

## Corporate Social Responsibility and Public Procurement

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Doreen McBarnet, Aurora Voiculescu & Tom Campbell (eds.), *The New Corporate Accountability: Corporate Social Responsibility and the Law* (Cambridge University Press, 2007) (forthcoming)

**University of Oxford Faculty of Law Legal Studies Research Paper Series**

**Working Paper No 9/2006**

**April 2006**

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**Draft: April 12<sup>th</sup>, 2006**

Forthcoming in: DOREEN MCBARNET, AURORA VOICULESCU & TOM CAMPBELL (EDS.), *THE NEW CORPORATE ACCOUNTABILITY: CORPORATE SOCIAL RESPONSIBILITY AND THE LAW* (CAMBRIDGE UNIVERSITY PRESS, 2007)

## **Corporate social responsibility and public procurement**

*Christopher McCrudden* \*

### **Introduction**

Public procurement (the purchase by public bodies of goods and services from others) has proven to be a dedicated follower of political fashion. Historically, we see consistent attempts to link public procurement with the government policy of the day, in areas as diverse as national industrial policy, reducing unemployment, improving employment conditions, support for small businesses, local development, employment of disabled workers, and equal pay for men and women, to mention only a few. With the increasing popularity of “corporate social responsibility,” it is hardly surprising, then, that CSR has become linked to the use of public procurement. The definition of CSR is contested and so, for the moment, Moon’s definition will suffice: “In essence CSR refers to business responsiveness to social agendas in its behaviour and to the performance of these responsibilities.”<sup>1</sup> This chapter considers the “new” use of public procurement in the pursuit of CSR in general, but considers in particular the relationship between CSR, public procurement, *and the law*.

### **Old wine in new bottles?**

Is the role of public procurement in CSR something new, or simply a new label for an old phenomenon? In another context, I have sketched out the historical development of the use of public procurement for social policy purposes, tracing its origins to the nineteenth century. I argued that public procurement is an extraordinarily adaptable tool, which has often been used to meet a regulatory need when other methods of regulation are not considered acceptable, available or effective. In the CSR context, a similar development appears to be happening: governments often seem to be unwilling to regulate business using traditional command and control regulation.<sup>2</sup> Procurement appears to be among a group of useful alternative regulatory mechanisms. The use of public procurement to deliver CSR may also be seen as simply old wine in new bottles in another respect: the content of the CSR principles that are “enforced” by public procurement echoes the content of many of the social linkages over the past two hundred years. Many issues frequently linked to CSR now

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<sup>1</sup> Jeremy Moon, Government as a Driver of Corporate Social Responsibility, ICCSR Research Paper Series, No. 20-2004, at 2.

<sup>2</sup> For a discussion of the failure to pass legislation in Australia, the United States and the United Kingdom to enforce standards of good practice for MNEs based in those countries in respect of their overseas operations, see Adam McBeth, ‘A Look at Corporate Code of Conduct Legislation,’ 33(3) *Common Law World Review* 222-254 (2004).

have all been linked to public procurement in the past, without using the CSR banner. Not surprisingly, those interest groups that were previously identified with the use of procurement to achieve these social goals, such as trade unions, jumped on the CSR bandwagon.

However, in at least two respects, the development of CSR has markedly expanded the types of policies that are now commonly linked to public procurement: in increasing the role of public procurement in addressing environmental issues, and in increasing the role of public procurement in addressing social conditions in other countries. We now see, increasingly, issues such as fair trade, reducing the use of child labour, and sustainable development featuring on the public procurement agenda. Increasingly, as CSR became more and more associated with sustainable development, so too did public procurement, leading to the development of the concept of sustainable procurement, for example. CSR did not generate these as policy issues, of course, but it provided a useful label by which these issues could be addressed. In another respect, linking CSR to procurement may be different than linkage has been in the past, in indicating that a significant shift of governance may be underway, at least in some countries. These are issues examined subsequently.

## **Developing CSR**

The new features of the linkage between procurement and CSR reflect the broader features of CSR more generally. The “integration of social and environmental concerns in business operations,” as CSR has sometimes been defined, is nothing new. That business has an important role in the wider community in which it is situated is hardly a novel proposition. Traditionally, however, this role was regulated by governments at the national or local level by traditional command and control regulation (think of the advent of laws against child labour in the United States Fair Labor Standards Act in 1938), or addressed by philanthropic individuals (think of Cadbury and the provision of social housing for his workers<sup>3</sup>). Seen from the historical perspective, then, modern discussion of corporate social responsibility (CSR) might seem to be simply the old debate about the proper role of government and the limits of the market dressed in new clothes. However, the debate over corporate social responsibility has aspects that mark it out from previous debates.

Since the Second World War, in the case of human rights, and since the 1960s in the case of environmental concerns, the social and environmental concerns that are at the centre of CSR have moved increasingly from the local and national to become global to a significant degree. (Appropriate conditions of labour had been considered from an international perspective since the early 20<sup>th</sup> Century.) All three issues came to a head after the seismic political events of the late 1980s, with the end of the Cold War, the collapse of Communism, the expansion of market capitalism, and the consequent growth of international trade and investment. Although the difficulties with national social and environmental regulation is well known, when production in most developed countries was largely national or local, compliance by business with social and environmental laws and regulations could be assessed relatively easily and consumers could be relatively confident that the products they bought were made

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<sup>3</sup> T. Cannon, *Corporate Responsibility* (Pearson Education, 1994).

according to the accepted norms of that country. With the globalization of supply chains, developed country consumers had much less assurance of the social and environmental costs that occurred in the production of their purchases. Even if governments in producing countries had comparable environmental and social legislation, they often appeared to have much more limited enforcement capacity (and, sometimes, an absence of desire to enforce).

Not surprisingly, the demand grew for global companies themselves to assume responsibility for managing their global supply chains to ensure that their products met the social and environmental requirements of their consumers. The recent explosion of the corporate social responsibility movement is in part a function of globalization.<sup>4</sup> In this context, the consumer is a key player. If consumers were to exercise their market power to buy goods and services from companies that complied with international and regional social and environmental norms, then firms would be forced to comply or suffer from decline in profits. A “business case” for CSR was developed, particularly in markets where the reputation of the firm was a significant part of the brand image. When a person buys a Nike shoe, he or she is not just buying a shoe, but a brand which sends subtle signals to others who see the “swoosh”.

Out of the business case emerged a variety of initiatives, particularly the rise of voluntary “codes”. Such codes vary considerably in their origin, their content, their coverage, and the methods of compliance associated with them. A small industry has now developed around the production and monitoring of such codes. Methods of making such voluntary codes more effective in practice have been developed, consistent with the underlying assumption that market-based methods should be preferred. Thus, for example, we have seen the development of social and environmental labeling schemes, seeking to reassure consumers that the company complies with certain environmental or social norms, and the use of codes of practice as the basis of shareholder initiatives, seeking to require companies to practice what they preach through shareholder resolutions. Such market-based approaches have, indeed, produced some significant changes in corporate practices. Seen from this perspective, CSR arises “as a demand made by others upon corporations, and then ... as an assertion made by companies themselves that is designed to reassure their critics that their complaints have been heard and that the corporate household has now been put in order.”<sup>5</sup>

To take one example of particular relevance for this article, procurement is increasingly used by the *private* sector as a mechanism by which it meets its CSR obligations. According to the UK-based Chartered Institute of Purchasing and Supply, “Corporate Social Responsible is currently seen by many in procurement as the number one ‘Hot Topic’”.<sup>6</sup> As CSR grew as a set of expectations on business, the responsibilities of a firm for what occurred in its supply chain became increasingly the focus of attention. Companies were held responsible in the court of public opinion

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<sup>4</sup> Pierre Kletz and Yvon Pesqueux, ‘Globalization: Towards a Cross-National Model of Corporate Social Responsibility’, in José Allouche (ed.), *Corporate Social Responsibility*, volume 1 (Palgrave Macmillan, 2006), chapter 5, p. 99. See also the Comments by David O’Connor, 29 September 2005, Report on the Third Expert Meeting on Sustainable Public Procurement, United Nations Headquarters, New York, U.S.A., 15-17 July 2005.

<sup>5</sup> Allouche (ed.), *Corporate Social Responsibility*, p. xxiii.

<sup>6</sup> [www.cips.org](http://www.cips.org).

for what happened in factories in developing countries that supplied it with products. Two examples must suffice: the Canadian Auto Workers presses Coca-Cola Canada to stop sourcing Coke-branded garments produced in Burma, and the company agreed.<sup>7</sup> In Britain, utility companies have significantly increased their scrutiny of their supply chains to prevent any loss of reputation that would arise were suppliers found to be involved in unacceptable practices.<sup>8</sup> In order to be seen to meet this responsibility, firms increasingly incorporated CSR requirements into their supply contracts.<sup>9</sup> “Companies with long supply chains, such as footwear, clothing, sporting goods and toy companies, have been in the forefront of implementing ... voluntary responsibility management approaches.”<sup>10</sup> Contracting became a method by which firms “enforce” their own (voluntary) codes of practice.<sup>11</sup> Perhaps paradoxically, CSR has come to be legally enforced by the companies themselves.

## Limits of voluntarism

There are clear limits, however, to such “voluntary” approaches. They rely heavily on consumers having the desire to put pressure on companies, where to do so might result in more expensive products. As importantly, even where consumers willing to do so, the pressure was likely to be greatest in those markets where reputation was important. As Aaronson has put it, “[a]lthough market forces are increasingly pressing companies to act responsibly, markets have not succeeded in prodding *all* corporations to ‘do the right thing’ *everywhere* they operate *all of the time*.”<sup>12</sup>

In domestic debates about regulation, these limits to what could be achieved by market pressures led to intervention by government, often in the form of legislation setting out minimum standards. The assumption was that “corporate responsibilities are likely to be fully met only when it is in the self-interest of the corporation to do so – or when they are required to meet those responsibilities by government mandate.”<sup>13</sup> In so far as this was considered to be of importance to international public policy, in the past the role of international organisations, such as the International Labour Organisation, was to establish international standards that nation states would have been free to apply to corporations in their jurisdictions. International relations, and

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<sup>7</sup> ‘Canadian Coca-Cola Workers Show Solidarity with Burma’, 2 September 2005, [www.iuf.org](http://www.iuf.org).

