

RESPONSIBLE BUSINESS DUE DILIGENCE AND PUBLIC PROCUREMENT

Implications of new regulation

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Responsible business due diligence and government procurement: Implications of new regulation

The international policy landscape of responsible business conduct (RBC) is shifting towards binding, legal requirements for businesses. Emerging regulations on RBC due diligence will impact the way public buyers interact with global supply chains. In this context, governments should lead by example in promoting RBC in their own commercial activities, including public procurement. This paper analyses the implications of RBC due diligence regulation for government procurement. It analyses diverse effects for public administrations and explores potential effects of policy coherence on global supply chains.

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Executive summary

Responsible business conduct (RBC) standards have been evolving from a voluntary nature towards more binding, legal requirements on businesses. While RBC sets expectations for businesses, governments are facing calls to abide by the same standards in their interactions with global supply chains. Similarly, regulation on RBC due diligence increasingly includes requirements for public institutions.

Emerging regulation on RBC due diligence is a catalyst for public administrations to apply the same standards to their own activities. Many Adherents to the OECD Guidelines for Multinational Enterprises on Responsible Business Conduct (the Guidelines) have long integrated aspects of RBC in their public procurement, such as expectations around fair wages, workers' safety, human rights issues, and environmental goals, notably through strategic, sustainable, and green public procurement. Several international instruments, including the OECD Recommendation on the Role of Government in Promoting RBC and the OECD Recommendation on Public Procurement, highlight public procurement as one of the key areas governments can leverage to promote and exemplify RBC in their own activities. Existing linkages between public procurement and RBC-related objectives have created a foundation for policy coherence.

The effects on global supply chains from heightened RBC expectations towards public institutions are expected to be significant. According to OECD analysis, approximately 75 percent of OECD countries have enacted legislation on RBC due diligence. Adherent countries with RBC due diligence regulation represent a large share of global public procurement spending. Of the roughly USD 8.3 trillion spent on public procurement by Adherents to the Guidelines in 2021, 73% is spent in countries with RBC due diligence regulation as classified in this paper. In total, approximately USD 6.2 trillion is spent on public procurement in countries with RBC due diligence regulation. This highlights the vast public funds subject to RBC due diligence regulation, as many of the countries that spend the most on public procurement worldwide have adopted regulation, and most of them have explicit or implicit requirements on public institutions.

Countries adopt different approaches to integrate government responsibility in RBC due diligence regulation. To understand the nature of requirements set by regulation, the type of RBC due diligence regulation matters, which can be categorised as: corporate due diligence disclosure measures, mandatory due diligence measures, and product and market-based measures. Depending on the type of regulation, there are different effects for public institutions – and public buyers among them.

RBC due diligence laws involve government activities in three different ways.

1. Some laws present *explicit* requirements. These laws state that public institutions fall under the scope and create specific requirements for them.
2. A set of laws include *implicit* requirements. These laws do not specifically mention public institutions, but the general requirements and conditions defined in the law apply to public institutions.
3. Other laws do not include any requirements for public institutions.

Observed effects demonstrate how regulatory developments are creating an opportunity for countries to scale up procurement and RBC policy coherence for more efficient and effective public functions. Explicit and implicit requirements result in different outcomes at the public administration level:

- In countries with laws that set specific expectations for public institutions, more immediate adaptation in the administration tends to be required. Considering this immediate legal obligation, countries are scaling up capabilities, allocating additional resources, and formulating new guidance to implement the laws.
- Countries with laws presenting implicit requirements or no requirements on public institutions have often pursued legal or regulatory reforms on their procurement legislation to incorporate RBC-related expectations.

This research is a preliminary exploration of the legal landscape around RBC due diligence regulation, at the early implementation stages. Initial insights reveal that effects of policy coherence on socioeconomic and environmental outcomes may be significant. However, the spillover effects of RBC and public procurement policy coherence on global supply chains are not yet fully understood.

Insights from this study on implications of RBC due diligence for public buyers carries lessons for policy makers in pursuing policy coherence for RBC. Considerations fall into three themes:

- **Defining the role of government:** As attention to government's role in global supply chains grows, the understanding of where a government's responsibility on RBC starts and stops is sharpening. As a consequence, government strategy is set to change.
- **The pursuit of policy coherence:** The toolbox for pursuing a smart mix of policy measures to promote RBC is evolving and diversifying. Greater attention to policy coherence for RBC will require a more systematic approach, and a better-informed choice of policy measures.
- **Global impact of policy coherence:** With an increasing appreciation for the responsibility of governments on RBC, the definition of success of government action will change as well: pursuing RBC policy coherence successfully is likely dependent on impacts much beyond the domestic realm.

1 Introduction

The international community is increasingly paying attention to the impact of businesses on people, planet, and society. In the past few decades, the OECD and other international organisations (e.g. UN, ILO) have set out different international instruments defining key responsibilities for businesses to increase their contribution to sustainable development and to manage adverse impacts of their operations, business relations, and supply chains. With this growing concept of responsible business conduct (RBC), the policy landscape is shifting from more voluntary principles at the international level towards binding, legal requirements on businesses at regional, national, and subnational levels (see Chapter 3).

