation, Enforceability and Effects of Ethical Requirements' (2014) *Nordic Journal of Commercial Law* 2.

businesses in deciding where to operate.³ Faced with the results of lax public governance, private actors regulate themselves.⁴ Following pressure from their stakeholders, multinational corporations acquire the title of 'governing entities' in addition to traditionally being the 'governed ones'.⁵

Transnational private regulation is a construct 'in which coalitions of nonstate actors codify, monitor, and in some cases certify firms' compliance with labour, environmental, human rights, or other standards of accountability'.⁶ Combined with the lack of accountability, private regulation raises legitimacy and effectiveness concerns; however, private law aids in its legitimization.⁷ More specifically, the contractualisation of regulatory standards allows businesses to mitigate the inadequacies of lack of regulation or lack of enforcement.

On the other side, one of the solutions to the problem from the public law perspective is promoting green and social conditions through public procurement. Making up a significant portion of a country's Gross Domestic Product (GDP), public procurement offers immense potential for sustainability. When used with regulatory goals, public procurement falls between voluntary corporate social responsibility (CSR) and strict regulation.⁸ Compared with voluntary CSR, as it inevitably involves the state, it can be considered 'light touch regulation'.⁹ It differs from regulation because as a contract, it is more responsive and does not have territorial borders of strict regulation.¹⁰ Since they are used with similar goals, the contractualisation of sustainability in transnational supply chains can assist

3 L. Catá Backer, 'Multinational Corporations as Objects and Sources of Transnational Regulation' (2008) 14 *ILSA Journal of International & Comparative Law* 499; see also for the importance of location in the 'race to the bottom' L. Vytopil, *Contractual Control in the Supply Chain On Corporate Social Responsibility, Codes of Conduct, Contracts and (Avoiding) Liability* (Hague: Eleven International Publishing, 2015) 27.

4 Vytopil, n 3 above, 61.

5 Peterková Mitkidis, n 2 above.

6 T. Bartley, 'Institutional Emergence in an Era of Globalization: The Rise of Transnational Private Regulation of Labour and Environmental Conditions' (2007) 113 *American Journal of Sociology* 297, 298 The same definition is used by different scholars, see C. Scott, F. Cafaggi and L. Senden, 'The Conceptual and Constitutional Challenge of Transnational Private Regulation' (2011) 38 *Journal of Law and Society* 1, 3; P. Verbruggen, 'Gorillas in the Closet? Public and Private Actors in the Enforcement of Transnational Private Regulation' (2013) 7 *Regulation & Governance* 512, 514.

7 Scott, Cafaggi and Senden, n 6 above, 2.

8 J. Howe, 'The Regulatory Impact of Using Public Procurement to Promote Better Labour in Corporate Supply Chains', in K. Macdonald and S. Marshall (eds), *Fair Trade, Corporate Accountability and Beyond: Experiments in Globalizing Justice* (Oxford: Ashgate Publishing, 2010).

9 *Ibid.*

10 A. Beckers, 'Using Contracts to Further Sustainability? A Contract Law Perspective on Sustainable Public Procurement', in B. Sjøfjell and A. Wiesbrock (eds), *Sustainable Public Procurement Under EU Law* (Cambridge: Cambridge University Press, 2015) 210.

sustainable public procurement (SPP) as commitments of the successful tenderer undertaken with its tender correspond to its contractual obligations. Accordingly, this paper aims to explore to what extent contractualisation of sustainability can be of guidance to SPP and whether public procurement offers solutions where contract law is considered unfit for accommodating sustainability.

This article first assesses how sustainability is contractualised and the limits of contract law in upholding the sustainability commitments of contracting parties (Section 2). It then investigates how sustainability is approached in public procurement under ‘European public contracts law’ (Section 3). By focussing on the differences between sustainability clauses in business contracts and public contracts, the article investigates whether the European-level harmonization of rules on the award of public contracts allows challenges faced in sustainable contracting practice to be removed in the contractualisation of sustainability (Section 4). The last section concludes (Section 5).

2 Sustainability through Contracts

2.1 Governance through Contracts

Combined with the demand coming from stakeholders and the desire to prevent future liability and ensure the security of supply, the networks of private contracts with their regulatory function replace the lack of regulation.¹¹ The contract mode utilizes business contracts to regulate the conduct of contracting partners and their affairs with sub-suppliers and employees.¹² With contracts, bottom-up regulation replaces top-down.¹³ This is done not by compensating for the lack of government regulation merely by incorporating requirements in the contracts, but also by incentivizing monitoring, enforcement and dispute resolution.¹⁴

Through a ‘hybrid regulatory system’, compliance with considerations coming both from public governance and private governance, from hard law and soft law

11 M.P. Vandenbergh, ‘The New Wal-Mart Effect: The Role of Private Contracting in Global Governance’ (2007) 54 *UCLA Law Review* 913, 913; L. Lin, ‘Legal Transplants through Private Contracting: Codes of Vendor Conduct in Global Supply Chains as an Example’ (2009) 57 *American Journal of Comparative Law* 711, 716.

12 F. Cafaggi, ‘New Foundations of Transnational Private Regulation’ (2011) 38 *Journal of Law and Society* 20, 37.

13 K. Peterková Mitkidis, ‘Using Private Contracts for Climate Change Mitigation’ (2014) 2 *Groningen Journal of International Law* 54, 55.

14 M.P. Vandenbergh, ‘The Private Life of Public Law’ (2005) 105 *Columbia Law Review* 2029, 2031–2034.

find their place in contracts.¹⁵ While the contractualisation of hard law allows states' obligations under public international law to be transposed to obligations for private parties and contract law remedies to be used to enforce requirements arising from the applicable legislation, which carries an added value especially where public enforcement is lax; the contractualisation of soft law gives them the binding nature they otherwise lack.¹⁶ While the 'business case for sustainability' is not inherent under the corporate law theories, the role of businesses has changed.¹⁷ In the current understanding of corporate sustainability, governance through contract is on the rise.¹⁸

2.2 How to Contractualise Sustainability

Traditionally, private law offers a 'facilitative framework'; therefore, unless mandated by law, it does not encompass public interest.¹⁹ Typically, the focus in commercial transactions is on the specific contract and in case of a breach of a provision, the aim is to remedy the breach for the benefit of the contractual partner.²⁰ However, when contract clauses are used to regulate contracting parties' conduct, the focus is on the process which covers a broader scope than the individual contract; they aim to ensure compliance before non-compliance takes place.²¹

The legitimacy of the contractualisation of regulatory sustainability standards comes from the freedom of contract.²² While process-oriented rules to be imposed by importing countries are limited due to their prohibition under rules of international trade, individual preferences reflected in terms of contracts can influence the practices

¹⁵ McCall-Smith and Rühmkorf, n 1 above, 37.