<sup>8</sup> ‘Increasing globalisation puts unlikely sectors in the line of fire’, *Financial Times*, November 28, 2005 Monday (FT Report: Responsible Business, p. 2); Monder Ram and David Smallbone, ‘Supplier Diversity Initiatives and the Diversification of Ethnic Minority Businesses in the UK’, 24(4) *Policy Studies*, 2003, 187 at 195 (study of British Telecom’s supplier diversity programme).

<sup>9</sup> See, Esben Rahbek Pedersen and Mette Andersen, Safeguarding Corporate Social Responsibility (CSR) in Global Supply Chains: How Codes of Conduct are Managed in Buyer-Supplier Relationships.

<sup>10</sup> Sandra Waddock, ‘Rhetoric, Reality and Relevance for Corporate Citizenship: Building a Bridge to Actionable Knowledge’, in Allouche (ed.), *Corporate Social Responsibility*, p. 20 at 26.

<sup>11</sup> See, for example, discussion of Statoil and BP in Gare Smith and Dan Feldman, Implementation Mechanisms for Codes of Conduct (World Bank, IFC, November 2004), p. 36; Elizabeth Rigby, ‘Topshop to sell clothes by Fairtrade companies’, *Financial Times*, March 2 2006, p. 3; Discussion of Boots, BT, and Ricoh UK, in Mike Scott, ‘Responsibility goes all down the line’, *Financial Times* Survey: Business in the Community Awards, July 6, 2005, p. 16; Buying Matters: Consultation: Sourcing fairly from developing countries (February 2006), [www.responsible-purchasing.org](http://www.responsible-purchasing.org).

<sup>12</sup> Susan Ariel Aaronson, “‘Minding Our Business’: What the United States Government has done and can do to Ensure that U.S. Multinationals Act Responsibly in Foreign Markets’, 59 *Journal of Business Ethics* (2005) 175 at 177.

<sup>13</sup> Allouche (ed.), *Corporate Social Responsibility*, p. xxiii.

international law, were classically thought to concern relations between nation states. This meant that obligations and norms generated at the international level were usually addressed to nation states, even when they involved the behaviour of individuals or entities other than the nation state. In other words, such individuals or entities were addressed indirectly by international law, for example, with the nation state being placed under an obligation to regulate the individual or entity through national law. For much of its history, international human rights norms placed nation states under legal obligations, not others.

Increasingly, however, this model has appeared to be out of synch with the realities. With the rise of the multinational company, the increasing use of the private sector to deliver state policy goals, increased efforts to liberalize trade and investment through the development of a new global economic architecture, and the perception that the nation state was becoming disempowered in setting social and environmental standards,<sup>14</sup> it is not surprising that attempts were increasingly made to develop international and regional standards for business operations, and to attempt to apply these directly as well as indirectly to companies. There has, indeed, been a plethora of such standards in recent years emanating from international and regional governmental organizations. The OECD MNE Guidelines had already been redrafted and resuscitated. The ILO had redrafted and relaunched their Tripartite Declaration. These standards, however, were, almost without exception, not legally binding. For business, that was not seen as a disadvantage, but rather as preferable to legal regulation. The Chief Legal Counsel for Shell put it well in 2000, when he contrasted legal regulation with self-regulation. “The rigidity of mandatory rules of law,” he said, “would stifle activity, mute communications and create strife rather than prosperity.”<sup>15</sup>

However, the more such standards were produced, the more noticeable became the gap between aspiration and reality. What has become apparent is the absence of sufficiently effective methods of implementation and compliance for these soft-law norms at the international or regional levels. Traditional methods of implementation of international norms just seemed not fit for purpose.

A notable development over the past few decades has been the expansion of those who consider themselves as having a justified interest in the way in which business in general, and specific businesses in particular, operate. The classic triumvirate of organized stakeholders usually consisted of national government, shareholders and employees. Now, however, “stakeholders” came to consist of a considerably expanded circle of increasingly organized interests including consumers, human rights and environmental non-governmental organizations, and inter-governmental organizations, in addition to the classic three. Not only were such stakeholders involved in generating norms for business, they increasingly became involved in attempting to ensure that these norms were followed.<sup>16</sup> This led to pressure at the international level for more legal regulation, in particular the introduction of social and environmental requirements into the instruments of economic liberalisation that

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<sup>14</sup> David Hess, in Allouche (ed.), *Corporate Social Responsibility*, p. 175

<sup>15</sup> Quoted in Sorcha Macleod and Douglas Lewis, ‘Transnational Corporations: Power, Influence and Responsibility’, 4(1) *Global Social Policy* (2004), 77 at 78

<sup>16</sup> Rory Sullivan, ‘NGO expectations of companies and human rights’, 3 *Non-State Actors and International Law* (2003), 303-322.

were the drivers of the economic globalisation that were seen as having exacerbated the problems. This pressure was strongly resisted both by business, which saw international regulation as likely to be a real drag on economic growth, and by many governments, anxious to ensure that this economic growth would be available to meet the demands of their populations, and who saw such growth internationally as a vital driver in development. An increasingly ugly standoff between anti-globalisation activists and an axis of powerful business and governmental interests developed. Before the terrorist attacks in September 2002, this confrontation was, indeed, one of the most important concerns in the international community around the beginning of the new millennium.

## **What business and government gain from CSR**

What could be done? In his address to the World Economic Forum in Davos, Switzerland, on 31 January 1999, the Secretary-General of the United Nations, Kofi Annan, presented a deal to multi-national business. This had been emerging in practice but had not been expressed so clearly and powerfully before at such a high level.<sup>17</sup> Responsible capitalism was in the interests of business. Unless business became socially and environmentally responsible, particularly in the three core areas of human rights, labour standards, and environmental practices where there was most popular pressure, it risked policy interventions generated by interest groups that would put a substantial break on business's ability to profit from the increasing market opportunities that international market liberalisation was bringing. Short-term greed would damage longer-term sustainable international markets. "There is enormous pressure from various interest groups," he said, "to load the trade regime and investment agreements with restrictions aimed at preserving standards in the three areas I have just mentioned. These are legitimate concerns. But restrictions on trade and investment are not the right means to use when tackling them. Instead, we should find a way to achieve our proclaimed standards by other means." If business put its own house in order, the United Nations would try to ensure a business-friendly international policy environment. "[W]hat [the United Nations] can do in the political arena," he stressed, "[is] to help make the case for and maintain an environment which favours trade and open markets."<sup>18</sup>

Six years later, the European Commission's approach to CSR, as a *voluntary* engagement by business with social and environmental concerns, was strikingly similar, and was most clearly demonstrated in its 2006 Communication.<sup>19</sup> For the Commission, CSR "is about enterprises deciding to go beyond minimum legal requirements and obligations stemming from collective agreements in order to address societal needs."<sup>20</sup> So, in return for a business-friendly regulatory environment

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<sup>17</sup> United Nations, Press Release SG/SM/6881 1 February 1999.

<sup>18</sup> He continued: "I believe what I am proposing to you is a genuine compact, because neither side of it can succeed without the other. Without your active commitment and support, there is a danger that universal values will remain little more than fine words -- documents whose anniversaries we can celebrate and make speeches about, but with limited impact on the lives of ordinary people. And unless those values are really seen to be taking hold, I fear we may find it increasingly difficult to make a persuasive case for the open global market."

<sup>19</sup> In a brief document of some 13 pages, the term "voluntary" was used 11 times.

<sup>20</sup> Commission Communication, Implementing the Partnership for Growth and Jobs: Making Europe a Pole of Excellence on Corporate Social Responsibility, COM (2006) 0136, p. 1. In a critical passage,

in Europe, the United Nations and the European Commission expected business to act responsibly, otherwise popular trust in capitalism would decline. Such trust was vital for business because they operate in a political environment. As with Kofi Annan, the unspoken warning was clear: adopt CSR or regulation would be more likely in the future.

The “Davos deal”, as we might call it, envisaged a role for government at both the international, regional and national levels, but it was a restricted role. Government should encourage CSR, facilitate it, and enable it, where appropriate, but not regulate. The European Commission’s approach was as clear as Kofi Annan’s in stressing that linking regulation to CSR was not on their agenda: “Because CSR is fundamentally about voluntary business behaviour, an approach involving additional obligations and administrative requirements for business risks being counter-productive and would be contrary to the principles of better regulation.”<sup>21</sup>

Governments also stand to gain if business adopts CSR principles.<sup>22</sup> Matten and Moon, for example, have argued that CSR “encourage[s] companies to assume more responsibilities as most welfare states in Europe are increasingly facing limits to their capacities of tackling social issues in the way they traditionally did.”<sup>23</sup> If welfare states (particularly in Europe) are in decline, then there will be pressure from governments and others on business to fill the gap of welfare provision. It is therefore in the interests of government that the CSR project is not seen to fail. At the international level, we have seen the development of several initiatives that are intended to facilitate, enable and complement voluntary initiatives by business. Perhaps the highest profile event was that launched by the Secretary General himself, a year later. Kofi Annan launched the Global Compact in July 2000. This was, in part, a mechanism for sharing good voluntary practice and, in part, recognition of existing good practice. The ten principles of the Global Compact covered the area of human rights, labour, environment and anti-corruption, and were derived from the soft-law norms mentioned earlier. By 2005, over 2000 companies were participating, compared to just 50 at the launch. These companies ranged from multi-nationals to national, and from large to small- and medium-scale enterprises. They covered all

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the Commission set out its basic position: “Since the end of the Cold War the market economy has prevailed throughout most of the world. While this has opened up new opportunities for business, it also creates a corresponding need for self-limitation and mobilisation on the part of the business community, in the interest of social stability and the well-being of modern democratic societies. Moreover, within the EU, better regulation and the promotion of entrepreneurial culture are now high on the European agenda.... The Commission is committed to promoting the competitiveness of the European economy.... In turn it calls on the European business community to publicly demonstrate its commitment to sustainable development, economic growth and more and better jobs, and to step up its commitment to CSR, including cooperation with other stakeholders. More than ever Europe needs active entrepreneurs, positive attitudes towards entrepreneurship, and confidence and trust in business. Europe needs a public climate in which entrepreneurs are appreciated not just for making a good profit but also for making a fair contribution to addressing certain societal challenges.