The role of governments in creating an enabling environment for RBC has grown in tandem, along with the expectation that governments also exemplify RBC in their own role as an economic actor (as set out in the Recommendation on the Role of Government in Promoting RBC). Public procurement is one prominent area of economic activity where governments interact with supply chains as an economic actor – and may be exposed to the same adverse risks and impacts as businesses. Given the volume of public procurement in OECD countries, which comprises more than 12% of GDP (OECD, 2023^[1]), and the leverage that governments have in their business relationships as the largest buyers across various industries (OECD, 2020^[2]), the impact of policy alignment between public procurement and RBC due diligence on sustainable outcomes for people, planet, and society could be significant. OECD countries already have a strong history of incorporating some RBC-related considerations into their public procurement frameworks, such as through strategic, sustainable, or green public procurement. To date, this has stopped short of integrating a comprehensive RBC due diligence approach to manage the full scope of potential adverse impacts covered by the OECD Guidelines for Multinational Enterprises on Responsible Business Conduct (the Guidelines). Emerging RBC due diligence regulation on businesses, however, may impact public institutions by requiring them to follow the same actions around conducting or reporting on RBC due diligence.

As emerging RBC due diligence regulation is targeted at businesses, the way that they impact public institutions, and public procurement systems in particular, is an unexplored area. This paper seeks to analyse the ways in which different types of RBC due diligence regulations implicate public procurement, regardless of whether there are RBC aspects already integrated into country-level public procurement systems. In order to gain a comprehensive understanding of what these implications look like, the paper presents a typology for classifying emerging RBC due diligence regulation and what types of requirements on public institutions emerge – if at all. These requirements may be explicit, where the law specifies that public institutions must abide by the same conduct on RBC due diligence as businesses, or more implicit requirements that infer public institutions are covered in the scope and parameters of the law. Understanding these implications is crucial to mapping their effects, as explicit and implicit requirements result in different outcomes at the public administration level. Overall, this paper seeks to demonstrate that public administrations would benefit from anticipating and preparing for the growing effects of these regulatory trends, to both keep pace with an evolving legal context and to also promote better impact of these regulations.

Countries are taking various approaches towards RBC due diligence and public procurement policy coherence. Some countries feature explicit requirements in RBC due diligence regulation for public institutions and thus have scaled up training, guidance, and other efforts to increase capabilities to

implement the requirements. Countries with laws presenting implicit requirements on public institutions have adopted regulatory reforms that aim at facilitating the inclusion of RBC due diligence expectations through requirements in the public procurement legal framework. Pursuing policy coherence brings unique legal and regulatory challenges for public administrations seeking to bring together two distinct areas of policy – and highlights resource and capacity constraints of public administrations. Yet, clear opportunities emerge to scale up procurement and RBC due diligence policy coherence for more efficient and effective public functions that are responsive to emerging regulatory developments. While the overall effects of policy coherence for global supply chains is an under-researched area, current evidence around the integration of RBC-related objectives into public procurement demonstrates the significant potential impact that RBC due diligence regulation can have on public procurement.

The paper is structured into five chapters that explore these questions around RBC due diligence regulation, public procurement, and policy coherence. Chapter 2 outlines the main international frameworks that have characterised the RBC and public procurement policy communities to date, how these two policy areas have historically interacted, and the increasingly binding nature of RBC policies. Chapter 3 presents the typology for classifying emerging RBC due diligence regulation and their requirements on public institutions, and more specifically, on public procurement, focusing on individual legislation. Chapter 4 focuses on the effects seen to date of RBC due diligence regulation on public procurement through country examples, and extrapolates on potential effects throughout global supply chains given limited available research and evidence. The chapter also highlights some practical challenges around public procurement and RBC due diligence policy coherence. Finally, Chapter 5 concludes with a set of forward-looking considerations for public institutions around how to anticipate the effects of emerging regulation on public administrations and pursue policy coherence.

2 Background: An evolving international agenda on RBC

2.1. International frameworks on RBC

The international policy landscape on RBC in recent years is characterised by a trend towards increasingly binding rules. This evolution is most visible in policy developments at the national level (see Chapter 3) but rooted in the international frameworks on RBC that have been setting the bar and providing inspiration on RBC for decades. Three instruments constitute the core of the international principles and standards on RBC (UN OHCHR et al., n.d.^[3])