¹⁶ F. Cafaggi, 'The Regulatory Functions of Transnational Commercial Contracts: New Architectures' (2013) 36 *Fordham International Law Journal* 1557, 1560–1565; Cafaggi, n 12 above, 41–44; V. Ulfbeck, O. Hansen and A. Andhov, 'Contractual Enforcement of CSR Clauses and the Protection of Weak Parties in the Supply Chain', in Ulfbeck, Andhov and Mitkidis (eds), n 1 above, 47.

¹⁷ B. Sjøfjell and C.M. Bruner, 'Corporations and Sustainability', in B. Sjøfjell and C.M. Bruner (eds), *The Cambridge Handbook of Corporate Law, Corporate Governance and Sustainability* (Cambridge: Cambridge University Press, 2019).

¹⁸ J. Salminen, 'Sustainability and the Move from Corporate Governance to Governance through Contract', in Sjøfjell and Bruner (eds), n 17 above.

¹⁹ M.C. Menting, 'Industry Codes of Conduct, the Foundations of Contract Law and Regulation: A Bottom-up Perspective', in *Contract and Regulation* (Cheltenham: Edward Elgar Publishing, 2017) 69.

²⁰ Cafaggi, n 16 above, 1559.

²¹ *Ibid.*

²² P. Verbruggen, 'Regulatory Governance by Contract: The Rise of Regulatory Standards in Commercial Contracts' (2014) 35 *Recht der Werkelijkheid* 79, 92.

in exporting countries.²³ The standards incorporated in contracts concern different aspects of business conduct and compliance with different regulatory levels. By including an array of social, economic and environmental requirements in contracts, the network of contracts aims to overcome the regulatory gap that reigns over sustainability.²⁴ Initiatives providing models for sustainable contracting are trending.²⁵ As can be seen from the European Model Clauses that are currently being developed, the Proposal for a Directive on Corporate Sustainability Due Diligence – putting an emphasis on contractual cascading – provided the impetus needed in Europe.²⁶

2.3 Sustainability Contractual Clauses and Limits of Contract Law

Different terms have been used to refer to specific contract clauses aimed at incorporating social, environmental and labour-related concerns with regulatory function: ‘sustainability clause’,²⁷ ‘CSR clause’,²⁸ or ‘regulatory clause’.²⁹ The term, introduced by Mitkidis, that has found the most audience is ‘sustainability contractual clauses’ (SCCs). SCCs are ‘contractual provisions covering social and environmental obligations that are not directly connected to the subject matter of a specific contract and which pursue long-term business objectives and public

23 Vandenbergh, n 11 above, 921; for a discussion on the legality of processes and production methods under WTO law, see S. Charnovitz, ‘The Law of Environmental PPMs in the WTO: Debunking the Myth of Illegality’ (2002) 27 *Yale Journal of International Law* 59.

24 Vandenbergh, n 11 above, 913; Peterková Mitkidis, n 2 above, 2.

25 See ABA, ‘Contractual Clauses Project’ at https://www.americanbar.org/groups/human_rights/business-human-rights-initiative/contractual-clauses-project/ (last visited 4 June 2023); The Chancery Lane Project, ‘Climate Clauses’ at <https://chancerylaneproject.org/climate-clauses/> (last visited accessed 4 June 2023).

26 European Commission, ‘Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and Amending Directive (EU) 2019/1937’ (2022) COM(2022) 71 final (in December 2023, the Council and the Parliament reached a provisional deal); NOVA BHRE ‘Ep 14: Model Contract Clauses to Protect Human Rights in Global Supply Chains’ at <https://www.youtube.com/watch?v=XyR3JCRvb38> (last visited 9 November 2023); Draft European Model Clauses published for consultation at <https://www.eur.nl/en/esl/events/consultation-european-model-clauses-supply-chains-project-2023-10-23> (last visited 9 November 2023).

27 V. Ulfbeck and O. Hansen, ‘Sustainability Clauses in an Unsustainable Contract Law?’ (2020) 16 *European Review of Contract Law* 186; Ecovadis, ‘Sustainability Clauses in Commercial Contracts: The Key to Corporate Responsibility’ at <https://resources.ecovadis.com/whitepapers/sustainability-clauses-commercial-contracts-key-corporate-responsibility> (last visited 9 November 2023).

28 Vytopil, n 3 above; A. Rühmkorf, *Corporate Social Responsibility, Private Law and Global Supply Chains* (Cheltenham: Edward Elgar Publishing, 2015).

29 Cafaggi, n 16 above.

interests, by frequently aiming to extend their applicability to third parties and employing relational monitoring and enforcement tools.³⁰

That being said, the contractualization of sustainability is no panacea. It presents new questions in compliance, enforcement and remedies.³¹ The potential of private law is challenged due to the lack of explicit contract terms, the ethical nature of the obligations, the inapplicability of traditional contractual remedies, the principle of privity and the third-party interests.³² While the potential of enforcement provided by contract law is exploited, when it comes to actual judicial enforcement, reluctance takes over.³³ Traditional contractual remedies become ineffective when the breach concerns SCCs.³⁴

Sustainability commitments may be deemed non-legal because they address non-commercial concerns and may require compliance going beyond the law that is applicable.³⁵ Since they focus on production process-related requirements rather than product-related ones, by their nature they influence other contracts in the chain.³⁶ However, due to the principle of privity, contractual commitments do not go beyond the parties of the contract.³⁷ On the same line of problems arising due to the principle of privity, there is a mismatch between the party bearing the burden and the beneficiary of the regulatory provision, which is a third party to the contract.³⁸ Bringing action in case of non-compliance with sustainability commitments and the enforcement thereof is not simple but only possible with the use of exceptions to general rules of private law i.e. third-party beneficiary claims.³⁹ The vagueness in the formulation of SCCs highly affects their interpretation, enforceability and the remedies available.⁴⁰ These are owed to the fact that contract law does not deal with what is traditionally seen as 'public goals'.⁴¹

30 K. Peterková Mitkidis, *Sustainability Clauses in International Business Contracts* (Hague: Eleven International Publishing, 2015) 75.