<sup>21</sup> Commission Communication, Implementing the Partnership for Growth and Jobs: Making Europe a Pole of Excellence on Corporate Social Responsibility, COM (2006) 0136, p. 1.

<sup>22</sup> Moon has argued that there are three reasons for government to encourage CSR: “it can substitute for government effort; it can complement government effort; and it can legitimise government policies.” Government as a Driver of Corporate Social Responsibility, p. 2.

<sup>23</sup> Dirk Matten and Jeremy Moon, ‘Implicit’ and ‘Explicit’ CSR: A conceptual framework for understanding CSR in Europe, No. 29-2004 ICCSR Research Paper Series, p. 24



business sectors and were from both developed and developing countries. In addition to the business sector, global labour federations, international and local NGOs, Governments and UN agencies were involved.

## Public procurement and the compliance gap

The problem of lack of compliance with these voluntary measures remains, however. The expectations of high standards, partly generated by NGOs and IGOs, but also by business itself, are all too frequently not met. As David Vogel has written, “there remains a substantial gap between discourse and practice with respect to virtually all codes and voluntary standards.”<sup>24</sup> For Vogel, and for many others, “[i]n order for corporations to make sustainable improvements in their social and environmental performance, the role of government must change.”<sup>25</sup> There is, of course, a multiplicity of differing ways in which government may play a role in encouraging CSR.<sup>26</sup> Fox, Ward and Howard have identified how public sector bodies encourage CSR by “using any one or a combination of various ... tools: “mandating” “governments at different levels define minimum standards for business performance embedded within the legal framework”<sup>27</sup>), “facilitating” (“public sector agencies enable or incentivize companies to engage with the CSR agenda or to drive social and environmental improvements”<sup>28</sup>), “partnering” (“public sector bodies may act as participants, convenors, or facilitators”<sup>29</sup>), and “endorsing” (taking “various forms”, including the “demonstration effect ... of public sector management practices”<sup>30</sup>). As a recent report for the World Bank put it: “Government action has the benefit of rationalizing market forces by creating a ‘level playing field’; it spreads costs across the breadth of society, [and] provides a formal and public means of recourse.”<sup>31</sup>

We can see these various approaches multiplying. Although the Global Compact is purely voluntary, participating companies need to submit a report on their activities in implementing the principles of the Compact. This “Communication on Progress” policy was introduced in January 2003. After a grace period of two years, a company will be removed from the list and classified as “non-communicating” if no report is received. But other, more legally based approaches are also being adopted. Just as nature abhors a vacuum, law tends to fill compliance gaps. Sandra Waddock has identified “signs emerging in the early 2000s that accountability will be enforced through an array of new laws and regulations that are slowly beginning to emerge

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<sup>24</sup> David Vogel, *The Market for Virtue: The Potential and Limits of Corporate Social Responsibility* (Brookings, Washington D.C., 2005), p. 164.

<sup>25</sup> Vogel, *Market for Virtue*, p. 166.

<sup>26</sup> For a survey, see Constantina Bichta, *Corporate Social Responsibility: A Role in Government Policy and Regulation?* (University of Bath School of Management).

<sup>27</sup> Tom Fox, Halina Ward, and Bruce Howard, *Public Sector Roles in Strengthening Corporate Social Responsibility: A Baseline Study* (World Bank, October 2002), 3

<sup>28</sup> Fox, et al., *Public Sector Roles*, 3-4.

<sup>29</sup> Fox, et al., *Public Sector Roles*, 4.

<sup>30</sup> Fox, et al., *Public Sector Roles*, 6

<sup>31</sup> Helle Bank Jørgensen and Peder Michael Pruzan Jørgensen, Margaret Jungk, Aron Cramer, *Strengthening Implementation of Corporate Social Responsibility in Global Supply Chains*, World Bank, IFC, October 2003), p. 39.

around the world.”<sup>32</sup> At the national level, we have seen the use of the U.S. Federal Sentencing Guidelines of 1991 to act as an incentive for compliance, by offering reduced penalties. In Britain, the Occupational Pensions Schemes (Investment) Regulations 1996 required pensions funds to report how they take account of social, environmental and ethical factors in making investment decisions from 2000. In 2002, France introduced requirements on all firms listed on the stock exchange to report on their performance in various areas of CSR.<sup>33</sup> We have also seen attempts to harden up the “soft law” of environmental and social standards applicable to business. The OECD guidelines have been used to supply legally binding standards in export credit guarantees in the Netherlands.<sup>34</sup> The European Union has incorporated the soft-law ILO standards into its Generalized System of Preferences. Consumer protection laws have been used to “enforce” voluntary codes.<sup>35</sup> Parent companies of multinational corporations have become subject to domestic principles of civil liability where they breach international legal norms, such as under the Alien Tort Claims Act in the United States, and equivalent principles in France and Belgium.<sup>36</sup> Bilateral and plurilateral trade treaties have increasingly incorporated social and environmental requirements for business. Yet, each of these approaches has clear problems that lessen their effectiveness in practice.<sup>37</sup>

This is one important context in which governmental entities (in which I include public bodies and governmental organisations at the local, national, regional and international levels) are rethinking the relationship between public procurement and corporate social responsibility. One important driver for the introduction of CSR requirements into public procurement is the desire to narrow the gap between aspiration and practice by firms: procurement came to be seen by some governments as a method of providing (market-based) incentives to firms to adopt and fulfil CSR obligations, by linking these obligations with access to government contracts.<sup>38</sup> Public procurement becomes one of a range of initiatives, a “portfolio approach”,<sup>39</sup> in which different initiatives support each other.<sup>40</sup> At the international level, this approach is usefully illustrated by the incorporation of public procurement as an element for achieving compliance with the draft Norms on the Responsibility of Transnational Corporations and Business Enterprises with Regard to Human Rights.<sup>41</sup> The *Norms* were drafted by the United Nations Subcommission on the Promotion and Protection

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<sup>32</sup> Sandra Waddock, in Allouche (ed.), *Corporate Social Responsibility*, at p. 31

<sup>33</sup> José Allouche, Françoise de Bry, Isabelle Huault and Géraldine Schmidt, ‘The Institutionalization of CSR in France: the State Injunction’, in Allouche (ed.), *Corporate Social Responsibility*, p. 284 at 299.

<sup>34</sup> Macleod and Lewis, ‘Transnational Corporations’. at 81.

<sup>35</sup> Unfair Commercial Practices Directive of 11 May 2005, OJEU, L 149/22, 11.6.225; *Kasky v Nike*,

<sup>36</sup> Karim Medjad, ‘In Search of the ‘Hard Law’: Judicial Activism and International Corporate Social Responsibility’, in Allouche (ed.), *Corporate Social Responsibility*, p. 181.

<sup>37</sup> For a discussion of the difficulties with private actions based on tort, for example, see Karim Medjad, in Allouche (ed.), *Corporate Social Responsibility*, 185 ff.

<sup>38</sup> For example Promoting Global Corporate Social Responsibility: The Kenan Institute Study Group Consensus (September 2003) recommended the use of U.S. government procurement policies as tools to promote global CSR, [www.csrpolicies.org](http://www.csrpolicies.org).

<sup>39</sup> Simon Zadek, Sanjiv Lingayah, and Maya Forstater, *Social Labels: Tools for Ethical Trade: Final Report* (European Commission, 1998), p. 10, 58, 75.

<sup>40</sup> David Hess, in Allouche (ed.), *Corporate Social Responsibility*, p. 173. Compare Olivier de Schutter, *The Accountability of Multinationals for Human Rights Violations in European Law*.

<sup>41</sup> See David Weissbrodt and Maria Kruger, ‘Norms on the Responsibilities of Transnational Corporations and Business Enterprises with Regard to Human Rights’, *American Journal of International Law*, October, 2003, footnote 108.

of Human Rights. The use of procurement was commended by the Subcommission during the course of the discussions on the drafting of the Norms.<sup>42</sup> The Commentary to the Norms,<sup>43</sup> stated that “The U.N. and its specialized agencies should ... monitor implementation by using the Responsibilities as the basis for procurement determinations as to which products and services to purchase ...” The Norms have proven extremely contentious, however, and it appears at the time of writing to be unlikely that they will become the basis for international consensus.<sup>44</sup>

## Public procurement as equivalent to private procurement

Although an important context, the relationship between public procurement and CSR cannot *only* be seen as a compliance-gap-filling measure. The relationship between procurement and CSR is more complex than this suggests. In practice, public procurement is to be found as a tool in each of the “mandating”, “facilitating”, “partnering” and “endorsing” roles identified earlier.<sup>45</sup>

We need to step back a little and look at the relationship between procurement and CSR more broadly. Increasingly, the distinction between public and private in general, and public procurement and private procurement in particular is becoming blurred. There are several aspects to these developments. First, with the advent of privatization and contracting out, functions that would traditionally have been carried out by government are now increasingly carried out, under contract, by the private sector. This has led to an argument that when this happens, some of the “public sector ethos” should carry over to the private sector. This is, perhaps, most strikingly the case in the context of utilities privatization, where the argument that certain “public” values should be transferred over to the private providers.<sup>46</sup> More generally, the “growth of CSR activity in the 1990s occurred in response to widespread concerns about increases in corporate power through privatization and globalization.”<sup>47</sup> Second, with increasingly tight public sector budgets and the increasing emphasis on efficiency and “value for money,” public bodies were urged (in some cases required) to become more like the private sector. Private sector values, ethos and management styles were increasingly incorporated into public sector management. This was strikingly so in several countries with regard to public procurement activities, contributing to the dramatic extent of reform in the management of public procurement in developed countries over the past twenty years.

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<sup>42</sup> Sub-Commission on Human Rights Resolution 2002/8 (2002), para. 4(a): “Recommends that the working group and the Sub-Commission continue their efforts to explore possible mechanisms for implementing the draft norms ..., such as: (a) The use of those human-rights related norms as a basis for determining the purchases of goods and services from and the partnerships developed with transnational corporations and other enterprises ...”

<sup>43</sup> Commentary, para. 16b.

<sup>44</sup> The Interim report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, 22 February 2006, E/CN.4/2006/97, was a damning critique and was seen in many quarters as indicating the swift demise of the Norms.