- The **OECD Guidelines for Multinational Enterprises on RBC (the Guidelines)**: The Guidelines are recommendations addressed by governments to multinational enterprises to enhance the business contribution to sustainable development and address adverse impacts associated with business activities on people, planet, and society (OECD, 2023^[4]). First introduced in 1976, the Guidelines have been most recently updated in 2023 (OECD, 2023^[4]). The currently 52 Adherents commit to promoting the Guidelines and the voluntary principles and standards that they establish (OECD, 2023^[4]).
- The **Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy (ILO MNE Declaration)**: The ILO MNE Declaration is an instrument adopted by governments, employers, and workers, first in 1977 and then updated several times (most recently in 2022). It provides guidance to enterprises (multinational and national) on social policy and inclusive, responsible, and sustainable workplace practices. The ILO adopted several other relevant international instruments focusing on the labour related aspects of RBC (OECD, 2023^[4]; OECD, 2022^[5]; ILO, 2024^[6]).
- The **United Nations Guiding Principles on Business and Human Rights (UNGPs)**: The UNGPs, established in 2011 by the United Nations (UN) Human Rights Council, are a set of guiding principles that apply to states and businesses to prevent, address, and remedy human rights abuses in business operations. The UNGPs describe the state's duty to protect human rights in their territory and/or jurisdiction, the responsibility of businesses to respect human rights and comply with applicable laws, and the responsibility of states to provide access to effective remedy when human rights abuses occur (United Nations, 2011^[7]).

The three instruments align with and complement each other, setting overarching guidelines for promoting RBC, and outlining how risk-based due diligence can help avoid and address negative impacts in supply chains (UN OHCHR et al., n.d.^[3]). The UNGPs refer to the concept of Business and Human Rights, while the Guidelines use the encompassing term of Responsible Business Conduct. Although different terms, these concepts both focus on the responsibility of businesses to prevent and mitigate adverse impacts. Corporate Social Responsibility (CSR) and Environmental, Social and Governance (ESG) are other terms that have historically been used for similar purposes.¹ This paper will use the more specific term RBC. RBC sets out an expectation that all businesses – regardless of their legal status, size, ownership or sector

– avoid and address negative impacts of their operations, including in their value chain, while contributing to sustainable development in the countries where they operate. It includes an expectation that businesses will undertake risk-based due diligence to identify, assess, and mitigate risks in their core operations and in their supply chains and relationships.

2.2. The role of government in promoting RBC

Together, the above-mentioned instruments recognise the role that governments play in creating an enabling environment for RBC to drive, support, and promote responsible business practices (OECD, 2023^[8]). It is the OECD Recommendation on the Role of Government in Promoting RBC that establishes the expectation that governments adopt and enforce relevant laws, regulations, and policies that promote, enable and support responsible business conduct (OECD, 2023^[8]). See Box 1 for additional details on the Recommendation.

Box 1. Recommendation on the Role of Government in Promoting RBC

The 2023 OECD Recommendation on the Role of Government in Promoting RBC (the Recommendation) represents a dedicated instrument focusing exclusively on activities undertaken by *governments* (not business), i.e. how governments can foster the uptake of responsible business practices. The Recommendation is a comprehensive instrument aligned with the Guidelines, the UNGPs and ILO MNE Declaration.

The Recommendation lays out a set of principles and policy recommendations to assist governments and stakeholders in their efforts to design and implement policies around RBC, bringing together guidance on government policies and policy coherence for RBC from existing OECD standards. The Recommendation seeks to highlight governments' central role in creating an enabling policy environment for RBC through domestic legislation, policies, standards, and initiatives, raising awareness on the mainstreaming of RBC standards at the national level, and increasing the visibility of what governments are doing to promote and advance RBC standards.

The Recommendation outlines the ways in which governments, through their own economic activity, can incentivise businesses to behave responsibly (OECD, 2023^[8]). The Recommendation identifies public procurement as one of these key economic activities.

Source: OECD (2023^[8]), OECD Recommendation on the Role of Government in Promoting Responsible Business Conduct, <https://legalinstruments.oecd.org/en/instruments/OECD-LEGAL-0486>

The Recommendation encourages governments to lead by example and take measures to promote and exemplify RBC in their role as economic actors, including through public procurement, State-Owned Enterprises (SOEs), and government investment. Supply chains associated with public procurement face the same risks related to human rights, labour rights, slavery, and environmental degradation as all supply chains, yet, until recently, this topic has not been subject to the same level of policy attention. The 2015 OECD Recommendation on Public Procurement was the first international instrument to highlight the potential role of public procurement in promoting RBC (OECD, 2015^[9]). Today, emerging laws that address business activities are also affecting the public sector in turn as governments purchase from this regulated market. The three other main international instruments on RBC address the role of government in promoting RBC more broadly (see Box 2).

Box 2. How is the role of government in promoting RBC featured in other international instruments?

The Guidelines

With the 2023 update, the Guidelines now recognise the role that governments play with respect to RBC, which includes creating an enabling policy environment as well as promoting policy coherence on RBC at the national and international level (OECD, 2023^[4]).

ILO MNE Declaration

The majority of principles in the ILO MNE Declaration addressed to governments speak to how governments should set and implement RBC expectations, including through policy, enforcement measures, awareness raising, and training. A limited number speak to policy coherence or the role of government as an economic actor. Principle 52 addresses the need to reflect workers' rights in incentives for foreign investment as a policy area through which governments can encourage RBC (ILO, 2022^[10]; ILO, 2024^[6]).