31 Peterková Mitkidis, n 2 above.

32 O. Hansen, C.S. Petersen and V. Ulfbeck, 'Private Governance and the Potential of Private Law' (2020) 2 *European Review of Private Law* 333, 344.

33 A. Beckers, 'Regulating Corporate Regulators through Contract Law? The Case of Corporate Social Responsibility Codes of Conduct' (European University Institute 2016) *EUI Working Paper MWP 2016/12* 12.

34 C. Poncibò, 'The Contractualisation of Environmental Sustainability' (2016) *European Review of Contract Law* 335, 348.

35 Ulfbeck and Hansen, n 27 above, 193.

36 Cafaggi, n 16 above, 1563.

37 Verbruggen, n 22 above, 83.

38 F. Cafaggi, 'Regulation through Contracts: Supply-Chain Contracting and Sustainability Standards' (2016) 12 *European Review of Contract Law* 218, 227.

39 Hansen, Petersen and Ulfbeck, n 32 above, 356; Ulfbeck and Hansen, n 27 above.

40 Peterková Mitkidis, n 2 above.

41 Peterková Mitkidis, n 30 above, 8.

Different solutions have been suggested by scholars. It is argued that supply chain governance through private law requires an ‘exception-based private law’.⁴² Ramberg stresses that recent developments in contract law show how contract law adapts to its time; a similar approach can also be employed for contracts with regulatory goals.⁴³ Similarly, Becker asserts that contract law needs to be responsive to the trend and the conflicts coming with it.⁴⁴ Cafaggi and Iamiceli suggest that contract law should adopt less stringent rules on the privity of contract or a broader concept of performance that covers conformity of products for incorporation of transnational standards.⁴⁵ On the other side, Ulfbeck and Hansen argue that ‘sustainability adjusted contract law’ may be a solution; however, parties who lack sincerity can come up with new ways to circumvent if they provide them explicitly.⁴⁶ In order to establish supply chain liability Salminen and Ulfbeck propose a ‘marriage of contract and tort’.⁴⁷ On labour protection, recent cases seem to uphold the interplay between contract law and tort law.⁴⁸

In ensuring compliance with SCCs, informal mechanisms prevail over traditional contract enforcement.⁴⁹ Including sustainability in the contract brings about the need to monitor performance and sanction non-compliance.⁵⁰ Therefore one of the solutions is to rely on the three-step best practice which consists of preventive monitoring, relational enforcement and termination.⁵¹ The aim of compliance monitoring is to identify risks and detect non-compliance.⁵² The focus is not compensation, but correction.⁵³ Still, the driving force behind the effectiveness of

42 Hansen, Petersen and Ulfbeck, n 32 above, 372.

43 C. Ramberg, ‘Emotional Non-Conformity in the International Sale of Goods, Particularly in Relation to CSR-Policies and Codes of Conduct’, in I. Schwenzer and L. Spagnolo (eds), *Boundaries and Intersections: 5th Annual MAA Schlechtriem CISG Conference* (Hague: Eleven International Publishing, 2015) 92.

44 Beckers, n 33 above.

45 F. Cafaggi and P. Iamiceli, ‘Regulating Contracting in Global Value Chains. Institutional Alternatives and Their Implications for Transnational Contract Law’ (2020) 16 *European Review of Contract Law* 44, 44.

46 Ulfbeck and Hansen, n 27 above, 191.

47 J. Salminen and V. Ulfbeck, ‘Developing Supply Chain Liability A Necessary Marriage of Contract and Tort?’, in Ulfbeck, Andhov and Mitkidis (eds), n 1 above.

48 See Landgericht Dortmund [LG Dortmund] [District Court of Dortmund] 10 January 2019, 7 O 95/15, ECLI:DE:LGDO:2019:0110.7095.15.00 (KIK); *Hamida Begum (on behalf of MD Khalil Mollah) v Maran (UK) Ltd* [2021] EWCA Civ 326 [68] (Maran).

49 Peterková Mitkidis, n 2 above.

50 Cafaggi, n 38 above, 218.

51 Peterková Mitkidis, n 2 above, 20.

52 Peterková Mitkidis, n 30 above, 209.

53 Cafaggi, n 38 above, 228.

relational tools ultimately is the threat of legal sanction.⁵⁴ Nevertheless, unless the parties are committed to upholding the standards throughout the performance of the contract, the three-step practice cannot go beyond being a mere suggestion.

3 Sustainability Clauses in Public Contracts

3.1 European Contract Law

Contrary to what many books named as such may suggest, as Kötz said, '(t)here is no such thing as European law of contract'.⁵⁵ However, there is *Acquis Communautaire* in contract law which refers to Union level legislation that applies to specific types of contracts, specific contractual issues or to contracting with specific parties; international conventions on contract law that apply to member states and growing literature on comparative approaches to contract laws of the member states all of which are often referred to as European contract law.⁵⁶ There are also initiatives taken by different stakeholders to provide a unified approach to contract law in Europe.

Influenced by the United Nations (UN) Convention on Contracts for the International Sale of Goods (CISG), the Commission on European Contract Law started its work on Principles of European Contract Law (PECL).⁵⁷ The PECL provide contract law principles common to the member states and were intended to be applied in the EU as the blueprint.⁵⁸ They provide guidance both to the legislatures and courts.⁵⁹ The Draft Common Frame of Reference (DCFR) took a step further based on the work carried out for the PECL and covers a broader scope with specific contracts and non-contractual obligations. The DCFR combined the principles of existing Community law with the principles derived as a result of comparative research.⁶⁰ Though not

⁵⁴ Poncibò, n 34 above; Peterková Mitkidis, n 2 above.

⁵⁵ H. Kötz, *European Contract Law* (Oxford: Oxford University Press, 2017) 1.

⁵⁶ R. Schulze and F. Zoll, *European Contract Law* (Baden-Baden: C H Beck, Hart, Nomos, 2016) 6; M.W. Hesselink, *Justifying Contract in Europe* (Oxford: Oxford University Press, 2021) 17.

⁵⁷ O. Lando and H. Beale (eds), *Principles of European Contract Law, Parts I and II* (2000); O. Lando and others (eds), *Principles of European Contract Law, Part III* (2003).

⁵⁸ PECL Article 1:101, H. Kötz, 'Comparative Contract Law', in M. Reimann and R. Zimmermann (eds), *The Oxford Handbook of Comparative Law* (Oxford: Oxford University Press, 2019) 906.