<sup>45</sup> Fox, et al., Public Sector Roles, 3: “some public sector activities, such as procurement, have multiple linkages with the contemporary CSR agenda.” See also at 4.

<sup>46</sup> See Christopher McCrudden, ‘Social Policy and Economic Regulators: Some Issues for the Reform of Utility Regulation’, in Christopher McCrudden (ed.), *Regulation and Deregulation: Policy and Practice* (Oxford University Press, 1998), pp. 275-294.

<sup>47</sup> Allouche (ed.), *Corporate Social Responsibility*, p. xxiv.

We saw previously that private sector firms increasingly incorporate CSR principles into private procurement. If private sector firms do so, why should public sector bodies not also? After all, shouldn't the public sector become more like the private sector? CSR suggests to the private sector that business should go beyond purely economic considerations, and go beyond strictly legal obligations, appreciating the social and environmental externalities involved in its operations, including its supply chain. Incorporation of social and environmental concerns into *public* procurement appears to involve a similar acceptance of responsibility by government. Are government service providers to be viewed as public corporations that comply with the law, including those pertaining to the environment and workplace practices, but do not normally go beyond it?<sup>48</sup> If so, there would be no justification for incurring additional costs to purchase goods and services that meet environmental or social criteria beyond what laws and regulations require. The assumption underlying this model is that the citizenry, or its elected representatives, have already embodied their social and environmental preferences in existing legislation. If they now expect even better performance, whether of the public sector or the private sector, they will change that legislation.

In contrast with this model, however, are Government service providers to be viewed as having a broader mandate, including safeguarding the environment and the social fabric, protecting the interests of vulnerable members of society and of future generations? On this view, Government is a social welfare optimizer, seeking to internalize in its policies and practices all relevant externalities. This calls for a more activist role of Government with respect to its procurement decisions. The sheer size of the public procurement market, for example, might be used to encourage the development of "green" products at an affordable price for the general market, simply by guaranteeing a sufficient number of public purchases to create viability. For example, "Japan has successfully used green procurement of low emission cars to stimulate technological innovation in the motor industry to stimulate technological innovation in the motor industry."<sup>49</sup> Efforts such as these contributed to the adoption by the OECD Council of a recommendation advocating green public procurement.<sup>50</sup> From this viewpoint, public bodies have CSR responsibilities themselves as purchasers, and public procurement is not just a mechanism for ensuring compliance by others with their CSR responsibilities but an important element in how the public sector can satisfy its own CSR responsibilities.<sup>51</sup>

## **Responsible public procurement as "leading by example"**

The more we equate public bodies with private firms, the more similarities appear. If we equate the relationship between private firms and their consumers with the relationship between public bodies and their citizens, it would be strange indeed if

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<sup>48</sup> This paragraph draws substantially on comments by David O'Connor, Third Expert Meeting on Sustainable Public Procurement, United Nations Headquarters, New York, U.S.A., 14-17 June 2005.

<sup>49</sup> Roger Cowe and Jonathon Porritt, *Government's Business: Enabling corporate sustainability* (Forum for the Future, 2002), p. 33

<sup>50</sup> OECD Press Release, January 23, 2002, <http://www.oecd.org>

<sup>51</sup> This is the message, for example, of such studies as Lisa Mastny, *Purchasing Power: Harnessing Institutional Procurement for People and the Planet* (Worldwatch Paper 166, July 2003),

public bodies did not react similarly. Indeed, some see the role of government as being in part to represent the collective preferences of citizens. The inclusion of social and environmental conditions should not only be seen as about the consequences of procurement decisions and the leverage those consequences give us on policy. A common intuition, surely, runs rather this way: when the government buys purchases, it acts in the name of its citizens and ought to uphold certain standards. "We" do not want "our" public goods purchased from companies that discriminate or pollute because it is sordid, it would dirty our hands, and not (only) because we are hoping to use government spending to alter the social landscape.<sup>52</sup>

Private sector procurement, as we have seen, increasingly engages with CSR. Government increasingly encourages the private sector to ensure that its supply chains are in CSR compliance. Governments also act to facilitate such initiatives.<sup>53</sup> The British government, for example, supported the creation of the Ethical Trading Initiative, which brings together companies, NGOs and trade unions in order to help purchasers to secure goods that are produced in conditions in developing countries that meet environmental and social standards. Not surprisingly, the result of this is also to shine a spotlight on the procurement practices of those bodies that advocated that firms should use their procurement operations in this way.<sup>54</sup> A prominent example was the reaction of some NGOs to the United Nations launch of the Global Compact. Did the UN itself comply with the principles of the Global Compact in its procurement practices? When the answer was "not yet", a degree of embarrassment was apparent.<sup>55</sup> Governments, in other words, operate both as regulators of the market, but also as participants in the market. When principles they espouse in the former are not applied in the latter, the government appears to lack co-ordination, or appears to be simply hypocritical. An important driver, then, for the incorporation of CSR standards in public procurement is the need to be seen to be leading by example:<sup>56</sup> if government expected firms to ensure that their supply chains are clean, then the least government can do is to ensure that its own house is in order too.

## European Community and CSR in procurement

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<sup>52</sup> Don Herzog, personal communication.

<sup>53</sup> Thomas Loew, Kathrin Ankele, Sabine Braun, Jens Clausen, Significance of the CSR debate for sustainability and the requirements for companies: Summary, p. 8 (example of the German federal government's encouragement of codes of practice in private sector procurement).

<sup>54</sup> See, for example, Cowe and Porritt, *Government's Business*, p, 46 (where the British Government is encouraged to apply the same standards in its procurement as it is commending to others.); EU Accused of Using Illegally Logged Timber, [www.tendersdirect.co.uk](http://www.tendersdirect.co.uk), in which Greenpeace alleged that illegal timber was being used in new EU buildings in Brussels. "If true, the allegations would be an acute embarrassment for the EU. Last year the Commission launched its own action plan to combat illegal logging and the trade in illegal timber."

<sup>55</sup> Role of UN Global Compact, Human Rights and Business Matters Spring/Summer 2001, including the correspondence between Kenneth Roth, Executive Director of Human Rights Watch and John G. Ruggie, Assistant Secretary General ([www.amnesty.org.uk/business](http://www.amnesty.org.uk/business)); Peter Utting, 'The Global Compact and Civil Society: Averting a Collision Course', UNRISD News, No. 25. For subsequent developments, see, Report on the Third Expert Meeting on Sustainable Public Procurement, United Nations Headquarters, New York, U.S.A., 15-17 July 2005

<sup>56</sup> Cowe and Porritt, *Government's Business*, p, 32; Gianni Zappalà, *Corporate Citizenship and the Role of Government: the Public Policy Case*, Information and Research Services, Department of the Parliamentary Library, Research Paper No. 4 2003 (Canberra, 2003), p. 2, 17.

The development of the European Community approach to the relationship between CSR and procurement illustrates several of these points. The movement for corporate social responsibility was actively pursued in several Member States during the 1990s. This included, in some states, the use of public procurement in this context.<sup>57</sup> However, CSR was relatively slow in being recognized and incorporated into European Community policy.<sup>58</sup> The European Union's framework for CSR began to be developed soon after the Lisbon Council appealed to companies' sense of social responsibility in March 2000. A Green Paper was published by the Commission in 2001, and a Communication followed in 2002. This established the EU Multi-Stakeholder Forum on CSR, which deliberated and published a report in 2004. As we have seen, in 2006, the Commission published a further Communication on CSR. In the Community context, CSR includes promoting responsible production, promoting responsible consumption, promoting the transparency and credibility of CSR practices, and promoting responsible investment.

There were two linked aspects to the idea of corporate responsibility as it developed at the European level. One related to the practices of European enterprises operating outside the EU, particularly in developing countries. A second related to the activities of enterprises operating within the EU. In both, though to somewhat differing degrees, whether to use public procurement was an element of the debate. First off the block on the first of these issues was the European Parliament.<sup>59</sup> In 1999 the Parliament adopted a resolution on EU standards for European enterprises operating in developing countries. The principal element of the wide-ranging Resolution was a request to the Commission and the Council to make proposals "to develop the right legal basis for establishing a European multilateral framework governing companies' operations worldwide."<sup>60</sup> Amongst the other actions the Resolution called on the Commission "to bring forward proposals for a system of incentives for companies complying with international standards developed in close consultation and cooperation with consumer groups and human rights and environmental NGOs – such as in procurement, fiscal incentives, access to EU financial assistance and publication in the Official Journal."<sup>61</sup> In a 1999 Commission publication on codes of practice considered possible methods of making social labels more effective through public policy interventions. Among the methods listed were "using public procurement in promoting labelled products."<sup>62</sup>

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<sup>57</sup> See, e.g. Anders Rosdahl, *The Policy to Promote Social Responsibility of Enterprises in Denmark*, p. 9 (September, 2001) (paper prepared for the European Commission-DG EMPL Peer Review Programme).

<sup>58</sup> For discussion of earlier initiatives at the EU level, see Lewis and MacLeod, *Transnational Corporations*, at 85

<sup>59</sup> The European Parliament, had a long history of prior involvement in this issue. For example, in its Resolution on the Commission's Action Programme relating to the implementation of the Community Charter of Fundamental Social Rights for Workers, A3-175/90, 13 September 1990, insisted that in the trade agreements and co-operation treaties "social clauses should be incorporated under which the contracting parties would undertake to abide by ILO standards", Para. 10, "international treaties and conventions on working conditions and the rights of workers", para. 22, and that they should also take "environmental considerations into account and that penalties should be imposed for failure to comply with contractual arrangements", para. 23.

<sup>60</sup> Resolution of the 15th January 1999, Code of conduct for European enterprises operating in developing countries, OJ C 104/180, 14.4.1999, para. 11.

<sup>61</sup> Para 28.

<sup>62</sup> Quoted in Colleen Hanley, 'Avoiding the Issue: The Commission and Human Rights Conditionality in Public Procurement', 27 *European Law Review* 714 at 714 (2002).