UN Guiding Principles

The UN Guiding Principles contain details on the role of governments in two of its three pillars, in the first pillar on the “State Duty to Protect Human Rights” and in the third pillar on “Access to Remedy”. Of note, the UN Guiding Principle 6 specifies that “States should promote respect for human rights by business enterprises with which they conduct commercial transactions” (United Nations, 2011^[7]).

Source: OECD (2023^[4]), OECD Guidelines for Multinational Enterprises on Responsible Business Conduct, https://www.oecd.org/en/publications/oecd-guidelines-for-multinational-enterprises-on-responsible-business-conduct_81f92357-en.html
ILO, (2022^[10]), Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy, <https://www.ilo.org/publications/tripartite-declaration-principles-concerning-multinational-enterprises-and-3>
ILO, (2024^[6]) What is the ILO MNE Declaration?, <https://www.ilo.org/resource/other/what-ilo-mne-declaration>
United Nations (2011^[7]), UN Guiding Principles on Business and Human Rights, https://www.ohchr.org/sites/default/files/documents/publications/guidingprinciplesbusinessshr_en.pdf

2.3. Governments leading by example: The case of public procurement

As highlighted above, governments utilise various avenues to promote RBC. Aside from setting policy, governments can lead by example, i.e. by applying the same RBC standard that they expect from businesses. This can mean, for example, that State-Owned Enterprises (SOEs) conduct due diligence. Public procurement has a particular place in the toolbox of government's own economic activity as it is associated with large financial sums and close linkages to businesses unlike many other government activities (OECD, 2020^[2]).

Public procurement refers to “the purchase by governments and state-owned enterprises of goods, services, and works” (OECD, n.d.^[11]). Public procurement on average accounts for 12.9% of GDP in OECD countries (OECD, 2023^[11]). Government contracting is often linked to sectors that have been associated with human rights and labour rights violations in supply chains, such as infrastructure and construction, healthcare, and the textile industry (OECD, 2020^[2]) Governments are often the largest buyers in these industries (OECD, 2020^[2]) and thus have an impact on the businesses they contract with and ultimately on the realities of workers in these supply chains. National public procurement frameworks have undergone a considerable shift from a purely cost-focused approach to a full life-cycle approach, including the consideration of environmental and social costs as part of total value for money (OECD, 2020^[2]).

Governments face calls to further integrate RBC considerations in their purchasing. This is illustrated by a number of international frameworks highlighting public procurement as one of the key tools that governments can use to promote RBC and related issues, and as a key policy area when working towards greater policy coherence. As mentioned above (see Box 1), the Recommendation encourages the use of “public procurement as a strategic tool for RBC and including RBC in procurement policies (regulatory and strategic frameworks), as well as promoting due diligence for RBC in public procurement.” (OECD, 2023^[8])

Governments have been using public procurement as a tool to achieve strategic policy objectives using various approaches. The 2015 OECD Recommendation on Public Procurement is the main OECD standard that supports the use of public procurement for strategic policy objectives (OECD, 2015^[9]). This instrument promotes the strategic and holistic use of public procurement, and points towards responsible business conduct as one strategic objective. For instance, strategic public procurement attempts to integrate economic, social, and environmental considerations into procurement frameworks (OECD, 2020^[2]). Countries have introduced these measures not just as formal policies or amendments to procurement frameworks, but also as soft strategies and action plans. The 2030 Agenda for Sustainable Development with its Sustainable Development Goals is another instrument that highlights public procurement (Goal 12) as part of efforts to promote sustainable consumption and production (United Nations, n.d.^[12])

Many Adherents to the Guidelines (as well as to the OECD Recommendation on Public Procurement) have long integrated aspects of RBC in their public procurement, such as expectations around fair wages, workers’ safety, human rights issues and environmental goals (OECD, 2020^[2]). The articulation of RBC and public procurement happens at a practical level (e.g., in heightened RBC expectations towards bidders in tender procedures), and at a policy level, visible in particular through aspects of RBC featured in the public procurement legal and regulatory framework (and vice versa, see Chapter 4). Green public procurement strategies are especially prominent amongst OECD countries. By the end of 2022, 92% of OECD and accession countries had adopted green public procurement policy or legal frameworks establishing either the mandatory use of green requirements in public tenders, or incremental targets such as the percentage of goods and services subject to green strategies (OECD, 2024^[13]). For example, Lithuania committed to increase the use of green criteria in public spending, boosting the percentage of green procurement procedures from 5% in 2020 to 94% by 2023 (Open Contracting Partnership, 2023^[14]). Related to social risks and impacts, many countries have socially responsible public procurement strategies, or include provisions related to social issues (such as labour rights) in public procurement laws.