⁵⁹ Kötz, n 55 above, 4.

⁶⁰ R. Schulze, 'The Academic Draft of the CFR and the EC Contract Law' *Common Frame of Reference and Existing EC Contract Law* (Berlin: Sellier de Gruyter, 2009).

binding, they could be used ‘in order to find appropriate solutions’ in private law.⁶¹ Both the PECL and the DCFR represent common principles of contract law in Europe.

3.2 European Public Contract Law

Similarly, there is no European public contract law. However, there are unified rules pursuant to Directive 2014/24 (the Public Sector Directive) on the award of public (procurement) contracts the value of which is above the thresholds specified.⁶² The Union harmonization concerns the award of the contracts within the principles underlying the internal market. It aims ‘to avoid the risk of preference being given to national tenderers or applicants whenever a contract is awarded by the contracting authorities’.⁶³ In line with this aim, with Article 2(5) of the Directive, a definition of ‘public contract’ is given to determine the scope of contracts the award of which is subject to harmonized rules. Because the definition is a European definition, it remains unaffected by the classification of the contract in national laws.⁶⁴

As the harmonization focuses on the elements of a contract to determine the applicability of the Directive concerning its award, there are a limited number of references to public contracts as ‘contracts’ or to the clauses thereof. For instance, Recital 39 demonstrates that the obligations arising from the law applicable could be ‘mirrored in contract clauses’ and Recital 45 provides that in the competitive procedure with negotiation, negotiations may cover ‘commercial clauses’. Article 70 of the Directive titled ‘Conditions for performance of contracts’ allows contracting authorities to incorporate special conditions relating to the performance of a contract. In the Commission soft law guidance and academic literature, often the terms ‘contract clauses’ and ‘contract performance conditions’ are used interchangeably.⁶⁵ Nevertheless, contract clauses in a public contract are not only commercial clauses in the draft contract or contract performance conditions; but also,

61 Opinion of Advocate General Trstenjak Case 137/08 *VB Pénzügyi Lízing Zrt v Ferenc Schneider* [2010] ECR I-10847 fn 54.

62 Dir 2014/24.

63 Case 44/96 *Mannesmann Anlagenbau Austria AG and Others v Strohal Rotationsdruck GesmbH* [1998] ECR I-00073 para 33 (CJEU); Case 360/96 *Gemeente Arnhem and Gemeente Rheden v BFI Holding BV* [1998] ECR I-06821 paras 41–42 (CJEU); Case 9/17 *Türkmen* [2018] 1 March 2018 para 29 (CJEU); Case 410/17 *A Oy* [2019] 10 January 2019 para 35 (CJEU).

64 *Ibid.*

65 For example, European Commission, ‘Buying Green! A Handbook on Environmental Public Procurement’ (2004) First edition 38.

other contractual commitments undertaken by the contractor in its response to the call for tender.

Contract clauses in a public contract encompass all contractual commitments undertaken by the successful tenderer including technical specifications (Article 43), contract performance conditions (Article 70) and the tender submitted in response to the award criteria (Article 67). Once the most economically advantageous tender (MEAT) is determined pursuant to Article 67 of the Directive, the contract document can be adapted to represent the result of the competition to the extent possible and/or the winning tender can be attached to the other contract documents. All the documents annexed or referred to in the original contract also need to be interpreted as the contract.⁶⁶ Therefore, clauses in a public contract cover, amongst many other, minimum mandatory requirements advertised in the call for tender coming from technical specifications and contract performance conditions and the tender submitted pursuant to the award criteria.

3.3 Sustainable Public Contracts

In the EU procurement regime, green and social requirements are often assessed under the tension between sustainability and competition.⁶⁷ The Court of Justice of the EU (CJEU) rulings on SPP concerning conditions such as employment of long-term unemployed in the execution of the contract, supply of electricity produced from renewable energy sources or the purchase of organic supplies have further developed the limits of public purchasing.⁶⁸ However, the relationship between sustainability and (other) principles of public procurement is puzzling due to the peculiar draughting of the provision which is often referred to as the 'principle of sustainability'.⁶⁹ Following the other principles provided in Article 18, the second

66 J.F. Donnelly, *Treatise on the Law of Public Contracts* (Boston: Little, Brown and Company, 1922) 288.

67 M.E. Comba, 'Green and Social Considerations in Public Procurement Contracts', in R. Caranta and M. Trybus (eds), *The Law of Green and Social Procurement in Europe* (Copenhagen: DJØF Publishing Copenhagen, 2010) 306.

68 Case 31/87 *Beentjes v State of the Netherlands* [1988] ECR 04635 (CJEU); Case 448/01 *EVN AG and Wienstrom GmbH v Republik Österreich* [2003] ECR I-14527 (CJEU); Case 368/10 *Commission v Netherlands* [2012] 10 May 2012 (CJEU).

69 See M. Andhov, 'Contracting Authorities and Strategic Goals of Public Procurement – A Relationship Defined by Discretion?', in S. Bogojevic, X. Grousot and J. Hettne (eds), *Discretion in EU Procurement Law* (Oxford: Hart Publishing, 2019) 132; M. Andhov, 'Article 18(2) Public Procurement Principles', in R. Caranta and A. Sanchez-Graells (eds), *European Public Procurement Commentary on Directive 2014/24/EU* (Cheltenham: Edward Elgar Publishing Ltd, 2021).

paragraph requires 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’. The CJEU confirmed that the legislator aimed to establish ‘a principle, like the other principles’.⁷⁰ However, due to questionable word choices, the provision does not necessarily introduce obligations for contracting authorities.

That being the case, even without a mandatory provision in the Directive requiring the purchase of sustainable supplies, services and works, the Public Sector Directive allows different sustainability considerations to be included throughout the procurement process (starting from the question of ‘to buy or not to buy’) in accordance with various criteria. The discretion given to contracting authorities in deciding what to buy, combined with mandatory sustainability criteria arising from other secondary Union legislation – which is on the rise⁷¹ – allows the contractualisation of sustainability for public contracts in Europe.

The possibilities of SPP under the Public Sector Directive have been extensively discussed.⁷² A few questions remain unanswered; one of which is how to treat the sustainability commitments of the successful tenderer to ensure compliance in the execution of a public contract. However, the lack of a contract law perspective on public procurement hinders approaching SPP from a contract compliance perspective. Green and social criteria are widely employed in public procurement as contractual obligations within the umbrella of SPP; still, the SPP literature mostly focuses on stages leading to the contract award. As the literature mostly focuses on which type of green and social considerations can be lawfully included under which criteria, it rarely explores whether such criteria are complied with during the performance of the contract.