It was really only in 2001, however, that the debate began in earnest at the EC level, with the publication of three important Communications for the Commission to the Parliament with relevance to the issue. Two, relating to the EU's role in promoting human rights and democratization in third countries,<sup>63</sup> and relating to the promotion of core labour standards and improving social governance in the context of globalisation,<sup>64</sup> did not mention procurement, but a third, presented the same day as the second, the Commission's Green Paper "Promoting a European Framework for Corporate Responsibility"<sup>65</sup> responded to the Parliament's recommendations regarding procurement. The Green Paper was intended to launch a debate on the promotion of corporate social responsibility within the EU. In the context of a discussion on social and environmental labelling, the Green Paper accepted that there is "increasingly a need for a debate regarding the value and desirability – in the context of the Internal Market and international obligations – of public actions aimed at making social and eco labels more effective."<sup>66</sup> The Commission gave several examples of such action, including "use of public procurement and fiscal incentives in promoting labelled products."<sup>67</sup>

The responses to the Green Paper varied considerably.<sup>68</sup> Lewis and MacLeod have, however, described "the remarkable homogeneity between individual corporate responses as well as the responses of industry representatives."<sup>69</sup> They characterise these as involving "a definite emphasis on self-regulation, a lack of enthusiasm for enforcement mechanisms, temporization of implementation requirements, the voluntary nature of CSR, good practice and a general abhorrence of a 'one-size fits all' approach to CSR."<sup>70</sup> Although welcoming the Commission's initiative, the Council fired a warning shot, asking the Commission to "query carefully the added value of any new action proposed at European level."<sup>71</sup> The Committee of the Regions, however, in its response to the Green Paper accepted "that local and regional authorities can give a lead in relation to promoting good CSR practices by ensuring that their purchasing and procurement strategies are CSR compliant."<sup>72</sup> The Parliament, perhaps unsurprisingly, took an even stronger position. A report from the Committee on Employment and Social Affairs<sup>73</sup> urged the Council to "take into account the Parliament's position on the principle of corporate social responsibility in the directive on public procurement"<sup>74</sup> and called on the Commission to bring forward proposals "to promote the contribution of EU companies towards transparency and

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<sup>63</sup> European Commission, The European Union's Role in Promoting Human Rights and Democratization in Third Countries, 8 May 2001, COM(2001) 252 final.

<sup>64</sup> European Commission, Promoting Core Labour Standards and Improving Social Governance in the Context of Globalisation, 17.7.2001, COM(2001) 416 final

<sup>65</sup> European Commission, Green Paper: Promoting a European framework for Corporate Social Responsibility, 18.7.2001, COM(2001) 366 final.

<sup>66</sup> Para 83.

<sup>67</sup> Para 83.

<sup>68</sup> For a discussion, see Lewis and MacLeod, *Transnational Corporations*, at 85.

<sup>69</sup> *Ibid.* 86

<sup>70</sup> *Ibid.*

<sup>71</sup> Council Resolution on the follow-up to the Green Paper on corporate social responsibility, OJ C 86/3, 10.4.2002

<sup>72</sup> Opinion of the Committee of the Regions on the Green Paper on Promoting a European Framework for Corporate Social Responsibility, OJ C 192/1, 12.8.2002.

<sup>73</sup> 30 April 2002, A5-0159/2002

<sup>74</sup> Para 32, draft Resolution

good-governance world-wide, including through the setting up of a blacklist to prevent the tendering for public contracts by EU companies ... for non-compliance with minimum applicable international standards (ILO core labour standards, OECD guidelines for multinational companies); and to establish a compliance panel to ensure that companies awarded contracts in the context of EC public procurement ... comply with EU human rights obligations and development policies and procedures as well as minimum standards according to the ... ILO and OECD Guidelines in the execution of those contracts; companies on the blacklist would be ineligible for EU contracts or awards for a period of three years.”<sup>75</sup> The Parliamentary Resolution reflected these recommendations closely.<sup>76</sup>

The European Commission produced its Communication on corporate social responsibility in July 2002.<sup>77</sup> The Commission’s treatment of procurement needs to be seen in the context of the developments in the procurement reform package. By the time of its response, the Commission had issued its Interpretative Communications on the possibilities for integrating social and environmental considerations into public procurement. As regards the integration of social considerations into the directives, the Commission was essentially unwilling to go beyond what it had said in these Communications. In the section dealing with external relations policy, however, the Commission was more forthcoming. Where “public support is provided to enterprises, this implies co-responsibility of the government in those activities. These activities should therefore comply with the OECD guidelines for multinational enterprises, and, inter alia, not involve bribery, pollution of the environment or child or forced labour. Making access to subsidies for international trade promotion, investment and export credit insurance, as well as access to public procurement, conditional on adherence to and compliance with the OECD guidelines for multinational enterprises, *while respecting EC international commitments*, could be considered by EU Member States and by other States adherent to the OECD Declaration on International Investment.”<sup>78</sup> In addition, the Commission announced its intention to “integrate further social and environmental priorities within its management, including its own public procurement.”<sup>79</sup> The Council, in its Resolution responding to the Commission, whilst welcoming the general thrust of the Commission’s approach, did not discuss procurement issues explicitly, and restricted itself to supporting “the intentions of the Commission, in particular to focus its strategy on ... integrating CSR into Community policies”, and calling on the Member States “to integrate, where appropriate, CSR principles into their own management.”<sup>80</sup>

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<sup>75</sup> Para 59 draft Resolution.

<sup>76</sup> P5-TA(2002)0278, European Parliament Resolution on the Commission Green Paper on promoting a European framework for corporate social responsibility, paras. 28 and 54.

<sup>77</sup> European Commission, Corporate Social Responsibility: A business contribution to Sustainable Development, 2.7.2002, COM(2002) 347 final.

<sup>78</sup> Para 7.6. The reference to respecting international commitments presumably refers to the WTO Government Procurement Agreement, inter alia.

<sup>79</sup> Para. 7.7. As regards the formal legislative provisions governing Commission procurement, however, the Commission took the position that they should reflect the procurement directives and that any changes in the existing Regulations (Commission Regulation (EC, Euratom) No 2342/2002 of 23 December 2002 laying down detailed rules for the implementation of Council Regulation (EC, Euratom) No 1605/2002 on the Financial Regulation applicable to the general budget of the European Communities, OJ L 357/1, 31.12.2002) should wait the completion of the legislative package, discussed in the next chapter.

<sup>80</sup> Council resolution of 6 February 2003 on corporate social responsibility, OJ C 39/3, 18.2.2003.



## *Opposition to CSR in European public procurement*

It would be misleading to suppose that attempts to use public procurement for CSR purposes are unopposed. There are two, rather different, objections. The first arises more specifically in the context of CSR. The use of public procurement has led to objections that CSR should, as we have seen from the European Commission's definition, be "voluntary". We have seen that "voluntary" in this context does not necessarily mean "motivated by philanthropy" but rather that it should not be legally required. Several of the mechanisms used to promote CSR are based on the "business case" argument in which consumers play a major role. The European Commission's 2002 Communication, after defining CSR as set out at the beginning of this article, went on to say that: "Despite the wide spectrum of approaches to CSR, there is large consensus on its main features [including that] CSR is behaviour by businesses over and above legal requirements, *voluntarily adopted* because businesses deem it to be in their long-term interest."

The second objection is based on a general objection to the use of procurement for social policy purposes. This objection derives from a concern that the adverse effects of such linkages outweigh any good that may come of them. Common general objections are: that such linkage increases the costs of procurement; that linkage leads to a reduction in the transparency of the procurement process; that linkage leads to greater bureaucratization of procurement; or that it increases the opportunity for corruption. In the European Community context, a particular concern, given that one of the primary functions of the organization is to reduce barriers to the creation of a vibrant internal market, is that such linkages increase the opportunity for, or have the effect of, reducing competition. To the extent that government addresses these problems, there may well come a time where there is seen to be a tension between achieving these goals, and using public procurement to achieve CSR.

One of the main features of the Commission's proposals was the establishment of a European Multi-Stakeholder Forum to include social partners, business networks, consumers and investors to exchange best practice, to establish principles for codes of conduct and to seek consensus on evaluation methods and tools such as social labels. These issues came to the fore in this Forum, hosted by the European Commission between 2002 and 2004, which provided an important forum in which the various interested groups (such as representatives of business, trade unions and NGOs) could discuss future European CSR policy, and help shape the Commission's future approach.<sup>81</sup> As regards the use of public procurement to encourage business to adopt CSR, it quickly emerged that the representatives of business were adamantly opposed, whereas the trade unions and NGOs were in favour. The three "roundtables" in which discussions took place could simply report the disagreement. In the Round Table on the diversity, convergence and transparency of CSR Practices and Tools, "[i]t was suggested by NGOs and trade unions that public authorities could play a number of roles in driving CSR and related activities, though actions in the areas of procurement policies, export credit schemes, trade policies and eligibility for subsidies and taxes." Business and employer organisations, however, "stressed the view that linking public policy or funding sources with CSR could have damaging consequences for SMEs, could distort competition and would involve disregarding the voluntary nature of

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<sup>81</sup> Michel Capron, Forum plurilatéral européen sur la RSE: la raison d'une déconvenue.

CSR.”<sup>82</sup> In the Round Table on fostering CSR among SMEs, participants “had fundamentally different views on the issue”. Some supported further analysis, “looking particularly at how SMEs might benefit from calls for tender with social and environmental criteria”, whilst others “argued that the practical problems of introducing ... social and environmental criteria into public procurement (particularly if those are built on what is accepted as voluntary practice) are too great.”<sup>83</sup> The emphasis on CSR being voluntary was also stressed during the course of the third Round Table, as well as the argument that it “would amount to discrimination against other bidders.”<sup>84</sup> In light of this, it was not surprising that the Final Report of the Forum merely recorded disagreement on the issue and set out the arguments for and against. Nor, given the extent to which the Commission had committed itself to going forward with CSR initiatives on the basis of a voluntary approach, was it surprising that mention of public procurement was entirely absent from the 2006 Commission Communication on CSR, much to the disappointment of trade unions and NGOs.<sup>85</sup>

### *CSR and procurement: European legal issues*

A third objection to the use of public procurement for CSR purposes related to the legality of such uses. In Europe, in addition to national legal provisions governing public procurement, there are two additional sets of legal requirements: those arising under European Community law (in particular, but not exclusively, arising from a series of Directives on public procurement that began in the 1970s), and those arising under international law (in particular, but not exclusively, arising from the WTO Government Procurement Agreement). The complexity of these provisions, and the uncertainty as to whether particular linkages were permissible, acted as a constraint on risk-averse public authorities adopting procurement-linkages for CSR purposes.<sup>86</sup>

In practice, the most effective single intervention of the Community in advancing the use of public procurement for CSR purposes was the attempted clarification of the legal position under EC law. If there were a risk of being sued, some public authorities would prefer not to act. Indeed, for the Commission, the clarification of the legal position was identified as part of the Commission’s strategy for encouraging CSR, as it meant removing an existing barrier to the further adoption of CSR policies in the Member States.<sup>87</sup> The Community had a role to play, therefore, if only in improving legal clarity.