However, despite Adherents’ commitments, not all Adherents have comprehensive policy frameworks addressing all RBC objectives in public procurement. Environmental objectives are more often integrated into different phases of the procurement cycle, but RBC due diligence expectations, for example, feature less in laws and regulations covering public procurement (OECD, 2020^[2]). In fact, only about 50% of OECD countries have developed strategies to assess, prevent, and manage risks in the public procurement cycle (OECD, 2020^[2]). Yet, countries have been implementing risk assessments in public procurement processes. One such example is seen in Bulgaria, where the municipality of Gabrovo conducted an audit to assess the potential harm concerning the environment and other energy-related harm as the first step when awarding tenders to modernise street lighting in the city. The audit allowed for adapted public procurement criteria to consider the environmental impact of lighting, such as encouraging the use of LED lighting. Thus, countries are making meaningful progress in promoting due diligence and risk assessments through public procurement.²

Researchers have noted the different speed with which policy makers implement RBC-related legislation in general and the compared lack of integration of RBC considerations in the public procurement legal and regulatory frameworks (McCrudden, 2007^[15]; Ankersmit, 2020^[16]). The progress OECD countries have made to date in integrating social, environmental, and ethical issues into public procurement frameworks is palpable – but there is little research that measures the broad impact of these considerations.

An extensive analysis of the evolving regulatory developments in public procurement-focused legislation is outside the scope of this research. As previously discussed, research abounds on how public procurement legislation can promote RBC-related objectives and the substantial progress governments have made in this area to date. This progress in the integration of RBC into public procurement can help facilitate the implementation of RBC due diligence regulations by providing a strong foundation for policy alignment. Adaptations of responsible public procurement systems, however, rely on a separate field of research that consider the intricacies and internal dynamics of national public procurement systems. The value-added of *this* paper stems from the analysis of how policy and regulation on RBC due diligence presents implications for public procurement, regardless of whether there are RBC aspects already integrated into country-level public procurement systems.

2.4. Promoting RBC through non-binding frameworks

Voluntary or non-binding policy frameworks are part of the “smart mix” governments can employ to encourage RBC. A “smart mix” means that governments rely on a variety of measures, including policies, regulation, and their own governmental activities to implement RBC commitments. Binding policy is the main focus of the following chapters. This sub-section will demonstrate how non-binding policy frameworks have been a central part of government efforts to promote RBC, often pre-dating binding policy frameworks. Government’s own efforts in “walking the talk” on RBC have featured in these plans as well. Public procurement, specifically, has been identified as a strategic tool by which countries can promote and exemplify RBC, as highlighted by the Recommendation on the Role of Government in Promoting RBC (OECD, 2023^[8]). An analysis of the current role of non-binding policy frameworks reveals important insights on the growing role of government in promoting RBC. Two types of frameworks are particularly important for the area of RBC and public procurement: National Action Plans on Business and Human Rights, as well as National Sustainable Development Strategies.

National Action Plans on Business and Human Rights

National Action Plans (NAPs) on Business and Human Rights or Responsible Business Conduct are among policy frameworks adopted by governments to set out commitments in a specific policy area and actions towards achieving them (Danish Institute for Human Rights, 2023^[17]). NAPs have been used to implement the UNGPs – but can also be used to promote RBC more broadly. According to information by the UN, 26 countries have developed a NAP to date (UN Working Group on Business and Human Rights, 2023^[18]).

A number of NAPs set expectations on public procurement specifically. Repeatedly, NAPs are considered an opportunity to further policy coherence in two ways: by contributing to an effort to adapt country public procurement systems to better align with RBC expectations, and by using public procurement as a tool for achieving RBC.

Peru’s 2021 NAP is an example where public procurement is identified as a tool to broadly incentivise RBC. Through public procurement, Peru sought to strengthen the regulatory and supervisory capacity of the government across priority areas, including reducing informality in the labour force, increasing transparency and anti-corruption efforts, eliminating child labour, and executing judicial reparation mechanisms (Peru Ministry of Justice and Human Rights, 2021^[19]). First, the government committed to assessing the current public procurement system and its relation to RBC standards. Second, based on this assessment, the government committed to “preventing the State from contracting with companies that commit serious human rights violations, specifically those related to forced labour and child labour, directly or through their supply chain, and promote and guarantee respect for human rights by companies in their supply chains” (Peru Ministry of Justice and Human Rights, 2021^[19]). Through their NAP, Peru sought to

promote greater cooperation between the public and private sectors for more responsible business practices. Public procurement was intended to serve as the bridge.

Similarly, Kenya's NAP process demonstrates how countries are using NAPs to further RBC and public procurement policy coherence – by directly looking at areas for improvement and alignment in the legal framework and enabling environment in these two areas. Kenya's 2020-2025 NAP contains a policy action to review existing procurement policies, laws, and standards and their impacts through the lens of the state's human rights obligations, such as the participation of women, persons with disability, and other vulnerable groups (Danish Institute for Human Rights, 2023^[20]). The government undertook an in-depth review of laws, regulations, standard tender documents, and guidance related to public procurement and human rights, with a focus on gender equality and responsible business conduct (Danish Institute for Human Rights, 2023^[20]). The report then contains a series of recommendations to enhance existing policies and scale up capabilities to further incorporate human rights and sustainability into public procurement in Kenya (Danish Institute for Human Rights, 2023^[20]).