As the impact of sustainability commitments of the successful tenderers depends heavily on their realization during the contract performance, it is crucial to look at SPP from a contract law perspective. Though the governing laws might differ, contracts carry similar risks in their supply chains.⁷³ For this reason, the

70 Case 395/18 *Tim SpA Direzione e coordinamento Vivendi SA v Consip SpA, Ministero dell’Economia e delle Finanze* [2020] 30 January 2020 para 38 (CJEU).

71 See W. Janssen and R. Caranta (eds), *Mandatory Sustainability Requirements in EU Public Procurement Law Reflections on a Paradigm Shift* (Oxford: Bloomsbury Publishing 2023); E. Uysal and W. A. Janssen, ‘The European Green Deal and Public Procurement Law’ in M. C. Eritja and X. Fernández-Pons (eds), *Deploying the European Green Deal* (London: Routledge 2024).

72 See mainly S. Arrowsmith and P. Kunzlik (eds), *Social and Environmental Policies in EC Procurement Law* (Cambridge: Cambridge University Press, 2009); Caranta and Trybus (eds), n 67 above; Sjøfjell and Wiesbrock (eds), n 10 above.

73 Howe, n 8 above, 29; M.E.L. Gausdal, ‘Breaching the Interpretative Wall between Private and Public Commercial Contracts’ (2020) 16 *European Review of Contract Law* 511, 523.

contractualisation of sustainability can provide guidance to public contracts.⁷⁴ However considering the fundamental differences, before relying on such guidance, whether the same limits to sustainable contracting also apply to public contracts requires comparison. Approaching SPP through the lens of contract law permits the exploitation of the potential of contract law while also using the underlying framework of public procurement to eradicate the limits thereof. Nevertheless, comparative research on public contracts and private/commercial contracts is rather limited.⁷⁵

4 Comparison of Sustainability Clauses

The terms 'public contract' and 'private contract' are not mutually exclusive given that 'public contract' is a European definition which does not preclude a contract from being a private contract under national law. Therefore, in assessing the differences, the term 'business contract' will be used to refer to private/commercial procurement contracts that fall outside the definition of 'public contract'. The rules stipulated in the DCFR and PECL will be used as a blueprint for rules applicable to 'business contracts' in Europe.

4.1 Freedom to/of Contract

Freedom is one of the underlying principles of European contract law with a focus on party autonomy and its reflection for contracts is the freedom of contract as also reflected in Book II Article 1:102(1) of the DCFR and Article 1:102 of the PECL. Contracting parties are free not only to enter into a contract (*freedom to contract*) but they also have the freedom to determine the content thereof (*freedom of contract*) through terms; they are both limited by mandatory rules.⁷⁶

On the other side, the same freedom does not necessarily translate to contracts in the public sphere.⁷⁷ The autonomy of the parties is considerably diminished in

⁷⁴ Beckers, n 10 above, 222; M. Andrecka (now Andhov) and K. Peterková Mitkidis, 'Sustainability Requirements in EU Public and Private Procurement – a Right or an Obligation?' (2017) *Nordic Journal of Commercial Law* 55, 60.

⁷⁵ For the limited research on the area, see Beckers, n 10 above; Andrecka and Peterková Mitkidis, n 74 above; Gausdal, n 73 above.

⁷⁶ DCFR Book II Article 1:102(1); C. von Bar and others (eds), *Principles, Definitions and Model Rules of European Private Law Draft Common Frame of Reference (DCFR)* (2008) 62; see S.A. Smith, *Contract Theory* (Oxford: Oxford University Press, 1993) 59.

⁷⁷ T. Indén and K.N. Olesen, 'The Public Sector and Obligation to Contract' (2016) 12 *European Review of Contract Law* 77; R. Caranta, 'Are the Principles of European Contract Law Relevant for Public Contracts?', in S. de La Rosa and P. Valcarcel Fernández (eds), *Principles of Public Contracts in Europe*

public contracts.⁷⁸ As a result, while a business is free to determine its contracting party along with the sustainability commitments expected therefrom, a public buyer can only do so within the principles of public procurement. Though such differentiation between contracts is inherent considering the aim of harmonization of the rules on public contracts, it nevertheless needs to be addressed as it affects sustainability clauses.

Under Article 18 of the Directive, principles of public procurement provide the underlying limits of public purchasing. Accordingly, the choice of tenderer and obligations to be undertaken by them should comply with the said principles which have different reflections in different provisions. For instance, under Article 42(4), unless justified, the specifications cannot refer to make, source or process ‘by a specific economic operator’.⁷⁹ However, a private company would not have the same limit as it is not subject to principles of equality and non-discrimination. It can refer to specific standards or suppliers without the need to refer to underlying criteria.

4.2 Incorporation of Terms

Regulatory requirements can be included in business contracts through the use of different models: the express terms model, the stand-alone model, the reference model and the implied terms model.⁸⁰ However, incorporation by reference is not straightforward and depends on the standards of the contract law that the contract is subject to.⁸¹ In European contract law, such a clause would need to be assessed pursuant to rules on terms not individually negotiated. Under both Article 2:104 of the PECL and Book II Article 9:403 of the DCFR, terms that are not individually negotiated can only be invoked against the other party, provided that they are previously brought to the attention of that party. However, both provisions stipulate that a ‘mere reference’ in the contract would not suffice, even if the contract is signed.

On the other side, by definition, public contracts are required to be ‘in writing’. Pursuant to Article 2(1)(18), words and figures are written when they ‘can be read, reproduced and subsequently communicated’. More specifically, Article 2(1)(13) provides that procurement documents consist of ‘any document produced or

(Bruxelles: Bruylant, 2022) 86; S. Arrowsmith, *The Law of Public and Utilities Procurement Regulation in the EU and UK* (London: Sweet & Maxwell, 2014) 389.

⁷⁸ C.C. Turpin, ‘Public Contract’, in A.T. von Mehren (ed), *International Encyclopedia of Comparative Law Vol VII: Contracts in General* (Hague: Brill | Nijhoff, 2008) 9.

⁷⁹ See Case 359/93 *Commission of the European Communities v Kingdom of the Netherlands* [1995] ECR I-00157 para 25 (CJEU); Case 368/10, n 68 above, para 70 (CJEU).