This strategy had two aspects. First, the Commission produced Interpretative

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<sup>82</sup> Round Table on the diversity, convergence and transparency of CSR Practices and Tools, Final Report, para 3.5 (2004).

<sup>83</sup> Round Table on “Fostering CSR among SMEs”, 2004, Final Version, 03.05, para. 3.1

<sup>84</sup> Round Table on “improving Knowledge about CSR and Facilitating the Exchange of Experience and Good Practice”, Final Version 29.04.2004, page 12.

<sup>85</sup> See European Parliament Socialist Group statement.

<sup>86</sup> See, e.g. finding of a survey into determinants of green public procurement, Luke Brander and Xander Olsthoorn, Three scenarios for Green Public Procurement, December 2002, Institute for Environmental Studies, Vrije Universiteit, The Netherlands, at p. 20 ff. See also, Janet Morgan and Jan Niessen, ‘Immigrant and Minority Businesses: Making the Policy Case’, 4 *European Journal of Migration and Law* 329 at 332, 334.

<sup>87</sup> Report on the Expert Meeting on Sustainable Public Procurement Copenhagen, Denmark, 2-3 December 2002 <http://www.un.org/esa/sustdev/sdissues/consumption/SPP-Report-rev.pdf>, European Commission view by Herbert Aichinger.

Communications of the existing Directives. In 2001, the Commission published an Interpretative Communication that set out the Commission's view on the use of public procurement for environmental purposes. In October 2001, an equivalent Communication was published relating to the pursuit of social policy in public procurement. At the same time, the Community was pursuing a general legislative reform of these Directives. In the context of the use of procurement linkages for social and environmental purposes, the Commission's primary strategy was to resist incorporating any requirements to pursue social or environmental policies into EC procurement law, and to argue that the Commission's interpretative communications brought sufficient clarity into the interpretation of the existing Directives to justify little substantive change from these Directives in the new Directives. The Commission largely succeeded, fending off amendments supported by trade unions, NGOs and the European Parliament, that would have required Member States to include environmental or social criteria into their public procurement, accepting the inclusion of substantial numbers of "recitals" at the beginning of the new Directives incorporating various of the clarifications originally set out in the interpretative Communications, and introducing minimal change into the drafting of the substantive provisions of the new Directives.<sup>88</sup> In its common position reached on March 20th, 2003, the Council amended the definition of "technical specifications" by strengthening the possibility of the contracting authority to include accessibility as a requirement for the works being tendered. The European Parliament went a step further last July in a second reading, by imposing this inclusion whenever possible for the contracting authority.

The result of the process, taken as a whole, was to leave substantial amounts of discretion to the Member States, and to the public authorities in the Member States, to decide whether to include CSR policies into public procurement. NGO activity then shifted to the Member States, since the new Directives had to be incorporated into domestic law in each Member State, thus providing an ideal opportunity for public pressure to be brought to bear. The result was a blossoming of activism around the issue of social and environmental standards in national procurement practices, and the development of significant levels of activity in these areas. From the point of view of the Commission, this aspect of their CSR strategy largely worked. "Clarifying the law," meant that the issue was put on national agendas.

Clarifying the law is a continuing issue, however, for the Commission. The very scope of the CSR agenda means that legal issues will continue to require clarification. A brief and partial list must suffice: the impact of the EC state aid rules on secondary policies in public; the extent to which issues relating to employment conditions are permissible under the new Directives; the legality of attempts to promote gender and racial equality issues using public procurement; issues relating to the new directives' provisions on sheltered workshops and access to disabled users; the legality of SME-development policies; the permissibility of incorporating "sustainable development" in public purchasing; the relationship between procuring renewable energy and the directives; the use of eco-labels and environmental management schemes under the

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<sup>88</sup> See, e.g., Sue Arrowsmith, 'An Assessment of the New Legislative Package on Public Procurement', (2004) 41 *Common Market Law Review* 1-49; Christopher H. Bovis, 'Public Procurement in the European Union: Lessons from the Past and Insights to the Future', 12(1) *Columbia Journal of European Law* 53 (2005); Joël Arnould, 'Secondary Policies in Public Procurement: The Innovations of the New Directives', 4 *Public Procurement Law Review* (2004), XXX.

new directives; the extent to which Corporate Social Responsibility impacts differently on procurement in the utilities sector; the impact of the EC procurement directives on “fair trade” issues. Partial attempts, mostly in the context of green procurement, have been made to address some of these legal issues. A Handbook on Green Public Procurement was published in August 2004 giving further explanations and best practice examples.<sup>89</sup>

### *CSR, procurement and the “soft power” of the Commission*

The other element in the strategy of the Commission that links CSR with public procurement is the use of the Commission’s ability to muster “soft power.”<sup>90</sup> Through the provision of information, and the attempt to guide the production of better coordinated standards, in the hope that public bodies will see the adoption of public procurement as a method of ensuring compliance in particular circumstances. This strategy has, in particular, attempted to address the problem of the more permissive regime that emerged out of the legal strategy: the proliferation of different standards and requirements that any particular firm may be subject to. Anna Diamantopoulou, when she was Commissioner responsible for Employment and Social Affairs in the European Commission, argued that the plethora of different standards applicable to CSR, not least in the public procurement context, “carries the risk of ‘accidental’ new barriers to trade in the EU’s internal market.”<sup>91</sup>

Good examples of this approach in practice are to be found in the development of approaches to linking public procurement with policies for green public procurement and policies for disabled workers. As regards green procurement, there have been several interlinking elements to the strategy, in addition to clarifying the law.<sup>92</sup> The Commission has encouraged Member States to draw up publicly available action plans for greening their public procurement.<sup>93</sup> The review of the Lisbon Strategy in 2004 again stressed the need for national and local authorities to set up action plans for greening public procurement by the end of 2006.<sup>94</sup> In January 2005, the Commission urged that such plans should establish objectives and benchmarks for enhancing green public procurement as well as guidance and tools for public procurers.<sup>95</sup> The Commission has also worked with other groups (such as ICLEI and Eurocities) to spread and clarify the message. For example LEAP is a project co-funded by the European Commission and ICLEI that aims to provide a series of

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<sup>89</sup> (SEC(2004/1050).

<sup>90</sup> Joseph S. Nye, Jr., *Soft Power: The Means to Success in World Politics* (2004).

<sup>91</sup> Anna Diamantopoulou, Commissioner responsible for Employment and Social Affairs, European Commission, The role of public policies in promoting CSR, Address at the Presidency Conference on Corporate Social Responsibility, Venice 14<sup>th</sup>, 2003, p. 6. See also: EDF Seminar Series: Can Procurement be used to promote equality? Lessons from experiences at home and abroad: Summary note of seminar on Thursday 2<sup>nd</sup> March 2006. See also David O’Connor’s identification of “the risk of proliferation of sustainable procurement criteria and the need for harmonization across jurisdictions,” Report on the Third Expert Meeting on Sustainable Public Procurement, United Nations Headquarters, New York, U.S.A., 15-17 July 2005.

<sup>92</sup> <http://europa.eu.int/comm/environment/gpp/>. See further Catherine Day, ‘Buying green: the crucial role of public authorities’, 10(2) Local Environment: The International Journal of Justice and Sustainability, April 2005, 201.

<sup>93</sup> Communication on Integrated Product Policy (IPP) of 18 June 2003.

<sup>94</sup> Report by the High Level Group headed by Mr. Wim Kok (November 2004).

<sup>95</sup> Communication on the Report on the implementation of the Environmental Technologies Action Plan (January 2005).

practical tools for assisting public authorities in implementing sustainable procurement and its integration with existing environmental management systems.<sup>96</sup> The Commission has also established an environmental database containing basic environmental information, referring to national and EU eco-labels where appropriate.<sup>97</sup>

As regards the use of procurement for meeting the needs of those who are disabled, the Commission has supported the establishment of a Pilot Project (“Build for All”) to mainstream disability policies, in particular promoting accessibility to the built environment. The Commission had established an Expert Group on Full Accessibility, which delivered its conclusions at the end of 2003, the European Year of People with Disabilities. The report<sup>98</sup> identified a lack of awareness as one of the most important obstacles to achieving accessibility in the built environment. The report also recommended that Guidelines should be produced that would help tenderers to comply with the new provision of the Directive. In January 2005, the Commission helped launch the “Build for All Reference Manual,” as part of a public consultation. The manual gives guidance in the establishment of essential accessibility criteria, and a methodology for step-by-step implementation of accessibility as provided for by the EU Public Procurement Directives. According to the Manual, Corporate Social Responsibility is one of the reasons for why the issue needed to be addressed.<sup>99</sup> “The concept of Corporate Social Responsibility is increasingly pressed for by political decision makers at all levels of Government and, as a result, is increasingly being highlighted as an important criterion in Public Procurement decisions. That is to say that there is a growing tendency to require that companies who are entrusted with the execution of large public Works contracts are actively engaged in pursuing Corporate Social Responsibility within their structures.”

#### *Developments in the Member States*

We have seen that the linkages between public procurement and CSR were being developed in the Member States during the 1990s. This activity substantially increased, however, during and after the process of “clarification” discussed above. We can point to several significant legal developments in the Member States. Among those “CSR-supportive policies” in the field of public procurement listed on the Commission’s CSR website, the Belgian example fits into this category. In November 2001, the Belgian government approved the introduction of a social clause for certain federal public procurement contracts favouring the inclusion of disadvantaged groups (for example, 5 percent of the total share of the contract is to be used to hire long term unemployed people.)<sup>100</sup> Since March 2001, the French law on public procurement authorises the inclusion of social and environmental considerations among the clauses of public procurement contracts (art 14). A new reform, which is being presently elaborated, will introduce sustainable development and high quality environment in

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<sup>96</sup> [www.iclei-europe.org/leap](http://www.iclei-europe.org/leap).