The United States (US) NAP also recognises the importance of using public procurement to incentivise RBC. The newly updated NAP strengthens commitments around existing US prohibitions on human trafficking and child labour in federal supply chains (United States Government, 2024^[21]). The NAP brings together commitments that involve multiple US public agencies. It works on areas such as identifying sectors with high risk to labour rights abuses for federal contracts, developing best practices around risk-based due diligence and public procurement, and the consideration of regulatory changes to reduce or eliminate the ability to contract with subcontractors who have been debarred, suspended, or proposed for disbarment (United States Government, 2024^[21]).

Beyond NAPs, countries have adopted national strategies or guidelines to formulate plans for promoting and enabling RBC. Japan, for instance, published Guidelines on Respecting Human Rights in Responsible Supply Chains, as part of their implementation plans for their NAP on Business and Human Rights (Government of Japan, 2022^[22]). Besides these guidelines, the government is requiring businesses to make efforts to respect human rights through bidding instructions and contracts in public procurement. Japan's direct application of RBC-related obligations to public procurement processes demonstrates how countries can choose to adapt RBC requirements to the public sector.

Sustainable Development Strategies

National Sustainable Development Strategies (NSDS), developed under the SDGs, often reference the private sector's role in implementing the 2030 SDG agenda. An NSDS is “a coordinated, participatory and iterative process of thoughts and actions to achieve economic, environmental, and social objectives in a balanced and integrative manner” (United Nations, 2022^[23]). Many NSDSs either include specific goals around business and human rights, or they intend to coordinate with other state-level policies that address RBC.

Generally, NSDSs tend to focus on environmental sustainability and economic development. As a consequence, public procurement, which is included in most NSDS as it is part of Sustainable Development objective 12.7, is more often discussed as a tool to achieve these two goals specifically. Fewer NSDSs address the role of government in promoting RBC or specifically the intersection of RBC and public procurement. Germany discusses the importance of integrating public procurement and RBC issues for achieving the development goals under the SDG agenda (German Federal Government, 2021^[24]). Other countries, such as the Czech Republic and Austria, give awards to businesses for demonstrating responsible business practices as a way to encourage sustainability in the private sector (Ministry of the Environment of the Czech Republic, 2021^[25]; Austrian Federal Chancellery, 2020^[26]).

2.5. The emergence of binding rules

Efforts by policy makers to render RBC due diligence requirements more binding have developed in a context of observers arguing for such binding requirements, pointing out limitations of non-binding implementation mechanisms (Wettstein, 2021^[27]; Cantú Rivera, 2019^[28]) or mechanisms to create accountability for corporate human rights and environmental impacts (Gustafsson, Schilling-Vacaflor and Lenschow, 2023^[29]). The Key Issues Paper of the OECD RBC Ministerial (February 2023) highlights the “significant increase in regulation and industry, government and multi-stakeholder sustainability initiatives embedding expectations on RBC due diligence” (OECD, n.d.^[30]).

As highlighted by some researchers, national legislation shapes the context in which businesses and other actors interact with each other in global value chains more immediately than other government activities (Chambers and Vastardis, 2021^[31]). Laws that require due diligence policies and practices, laws that mandate transparency and reporting by businesses, and product and market-based measures on certain goods or sectors are considered to be potentially more powerful in achieving company compliance with RBC standards than voluntary measures (Gustafsson, Schilling-Vacaflor and Lenschow, 2023^[29]).

The past decades have seen the emergence of these laws in Australia, Canada, the EU, France, Germany, the Netherlands, Norway, Switzerland, the United Kingdom, and the United States. Some observers are calling this development a “cascade of a new norm on foreign corporate accountability” (Gustafsson, Schilling-Vacaflor and Lenschow, 2023^[29]). Other regions, such as Latin America and Asia, are also initiating conversations around potential due diligence legislation.³ According to OECD analysis, approximately 75 percent of OECD countries in total have enacted legislation on RBC due diligence.

The European Union (EU) has been one of the most important sources of regulation relevant for RBC and due diligence in recent years – both on EU-level and through national legislation by EU member states. These developments further illustrate the shift towards more binding regulation by governments. As highlighted by various EU strategies on RBC and related concepts, the EU has pursued a smart mix to promote RBC. Regulations adopted as part of this mix have increased in number and ambition, successively creating a binding legal and regulatory framework for businesses (and EU member states) (European Commission, n.d.^[32]; European Union, 2016^[33]; European Union, 2011^[34]; European Commission, 2019^[35]; European Union, n.d.^[36]; European Commission, 2019^[37]).