⁸⁰ Ulfbeck, Hansen and Andhov, n 16 above, 48–49.

⁸¹ Vytopil, n 3 above, 107; Ulfbeck, Hansen and Andhov, n 16 above, 49.

referred to by the contracting authority to describe or determine elements of the procurement or the procedure, including [...] any additional documents.' Article 53 requires 'full direct access to' procurement documents.⁸²

Accordingly, as the contract needs to be in writing, the reference to measures of soft law is to be made in writing; if a document is 'referred to' by the contracting authority, it constitutes a procurement document and should be made accessible to the interested economic operators. This constitutes a relief compared to business contracts where the incorporation of terms gives rise to ambiguity because they are not openly communicated. Pursuant to the transparency requirement in Article 53, in case of failure to make additional documents accessible, the contracting authority will be in breach of procurement rules.

4.3 Link to the Subject Matter

The understanding of the link to the subject matter in business contracts and the meaning of the link to the subject matter in public contracts do not necessarily match. For SCCs, the link to the subject matter is strict. For instance, it is argued that whether a supplier employs children when manufacturing sports equipment would not be a condition linked to the subject matter because it does not alter the tangible quality of the product.⁸³ However, if the requirement is for the product in question to bear a specific label, it would be linked to the subject.⁸⁴

For a public contract, under the scope specified under both Articles 42 and 67, the requirement of a link to the subject matter – introduced with *Concordia Bus* by the CJEU and later developed with *EVN Wienstorm* and *Max Havelaar* – means relating to 'the works, supplies or services to be provided under that contract in any respect and at any stage of their life cycle'.⁸⁵ Conditions concerning a 'specific process of production, provision or trading' and 'specific process for another stage of their life cycle' are linked to the subject matter even if they do not alter the material substance. Therefore, in a public contract, both examples given above would be linked to the subject matter. Because, though whether a sneaker is manufactured with or without child labour does not alter the tangible quality of the product, it *does* specify a

⁸² However, it is argued that as there might be certain aspects open to negotiation depending on the procedure and the contract, Arrowsmith suggests that scope of procurement documents should be read as documents 'as appropriate' for the phase Arrowsmith, n 77 above, 702.

⁸³ Peterková Mitkidis, n 30 above, 173.

⁸⁴ *Ibid.*

⁸⁵ Case 513/99 *Concordia Bus Finland Oy Ab*, formerly *Stagecoach Finland Oy Ab v Helsingin kaupunki and HKL-Bussiliikenne* [2002] I-07213 (CJEU); Case 48/01, n 68 above; Case 368/10 n 68 above.

condition in the manufacturing. Therefore, the scope of what is considered linked to the subject matter is different.

In addition to the narrow scope of the link to the subject matter often covering only material characteristics in business contracts, SCCs, *by definition*, exclude sustainability requirements that are linked to the subject matter. On the other side, due to the criteria they arise from, sustainability clauses in public contracts are conditions that are required to be linked to the subject matter.⁸⁶ While the regulatory and exchange function in business contracts can be separated, in public contracts the sustainability considerations should relate to the contract exchange itself even though they may carry regulatory repercussions.⁸⁷ The link to the subject matter calls for sustainability commitments in public contracts to be contract-specific, rather than supplier/contractor specific.

For instance, a contract clause requiring a company to have a no-child-labour policy will be deemed to lack the necessary link for public contracts and therefore would be illegal. On the other side, though it would still lack the link to the subject matter in the narrow meaning given, it would be considered SCC for a business contract. Conversely, a clause requiring shoes purchased to be free of child labour would be a lawful condition for public contracts because it is linked to the subject matter; however, it would also be considered SCC under the definition because it is not linked to the subject matter within the meaning given to it in the narrow scope.

This being the case under the initial definition, recent research confirms that in practice SCCs do not always lack a link to the subject matter.⁸⁸ Nevertheless, whether this means that the definition of the link to the subject matter in business contracts has evolved in line with its scope used for public contracts or that the practice in business contracts changed to incorporate conditions that were not included before, is not clear. However, what is clear is that the term SCCs now means contractual provisions covering social and environmental obligations that are *not necessarily* linked to the subject matter; while sustainability clauses in public contracts are social and environmental obligations that are required to be linked to the subject matter. This differentiation is not without consequences for the enforcement of such commitments.

⁸⁶ Though it is argued that with the new legislation on due diligence the requirement of link to the subject matter for public procurement is on shaky grounds, see R. Caranta, 'Towards Socially Responsible Public Procurement' [2022] *ERA Forum*; L. Treviño-Lozano and E. Uysal, 'Bridging the Gap between Corporate Sustainability Due Diligence and EU Public Procurement' (2023) *Maastricht Journal of European and Comparative Law*.

⁸⁷ Beckers, n 10 above, 213.

⁸⁸ Andrecka and Peterková Mitkidis, n 74 above, 69 authors specify '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.'

Once sustainability clauses are detached from the subject matter of the contract, it is easier for the buyer to demonstrate non-compliance as it does not have to also prove that the lack of compliance affected the purchase.⁸⁹ For instance, it is more challenging for a buyer to prove that purchased goods are not free of child labour than to prove that the economic operator in question does not have a no-child labour policy. On the other side, as the details of it will be explained below, determining whether a non-complied sustainability clause amounts to a fundamental non-performance – allowing termination of the contract – is in correlation with the proximity of the condition to the subject matter.

4.4 Continuity of Contracts

SCCs, by their definition, pursue long-term business objectives. As global value chains are continuous, business contracts are rarely one-time contracts.⁹⁰ As a result, supply chain contracting employs a 'continuous improvement approach'.⁹¹ On the contrary, public contracts – with few exceptions such as framework agreements – are one-time contracts and not forward-looking. Therefore, they do not, but more importantly cannot, aim to establish long-term relationships.

The commitments of business partners are significant for companies in discharging their obligations arising from national or Union legislation on sustainability reporting and/or human rights and environmental due diligence. Accordingly, a multinational corporation has the incentive to opt for the same supplier/contractor who responded affirmatively to its regulatory requirements to report the reduction in carbon emissions. Therefore, parties in business contracts have the motivation to regulate and alter the business practices of each other for a long-term relationship. However, public buyers do not possess the same motivation to alter the practices of the successful tenderer through contract-specific what-to-buy decisions.