<sup>97</sup> <http://europa.eu.int/comm/environment/gpp/guidelines.htm#database>.

<sup>98</sup> “2010 A Europe Accessible for All,” October 2003, available at <http://www.eca.lu/upload/egafin.pdf>

<sup>99</sup> P. 8.

<sup>100</sup> [http://europa.eu.int/comm/employment\\_social/emplweb/csr-matrix/csr\\_topic\\_allcountries\\_en.cfm?field=14](http://europa.eu.int/comm/employment_social/emplweb/csr-matrix/csr_topic_allcountries_en.cfm?field=14)

public procurement criteria.<sup>101</sup> We can also point to significant developments in the practice of procurement, although changes in practice are very uneven across the Community. The 2005 European Commission survey on the state of play on green public procurement in the Member States found that seven Member States (Austria, Denmark, Finland, Germany, the Netherlands, Sweden and the UK) were practicing a significant amount of green public procurement. In these countries 40-70% of all tenders published on Tenders Electronic Daily (TED) during the past year included environmental criteria. However in the remaining 18 countries, this figure was below 30%.<sup>102</sup>

Whilst the approaches developed by the Community go some way to explain the development of responsible procurement in the past decade, it is by no means a complete explanation, whether at the level of the Community or domestically. Particularly in the latter, whilst Community law appeared to *permit* public bodies to introduce social and environmental issues, it did not require it, so we need further explanations. In particular, three developments encouraged the greater use of public procurement to achieve social and environmental objectives in Member States: the growth of the environmental movement, and its gradual evolution into a movement for “sustainable development,” developing strategies for greening public procurement;<sup>103</sup> the alliance between “old social movements,” such as trade unions,

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<sup>101</sup> [http://europa.eu.int/comm/employment\\_social/emplweb/csr-matrix/csr\\_topic\\_allcountries\\_en.cfm?field=14](http://europa.eu.int/comm/employment_social/emplweb/csr-matrix/csr_topic_allcountries_en.cfm?field=14)

<sup>102</sup> Bouwer M, de Jong K, Jonk M, Berman T, Bersani R, Lusser H, Szuppinger P, 2005. Green Public Procurement in Europe 2005 (<http://europa.eu.int/comm/environment/gpp/media.htm#state>).

<sup>103</sup> The United Nations Conference on Environment and Development (UNCED) held in Rio de Janeiro, Brazil in 1992 (the so-called “Earth Summit”) was a turning point for the development of the use of public procurement for green purchasing. The Rio Declaration on Environment and Development was adopted by more than 178 Governments. Agenda 21, as it came to be called, was a plan of action to be taken globally, nationally and locally by organizations of the United Nations, governments, and others in many areas in which humans impact on the environment. Agenda 21 (Paragraph 4.23 of chapter 4) called for governments to exercise leadership through government purchasing (procurement was addressed in element C of the CSD Work Programme on Changing Consumption and Production Patterns adopted at the third session of the CSD in 1995). A Commission on Sustainable Development (CSD) was created in December 1992 to ensure effective follow-up of UNCED, to monitor and to report on implementation of the agreements at the local, national, regional and international levels. The 1997 Programme for the Further Implementation of Agenda 21 further encouraged governments to take the lead in changing consumption patterns by improving their own environmental performance with action-oriented policies and goals on procurement, the management of public facilities and the further integration of environmental concerns into national policy-making. The full implementation of Agenda 21, the Programme for Further Implementation of Agenda 21 and the Commitments to the Rio principles, were reaffirmed at the World Summit on Sustainable Development (WSSD) held in Johannesburg, South Africa from 26 August to 4 September 2002. Changing consumption and production patterns was, indeed, seen as one of the overarching objectives of and essential requirements for sustainable development, as recognized by the Heads of State and Governments in the Johannesburg Declaration. The Johannesburg Plan of Implementation called for the development of “a 10-year framework of programmes in support of regional and national initiatives to accelerate the shift towards sustainable consumption and production” (chapter 3). The framework should strengthen international cooperation and increase exchange of information and best practices to facilitate the implementation of national and regional programmes to promote sustainable consumption and production. “[R]elevant authorities at all levels”, were encouraged “to take sustainable development considerations into account in decision-making, including on national and local development planning, investment in infrastructure, business development and public procurement (para 19).” This would include actions to “(c) Promote public procurement policies that encourage development and diffusion of environmentally sound goods and services.” For further developments, see Overview of progress towards sustainable development: a review of the

with new social movements, such as organisations claiming rights for disabled persons, in focusing on public procurement as a strategy; and the development of new forms of governance, such as the increasing requirement that major policies that cross departmental functions, such as gender equality, should be “mainstreamed” throughout government, including in procurement.

### *CSR and procurement in the United Kingdom*

A third explanation for the growth of social procurement at the national level derives for national approaches to CSR. Perhaps most significant, in this context, is the changing use of public procurement in the United Kingdom because this is linked more explicitly to a CSR agenda than in most other Member States.<sup>104</sup> During the 1980s and 1990s, under the successive Conservative governments, public procurement had been significantly reformed, in part by reducing the use of public procurement for social policy purposes. This was in part due to the need to cut public budgets; more efficient public procurement was thought to require a concentration on economic elements predominating in the idea of “value for money”. Local authorities, for example, which had experimented with incorporating social issues into their procurement, were substantially stripped of their ability to do so in 1988. However, alongside this increasing emphasis on an economically driven conception of “value for money” the other most significant development was the expansion of contracting as a method of governance. Public bodies were increasingly required to contract-out several basic services. In local government, for example, a regime of “compulsory competitive tendering” (or CCT) required a market-driven element to be introduced to service provision that resulted in work previously done in-house by council employees now being done by employees of private sector firms operating under contract to the public body. The election of a Labour government in 1995 (check), however, led to significant changes in this approach to procurement that enabled it to be increasingly incorporated into the new government’s increasingly strong CSR agenda.

The Labour governments’ approach to CSR is increasingly seen in the academic literature as part of an approach to governance based on partnership between business and the public sector, which aimed to meet the need for better public services without the tax and spend approach that had traditionally been associated with Labour governments. This led, for example, to considerably increased use of public-private partnerships in areas as diverse as the provision of housing, the building and running of schools, and the provision of social transfer payments. This increased use of the private sector resulted in “business ... assum[ing] a far greater profile in social life than hitherto.”<sup>105</sup> However, it also brought additional political risks to government, increasing the likelihood that the government would be seen as being no different to the Conservative administrations that they replaced, and be “punished for the

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implementation of Agenda 21, the Programme for the Further Implementation of Agenda 21 and the Johannesburg Plan of Implementation, Report of the Secretary-General, E/CN.17/2006/2, 15 February 2006, Para. 46).

<sup>104</sup> Darren Ford, ‘Public-sector procurement and corporate social responsibility’, in Christopher Stephen Brown, *The Sustainable Enterprise: Profiting from Best Practice* (Kogan Page, London, 2005), 49.

<sup>105</sup> Moon, *Government as Driver*, p. 7



irresponsibility of business”.<sup>106</sup> Together with this partnership approach to business came increased use of the rhetoric of CSR, leading to the United Kingdom being seen as one of the leading exponents of CSR in Europe. In this, the strategy of the Labour government matches, at the domestic level, the “Davos deal” discussed earlier.

One of the tools that government has used in helping to ensure that CSR is being delivered in the UK is the use of public procurement. It is by way of procurement, rather than increased use of traditional command and control regulation through legislation, that CSR is being encouraged. There has, as a result, been a significant shift in approach in policy on the use of procurement to deliver social and environmental outcomes. There have been two significant changes apparent. The first is that some of the most aggressively economically driven legislation on procurement introduced by the Conservative governments have been significantly changed, most notably the shift from CCT to a “best value” approach, and the amendment of the 1988 restrictions on the use of procurement for social purposes in local government. This has led to a significantly increased interest in the use of social and green procurement by major local government purchasers, not least in London. We can see this as one of the “initiatives [taken] to adjust the regulatory environment for CSR.”<sup>107</sup> The second identifiable change is the extent to which public procurement has been referred to in policy pronouncements since 2000 as a method of helping to deliver particular social or environmental goals, and the extent to which this is justified by using CSR influenced language.<sup>108</sup> The third identifiable change is the extent to which there have been attempts to put CSR procurement into practice. The more high profile attempts, for example, have been the Public Sector Sustainable Food Procurement Initiative,<sup>109</sup> the purchasing of sustainable timber products,<sup>110</sup> the purchase of “green” electricity,<sup>111</sup> and the incorporation of “fair trade” into some procurement.<sup>112</sup> Interestingly, in contrast with the debate at the EU level over the use of public procurement as an instrument of CSR, there has been relatively little opposition by business in Britain to these developments, and in some of these cases representatives of business have been involved directly in urging the use of public procurement.<sup>113</sup> Indeed, delivery of social outcomes through public procurement has

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<sup>106</sup> Moon, *Government as Driver*, p. 18

<sup>107</sup> Moon, *Government as Driver*, p. 14

<sup>108</sup> Strategy Unit, *Ethnic Minorities in the Labour Market* (March, 2003); CRE Guidance on equality and procurement (July 2003); National Procurement Strategy for Local Government (October 2003); Office of Government Commerce (OGC)/DEFRA, *Joint Note On Environmental Issues* (October, 2003); National Employment Panel Report to Chancellor (March 2005); Office of Deputy Prime Minister, *Code of Practice on Workforce Matters* (September 2005); Women and Work Commission, *Shaping a Fairer Future* (February 2006); Office of Government Commerce report, published this month; *The Equalities Review: Interim Report for Consultation* (March 2006).

<sup>109</sup> Ford, ‘Public-sector procurement and corporate social responsibility’, 52

<sup>110</sup> Office of Government Contracts, *Information Note 9/2002*, December 2002, *Timber Procurement by Government Departments*; Office of Government Commerce, *Timber Procurement by Government Departments: New Guidance and Revised Model Contract Specification Clause* (September 2003).