The Directive (EU) 2024/1760 of the European Parliament and of the Council of 13 June 2024 on corporate sustainability due diligence and amending Directive (EU) 2019/1937 and Regulation (EU) 2023/2859 (Text with EEA relevance) (commonly known as the Corporate Sustainability Due Diligence Directive (CSDDD)), which entered into force on 25 July 2024, sets unprecedented requirements for businesses (with at least 1000 employees and with EUR 450 million net turnover) to conduct human rights and environmental due diligence (Directive (EU) 2024/1760, 2024^[38]). The final text of the law includes explicit references to public procurement, creating the potential for effects for both the private and public sector. The Directive states that contracting authorities and entities may take into account compliance with the requirements in the Directive or their voluntary implementation as part of the award criteria for public and concession contracts in procurement procedures and as an environmental or social condition that contracting authorities may in accordance with the public procurement directives, lay down in relation to the performance of public and concession contracts (Directive (EU) 2024/1760, 2024^[38]).

EU directives are expected to have an impact on people and planet across the globe. With a GDP of close to EUR16 trillion in 2022, the European Union is one of the most powerful economic regions (OECD, 2023^[39]). According to the EU’s statistics office Eurostat, the EU’s imports and exports are the largest globally as measured in absolute values (Eurostat, 2023^[40]). In short, EU businesses and their conduct across value chains have an immense impact globally.

Emerging legislation on RBC and due diligence vary in scope, type, as well as in enforcement mechanisms, but all include either a direct or indirect expectation that companies carry out due diligence on their supply chains. These laws emphasise human rights and the environment, and push companies to seek to prevent and mitigate the impacts caused by their suppliers (Gustafsson, Schilling-Vacaflor and Lenschow, 2023^[29]). Governments are enacting these laws to harden their commitment to international instruments, and to strengthen the overall RBC enabling environment. Some of these laws include a direct focus on the government's role in RBC – whether that is as an enforcer of the law, or through its own activities as an economic actor in global value chains.

3 Public procurement in emerging RBC due diligence regulation

Emerging legislation on RBC due diligence stipulates key requirements for businesses around their impact on people, planet, and society. Yet approaches differ. Aside from their role as enforcer, public institutions are implicated in an increasing number of RBC laws in their role as an economic actor. These types of legislation interact with government institutions in distinct ways, highlighting important insights towards a deeper understanding of the current legal landscape shifting towards requirements for public institutions.

As this chapter will show, analysing the nature of the requirements on public institutions (and on public procurement specifically) in a more systematic and comprehensive way demonstrates the unique ways countries are pursuing policy coherence in practice, and allows for points of comparison between the different approaches. This analysis also allows for broader conclusions to be drawn around trends and effects related to RBC due diligence and public procurement policy coherence.

While the extensive developments related to social and environmental objectives in public procurement systems have been broadly analysed by scholars and practitioners, the role of public procurement in *RBC legislation* is largely unexplored. This chapter seeks to shed light on the interaction between public institutions and RBC due diligence legislation, by demonstrating and analysing what Adherent countries are doing in practice.

3.1. Classification of RBC due diligence regulation by type

The following analysis classifies RBC due diligence regulation by type, based on the core features of the law. Further, analysing what type of requirements for public institutions under each category of legislation helps reveal some of the implications for public procurement systems. The result of this analysis is summarised in Table 1 below.

The categorisation of emerging RBC due diligence laws follows the system developed by the OECD as part of its RBC Due Diligence Policy Hub (OECD, 2024^[41]), which defines three broad categories:⁴

1. **Corporate due diligence disclosure measures:** require public disclosure of information on what companies are doing to identify and address environmental and social risks in their operations and supply chains (OECD, 2024^[41]).
2. **Mandatory due diligence measures:** require companies to carry out due diligence in relation to specified adverse impacts associated with their operations, suppliers, and other business relationships, without introducing prohibitions on the import, export, or use of specific products (OECD, 2024^[41]).
3. **Product and market-based measures:** prohibit the import, placing on the market, export and/or use of products and commodities associated with adverse social and environmental impacts, subject to demonstration of adequate due diligence or due care (OECD, 2024^[41]).

Countries have also focused on a particular aspect of RBC – whether that is on a thematic issue such as modern slavery or child labour, or a sectoral issue such as minerals. Given this range of issues, the red thread between the types of legislation discussed in this chapter is that they incorporate due diligence as an integral and necessary feature, whether they directly require due diligence actions or not. The regulation of possibly harmful products (such as through products-ban legislation) requires a due diligence system to follow the law, and the disclosure of company practices around human rights, the environment, and social issues is based on information collected through a due diligence process.

3.2. Interaction of the RBC due diligence regulations with public institutions

While the laws in this analysis focus primarily on establishing requirements for businesses, the laws include at times requirements on governments. This chapter analyses *how* these laws address the activities of public institutions – a crucial question in examining how public procurement is increasingly being involved in RBC due diligence legislation. Overall, RBC due diligence laws appear to involve government activities in two ways: through enacting explicit, direct requirements on public institutions, or by creating implicit expectations that government follows certain requirements when it acts as an economic actor or interacts with the market that the regulation covers. For explicit requirements, the law clarifies directly (or explicitly) that public institutions fall under the scope. Laws with implicit requirements do not specifically mention public institutions as covered by the scope, but the public institution could be covered by the law if public institutions meet the (general) conditions defining the scope of the law. In addition, several laws do not include any requirements for public institutions at all. Table 1 details the different ways RBC due diligence regulation sets requirements for governments.