Even if a contracting authority is able to change the general conduct of its contractor/supplier by the criteria used in a single contract, the same contracting authority will not be there to directly reap the benefits of such change in the subsequent contracts. One option to include a continuous improvement approach within the limits of the Directive can be to include previous experience under the technical and professional ability as selection criteria under Article 58. Yet, this would not be specific to the contract carried out for the specific contracting authority, but previous contracts carried out with similar objectives.

⁸⁹ Beckers, n 10 above, 220.

⁹⁰ Cafaggi and Iamiceli, n 45 above, 50.

⁹¹ Cafaggi, n 38 above, 223.

On the same line, pursuant to Article 57(4)(g) an economic operator can be excluded from a public procurement procedure if deficiencies in a previous contract led to early termination of the public contract. This allows contracting authorities to take previous failures into consideration, even (or especially) when they concern sustainability clauses. While this means that a contracting authority can choose not to contract with the said economic operator, it does not discharge the obligation of the contracting authority to hold a new procedure for each new contract it intends to award.

4.5 (The Threat of) Public Enforcement

Whether failure to comply with regulatory conditions in contracts for the sale of goods amounts to non-conformity needs to be assessed. Under Article A.2:301 of the Book IV of the DCFR, the determination of non-conformity predominantly depends on the fitness for purpose and quality. Therefore, the determination of non-conformity becomes difficult when it concerns immaterial characteristics.⁹² It can be argued that considering that buyers are willing to pay more for such products, there is a distinctive market.⁹³ Therefore, though not visible upon physical examination, a lack of production characteristics may indicate non-conformity.⁹⁴ Nevertheless, this depends on the interpretation of ‘quality’.⁹⁵

In addition to the narrow understanding of conformity of goods; different from other types of remedies available, termination is only possible if non-performance reaches a standard of gravity set for termination. For instance, Article 1224 French Code Civil requires the breach to be ‘sufficiently serious’ (*suffisamment grave*) whereas Section 323 (5) German BGB provides the contract cannot be terminated if non-performance is ‘insignificant’ (*unerheblich*); Article 1455 of Italian Codice Civile stipulates that the contract cannot be terminated if the non-performance ‘is unimportant’ (*di scarsa importanza*) and Article 6:265(1) of Dutch BW states contract cannot be terminated if the non-performance is ‘of minor importance’ (*geringe betekenis*). Pursuant to Book III Article 3:502 of the DCFR and Article 9:301 of PECL, for all types of contract, the required standard for termination is whether

⁹² Ramberg, n 43 above, 83.

⁹³ I. Schwenzer, ‘Ethical Standards in CISG Contracts’ (2017) 22 *Uniform Law Review* 122, 123.

⁹⁴ I. Schwenzer and B. Leisinger, ‘Ethical Values and International Sales Contracts’, in J. Hellner and others (eds), *Commercial Law Challenges in the 21st Century* (Uppsala: Iustus, 2007) 266.

⁹⁵ For a considerably broader understanding of non-conformity under the CISG see, Oberlandesgericht München (Munich Court of Appeal) 27. Zivilsenat (27th panel for civil matters) 13 November 2002, 27 U 346/02, CISG-online no:786 Bundesgerichtshof (German Supreme Court) 2 March 2005, VIII ZR 67/04, CISG online no: 999 (translated by Birgit Kurtz).

non-performance is 'fundamental'. Under Book III Article 3:503 of the DCFR and Article 9:301 of the PECL whether non-performance of an obligation is fundamental depends on whether (i) non-performance deprives the other party of what it was entitled to expect or (ii) non-performance is intentional and it raises doubts as to future performance. In addition, the PECL provides that if strict compliance is the essence of the contract, non-performance is fundamental; however, as argued by Rübner, this is not a substantial difference.⁹⁶

Sustainability clauses are often deemed as 'secondary' obligations, the breach of which does not have the same outcome as a breach of material terms.⁹⁷ The proximity of the underlying (human rights, labour and environmental) obligations to the subject matter of the contract is a decisive factor in whether non-performed sustainability commitments deprive the party of what it is entitled to expect. Moreover, even if the non-performance is fundamental, contracting parties also have the freedom to choose if and when they will enforce the contract.⁹⁸

On the other side, non-complied sustainability commitments require a different assessment in public contracts. Based on the CJEU case law, Article 72 of the Directive obliges contracting authorities not to modify their contracts unless such modification falls under the exceptions. The provision does not only cover apparent contract changes but also 'worse than promised' performance.⁹⁹ Which in turn creates a basis that does not apply to business contracts. Pursuant to Article 72(4), to the extent that the contract is materially different as a result of the change, changes to contracts – including non-compliance with the agreed terms – are illegal and may require termination.

Therefore, regardless of whether a non-performance is fundamental, sufficiently serious, not insignificant, not unimportant or not of minor importance, the test to be applied in this case is whether the change in the contract is substantial. Under Article 72(4) of the Public Sector Directive, the change is substantial if the new conditions – in this case, the lack of sustainability obligations – 'would have allowed for the admission of other candidates than those initially selected or for the acceptance of a tender other than that originally accepted or would have attracted additional participants in the procurement procedure' or alter the 'economic balance of the contract'. Considering the arguments against the incorporation of sustainability

⁹⁶ T. Rübner, 'Art 8:103: Fundamental Non-Performance', in N. Jansen and R. Zimmermann (eds), *Commentaries on European Contract Laws* (Oxford: Oxford University Press, 2018) 1118.

⁹⁷ Ulfbeck and Hansen, n 27 above, 186.

⁹⁸ Peterková Mitkidis, n 30 above, 152.

⁹⁹ G. Racca and R. Cavallo Perin, 'Material Amendments of Public Contracts during Their Terms: From Violations of Competition to Symptoms of Corruption' (2013) 8 *European Procurement & Public Private Partnership Law Review* 279. See more recently Joined Cases 441/22 and C-443/22 *Obshtina Razgrad* [2023] 7 December 2023 (CJEU).

clauses in the first-place on the basis of their effect on competition, it is realistic to assume, most of the time, a public contract with sustainability commitments would have attracted more economic operators had it not incorporated such requirements.

The public buyers' failure to enforce sustainability clauses may require termination of the contract due to illegal contract modification.¹⁰⁰ This duty will materialize regardless of the standards for the severity of non-compliance accepted in national contract law. The threat of (i) proceedings to be brought by the Commission under Article 260 of the TFEU; (ii) actions to be taken by interested parties under the Remedies Directive¹⁰¹ and (iii) administrative measures to be taken by national supervisory authorities¹⁰² following an illegal contract modification provides an incentive for contract enforcement which is specific to public contracts.