<sup>111</sup> Department for Environment, Food and Rural Affairs, *Changing Patterns: The UK Government Framework for Sustainable Consumption and Production* (September 2003).

<sup>112</sup> Office of Government Commerce, *Guidance on Fair and Ethical Trading* (2005).

<sup>113</sup> One example is the CBI membership of the Women and Work Commission. There may be several reasons. Moon has sought to explain why, in general, business may urge governments to be a driver of CSR: “This could be for reasons either of wishing to increase competitors’ costs or of wishing to penalise free riders which enjoy the reputational goods and propitious governance systems that CSR may generate for business in general.” Moon, *Government as Driver*, at 19.



become increasingly seen as a business advantage in tendering for future government contracts.<sup>114</sup>

### *Use of public procurement for CSR purposes and its relationship to law*

The use of public procurement to achieve increased compliance and its relationship to *law* is complex and multi-faceted. Whilst public procurement *policy* has assiduously tracked government policy more generally, government procurement *law* has generally lagged behind changes in policy developments, leaving lawyers and policy makers to either interpret the existing law to conform to the changing policy preferences, to change the existing law to reflect these preferences, or to restrict linking public procurement with the delivery of these policy preferences. We have seen that the potential mismatch between existing public procurement law and CSR has required procurement law to be re-examined to see to what extent there are legal barriers to delivering CSR through public procurement.

Examining the relationship between public procurement law and CSR brings into focus aspects of public procurement that are not generally examined in this context, in particular the nature of public procurement itself, and how it differs from procurement by private firms. It also brings into focus the importance of which definition of CSR we adopt. This arises because CSR has been seen by some to be defined by the absence of legal obligation. Corporate social responsibility, according to the European Commission, is “a concept whereby companies integrate social and environmental concerns in their business operations and in their interaction with their stakeholders *on a voluntary basis*”.<sup>115</sup> What does “voluntary” imply in this context? What role, in particular, does this imply for public policy and law? Whether CSR should be undertaken only on a voluntary basis or can be complemented with a governmental regulatory framework is, of course, a central issue in the debates surrounding CSR more generally.<sup>116</sup> In this chapter, we examined this debate through a case study of a hitherto largely unexplored issue: the developing relationship between corporate social responsibility and public procurement, concentrating particularly but not exclusively on the debate among the European Union institutions surrounding the relationship between public procurement and CSR.<sup>117</sup> We can identify three differing relationships, drawing on the helpful analytical structure developed by Doreen McBarnett.

One way of viewing the relationship between public procurement requirements and the law is by seeing to what extent such procurement requirements *go beyond the law*, requiring companies to take action that they would not otherwise have been required to take. This type of analysis, whatever its merits in each particular legal system has little utility as a comparative tool. The extent to which public procurement requires corporations with which government is contracting to go beyond what is otherwise

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<sup>114</sup> See, e.g. Accord, Corporate Social Responsibility Report, 2004.

<sup>115</sup> Commission Green Paper 2001, Promoting a European Framework for Corporate Social Responsibility, COM(2001)366 Final (emphasis added).

<sup>116</sup> For a recent review of some of the academic literature, see Marta de la Cuesta González and Carmen Valor Martínez, ‘Fostering Corporate Social Responsibility Through Public Initiative: From the EU to the Spanish Case’, 55 *Journal of Business Ethics*, 275-293, 2004

<sup>117</sup> For a description of the development of CSR in the EU, see Kristina K. Herrmann, ‘Corporate Social Responsibility and Sustainable Development: The European Union Initiative as a Case Study’, 11(2) *Indiana Journal of Global Legal Studies* 205-232 (2004).

legally required or to merely comply with the law, depends crucially on how far particular legal systems incorporate into law requirements that in other jurisdictions are left instead to the private sector to deal with on a voluntary basis. An example should make the issue clear. In the United States, the federal government has used public procurement as one of a raft of measures to ensure compliance by government contractors with extensive legal prohibitions of employment discrimination; these obligations apply to employers generally. In this case, public procurement does not go beyond the legal requirements on business; rather it reflects them. Public procurement is also used, however, to require businesses to undertake affirmative action measures that are not otherwise applicable to businesses generally. In this case, public procurement goes beyond what the law otherwise requires. Different jurisdictions draw the lines between what is legally required and what is not in the social and environmental fields very differently. Until recently, for example, most European countries did not have extensive prohibitions on racial discrimination. If we define CSR as involving businesses going *beyond the law*, then CSR procurement will differ significantly from jurisdiction to jurisdiction depending on the extent of social and environmental legislation otherwise applicable in that jurisdiction. Nor, as Fox, Ward and Howard have argued, does the rigid “voluntary versus regulatory” divide “make sense in the context of developing country economies where tools to encourage compliance with minimum legislation can be understood as a significant element of the CSR agenda.”<sup>118</sup>

Most developed countries now have extensive legal regulation of the use of government procurement. The reasons for this are complex and multi-faceted. Suffice it to say that there is often much more extensive limits on how governments can behave in undertaking procurement activity than will apply to private parties contracting together. This has given rise to considerable debate in most jurisdictions as to whether existing legal restrictions on public procurement restrict the use of CSR public procurement. A prominent issue, therefore, in the relationship between public procurement, CSR and the law is how far CSR procurement is *against the law*. This debate has involved considering the restrictions on public procurement that arise at the national level, at the regional (particularly, as we shall see, at the EU) level, and under WTO agreements. One feature of the debate is the extent to which there is disagreement at each of these levels as to what the implications of the legal restrictions are for CSR public procurement. The other feature of the debate is the apparent effect of this uncertainty on the willingness of public bodies to engage in CSR public procurement.

One effect of this uncertainty is that some jurisdictions have attempted to clarify what public bodies are able to do to use public procurement for achieving social and environmental goals by law. Here the issue is how far CSR procurement has been facilitated *through the law*. There have been differing mixes of three basic approaches that have been adopted in different jurisdictions on different social and environmental issues. In some contexts, legislation explicitly requires public bodies not to give contracts under certain circumstances.<sup>119</sup><sup>120</sup> In other contexts, legislation requires

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<sup>118</sup> Fox, et al., Public Sector Roles, p. 1.

<sup>119</sup> For example in Northern Ireland contracts may not be awarded to employers who are systematically in breach of the fair employment legislation. Northern Ireland Fair Employment and Treatment Order, 1998. In Taiwan, the Government Procurement Act 1998 “introduced a new requirement that products bearing the ‘Green Mark’ ecolabel ... should be given priority in government procurement and benefit

public bodies simply to consider the use of procurement for achieving social and environmental purposes. This may be done explicitly, for example, by allowing the award of contracts on a preferred basis to sheltered workshops established to provide employment for severely disabled workers. Or it may be done impliedly, for example, in the increasingly frequent requirement that public bodies “mainstream” equality issues in their policies and practices.

Law may, therefore, require the use of public procurement for some CSR purposes, permit it but not require it for other CSR purposes, and prohibit its use for a third group of CSR purposes. When a particular legal system does this at the same time (as is the case in many jurisdictions), it is likely to give at least the appearance of policy incoherence, leading to legal uncertainty. The uncertainty of the legal position regarding linkage to achieve CSR goals is a recurrent theme. Legal uncertainty has been seen as a feature of domestic, European, and international law.<sup>121</sup> Uncertainty to this degree is one barrier to the further development of CSR. Adopting linkage in public procurement is likely, therefore, to give rise to a need to ensure policy coherence and consistency across government, ensuring that all sections of government are “singing from the same hymn sheet”. One of the sites in which the debate about the appropriate role of CSR is played out is in the legal domain, by which I mean to encompass both legislative and interpretative contexts.

Increasingly, the need to resolve legal difficulties, and create clear rules of the game to allow CSR to flourish may require legal intervention, but this appears to give rise to a tension with the underlying principle of voluntarism, if that is defined as the absence of legal regulation. Halina Ward has argued that the “voluntary/regulatory” divide “operates as a brake on discussions of new legislation or regulation as a response to contested CSR issues.”<sup>122</sup> The ambiguity in the public procurement context is whether we define public procurement as government regulation (in which case it appears akin to “regulation” and thus contrary to the spirit of CSR’s voluntarism) or as a market operation in which government acts as a purchaser (in which case it appears akin to the incentive-based market-mechanisms discussed earlier and fits in squarely with CSR voluntarism.) The reality, of course, is that it is both, occupying an ambiguous space between the two, hence its attraction in many ways.

In the European Community context, an approach to the issue appears to have developed in the form of an *enabling model of law*. This involves legal regulation

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from a price advantage of 10 percent. Fox, et al., Public Sector Roles, 13; Halina Ward, Legal Issues in Corporate Citizenship (IIED, February 2003), p. 1. See also [www.epa.hov.tw](http://www.epa.hov.tw). In South Africa, recent legislation, the Minerals and Petroleum Resources Development Act (No. 28 of 2002) introduced affirmative procurement requirements as part of a raft of measures to increase black economic empowerment. See, R. Hamann, ‘Mining companies’ role in sustainable development: the ‘why’ and ‘how’ of corporate social responsibility from a business perspective’, 20(6) *Development Southern Africa* (2003), 237 at 250.

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<sup>121</sup> The confusion in the area of WTO law is well illustrated in Simon Zadek, Sanjiv Lingayah, and Maya Forstater, Social Labels: Tools for Ethical Trade: Final Report (European Commission, 1998), p. 77. See also Helle Bank Jørgensen and Peder Michael Pruzan Jørgensen, Margaret Jungk, Aron Cramer, Strengthening Implementation of Corporate Social Responsibility in Global Supply Chains, World Bank, IFC, October 2003), p. 31.

<sup>122</sup> Ward, Legal Issues, p. 1.

enabling the relationship between CSR and public procurement to flourish, for example by explicitly setting out a common standard of what public bodies may do in the use of procurement for achieving CSR goals, but not requiring it, and in reducing legal uncertainties that might lead to unwillingness to use public procurement for CSR purposes. In this context, then, the Community fulfils one traditional function of government, which is to create the conditions for market-mechanisms to operate effectively. In the United Kingdom context, we see government taking one step further towards embracing a regulatory role for procurement in the name of CSR, but one that appears to be accepted by business as an acceptable price for an otherwise business-friendly environment.