Due to their knowledge of the specifics of the contract, unsuccessful contractors can take an active part in the execution of contracts as 'watchdogs'.¹⁰³ However, the right of the interested parties to challenge contract modification depends on their access to concluded contracts.¹⁰⁴ Often, whether competitors become aware of such changes, which impact their resort to remedies, is 'contingent upon incidental findings'.¹⁰⁵ Even so, regardless of competitors' knowledge of modifications or their motivation to initiate review proceedings, contracting authorities bear the duty of ensuring compliance with Article 72 and with the criteria they established not only during the award phase but also throughout the execution of a contract.¹⁰⁶

The threat of legal action to be taken by third parties provides the incentive to the contracting authorities to ensure compliance. The equivalent of this incentive does not exist for business contracts. This reason to monitor and ensure compliance with contractual commitments in public contracts complements the suggested

100 See Case 503/04 *Commission of the European Communities v Federal Republic of Germany* [2007] I-06153 (CJEU).

101 Dir 89/665.

102 See for instance two different case referred to the CJEU following the application of penalty fee by the national authority for non-compliance with contract clauses Joined Cases 441/22 and C-443/22 *Obština Razgrad* n 99 above.

103 R. Cavallo Perin, G.L. Albano and G.M. Racca, 'Competition in the Execution Phase of Public Procurement' (2011) 41 *Public Contract Law Journal* 89, 91.

104 C. Ginter, N. Parrest and M.A. Simovart, 'Access to the Content of Public Procurement Contracts: The Case for a General EU-Law Duty of Disclosure' (2013) 4 *Public Procurement Law Review* 156, 157.

105 E. Plas, 'Amendments to Public Contracts: In Search of a Sufficient Degree of Transparency' (2021) 1 *Public Procurement Law Review* 1, 4. See also Case 274/21 *EPIC Financial Consulting GesmbH v Republik Österreich and Bundesbeschaffung GmbH* 14 June 2022 (CJEU).

106 To that effect see Case 496/99 P *Commission of the European Communities v CAS Succhi di Frutta SpA* [2004] I-03801 (CJEU) para 115.

three-step enforcement to follow-up sustainability clauses. Therefore, while three-step enforcement is a recommended solution to ensuring compliance with SCCs, for public contracts, it becomes imperative.

4.6 Sustainable Performance Contract Clauses

The previous section has identified the differences between sustainability clauses in business contracts and public contracts. Based on this comparison, it can be concluded that sustainability clauses in public contracts are performance-oriented both in the meaning of 'performance' under public procurement law and contract law. First, the term 'performance' in the Directive is used interchangeably with the term 'link to the subject matter' – covering the whole life-cycle of supplies, services and works.¹⁰⁷ In the sense that sustainability clauses in public contracts are linked to the subject matter, they are required to be 'performance-specific'. On the other side pursuant to Book III Article 1:102 of the DCFR, the performance means 'the doing by the debtor of what is to be done under the obligation or the not doing by the debtor of what is not to be done.' The consequences of a successful tenderer's failure to perform, i.e. to do what needs to be done, are peculiar due to the threat of public enforcement. Therefore, the use of sustainability clauses in public contracts is required to be 'performance-oriented'. To establish the difference between sustainability clauses in public contracts and the focus on performance on both meanings of 'performance', sustainability clauses in public contracts may be referred to as sustainable performance contract clauses (SPCCs).

5 Conclusions

The lack of success of public regulation to address societal and environmental challenges led to transnational private regulation. Yet, as most of the mechanisms provided under transnational private regulation lacked a binding effect in themselves, through the incorporation of green and social clauses, such standards have

¹⁰⁷ It is argued that the reference to 'performance' in Article 18(2) should be read as referring to the subject matter of the contract rather than the execution of the contract, see J. Miranzo Diaz, 'Environmental Clauses in Public Procurement: Developments Introduced by the 2014 Directives' (2017) 2 *Public Policy Portuguese Journal* 7, 14; Andhov (2019), n 69 above, 202; on the contrary, see P. Telles and G.S. Ølykke, 'Sustainable Procurement: A Compliance Perspective of EU Public Procurement Law' (2017) 12 *European Procurement and Public Private Partnership Law Review* 239.

become part of business contracts. The incorporation of sustainability considerations allowed contracting parties to regulate their business partners' behaviours; however, the contractualisation of sustainability is not without its own hurdles.

Since the main objective of contract law is not to uphold regulatory standards between contracting parties, sustainability clauses raise new concerns. Due to the lack of clarity in the incorporation of terms, reliance on perpetuity, incorporation of third-party rights, vague language, determination of non-conformity and fundamental breach and ineffectiveness of traditional contract law remedies, SCCs present new problems in compliance, enforcement and remedies. Therefore, ensuring compliance with sustainability clauses in the contract execution is not straightforward and depends largely on innovative approaches to contract law. One of the solutions provided is 'three-step enforcement' based on best practices on preventive monitoring, relational enforcement and termination as a last resort to ensure compliance with sustainability commitments.

While private procurement is considerably more advanced in sustainability clauses, public procurement is not oblivious to sustainability. As the debate on sustainability mostly focuses on what consideration can be required under which criteria, sustainability commitments of successful tenderers are rarely seen as contractual commitments to be enforced on the contracting parties. Therefore, approaching SPP through the lens of contract law allows for the exploitation of the potential of contract law while also using the underlying framework of public procurement to eradicate the limits of contract law.

Public contracts possess different characteristics compared to business contracts such as limited freedom left to the contracting authorities in contract formation, the requirement of the link to the subject matter and lack of continuous relationship. The result of the comparison does not solve all the problems of the contractualisation of sustainability such as the impropriety of damages claims for non-performed sustainability commitments; however, some of these differences allow opportunities for SPCC that are not present for SCCs.

As a result, the need for 'sustainability-adjusted contract law' is considerably diminished for public contracts. Public procurement law with its formality, the requirement of the link to the subject matter and the threat of public enforcement changes the focus. Though not explicitly regulated under the Public Sector Directive, compliance monitoring is not merely a voluntary tool to ensure what is promised is what is delivered. It also is an obligation for the contracting authorities as most of the time compliance with obligations incorporated under SPCCs is not visible. SPP practice in Europe should adopt the three-step enforcement mechanism suggested by private law scholars for the sustainable performance of public contracts.

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