Table 1. OECD typology for analysing emerging RBC due diligence regulation

	Corporate due diligence disclosure measures	Mandatory due diligence measures	Product and market-based measures
Explicit requirements for public institutions	The law explicitly requires disclosure by public institutions on risks in their supply chains by mentioning public institutions in the law.	The law explicitly requires actions from public institutions towards RBC as part of their role as an economic actor and mentions conduct requirements for public institutions in the law.	The law explicitly requires that public institutions follow a market ban or regulation, by calling on their compliance.
Implicit requirements for public institutions	The law creates an expectation that public institutions disclose risks in their supply chains by inferring that all institutions with certain characteristics, regardless of their nature as public or private, must follow the law.	The law implicitly requires that public institutions undertake actions, such as due diligence, as part of their role as an economic actor, by inferring that all institutions, regardless of their nature as public or private, must follow the law.	The law implicitly requires public institutions to follow the market regulation, as it is implied that all actors in the supply chain must comply.
No requirements for public institutions	The law does not explicitly or implicitly require disclosure by public institutions on risks in their supply chains.	The law does not explicitly or implicitly require that public institutions undertake due diligence as part of their role as an economic actor.	The law does not explicitly or implicitly require public institutions to follow the market regulation.

The legislation analysed throughout this section comprises of primary legislation, which often provides the more explicit requirements for public institutions. However, many of the RBC due diligence laws also come with implementation decrees, guides, frameworks, and policy notes that elaborate the requirements of the law and its implementation, or issue new requirements. More formal secondary legislation (such as implementation decrees and other documents with a legal standing) can further clarify requirements, such as by providing detailed definitions for government activity, which institutions fall under reporting or conduct requirements, and how these processes should be conducted – and this is where implicit requirements appear for some countries.⁵

The following sections will analyse corporate due diligence disclosure measures, mandatory due diligence measures, and product and market-based measures, with examples of prominent country legislation (both primary and secondary where relevant), and discuss the implicit and explicit requirements placed on governments under the laws. Table 2 summarizes the different pieces of legislation discussed throughout the chapter that involve requirements on public institutions.

Table 2. Mapping of RBC regulations

	Corporate due diligence disclosure measures	Mandatory due diligence measures	Product and market-based measures
Explicit requirements for public institutions	Australia Modern Slavery Act, Canada Supply Chains Act	Germany Supply Chain Act, EU CSDDD	EU Deforestation Regulation, EU Batteries Regulation
Implicit requirements for public institutions	UK Modern Slavery Act	Norway Transparency Act	US Uyghur Forced Labor Prevention Act
No requirements for public institutions⁶	California Transparency in Supply Chains Act, EU Sustainable Finance Disclosure Regulation	French Duty of Vigilance Act, Norwegian Supply Chain Transparency Act	N/A

3.3. Corporate due diligence disclosure measures

Corporate due diligence disclosure measures aim to increase transparency and reporting on social and environmental risks in global supply chains by requiring companies to disclose certain types of risks and impacts and whether companies are taking or have taken any action to address them (OECD, 2024^[41]). Corporate due diligence disclosure measures do not require businesses to conduct due diligence as such, but to report on their efforts to address risks and the results of their efforts, which are often obtained by conducting due diligence. The literature around RBC due diligence legislation highlights that mandated corporate reporting can enhance accountability by providing information on company human rights and environmental risks, policies, and processes (Chambers and Vastardis, 2021^[31]). The information businesses disclose in the reporting process can be actionable, and may be used in the context of proceedings brought against companies or inform investment and purchasing decisions (Chambers and Vastardis, 2021^[31]). In some corporate due diligence disclosure measures, if companies cannot provide straightforward information or do not conduct due diligence, they must explain why (Mares, 2018^[42]).

Corporate due diligence disclosure measures exist in Australia, Canada, the UK, the US, and the EU. Several of these laws include explicit, direct expectations for public institutions, or have resulted in government action defined through key secondary legislation (see Table 3 for a summary of the classification). An analysis of the RBC due diligence laws from these four countries and the EU show that the approach towards government institutions' involvement differs across the laws, demonstrating the unique understanding of the role of government across countries. Australia and Canada include public institutions in the scope of their corporate due diligence disclosure measures, while the UK establishes government responsibility only in secondary legislation, through an implementation guidance document – while the law itself creates broad expectations (Modern Slavery Act, 2015^[43]; Modern Slavery Act, 2018^[44]; Bill S-211, 2023^[45]). The California law in the US (California Senate, 2010^[46]) and several EU laws do not include any mention of government institutions.

Table 3. Corporate due diligence disclosure measures with requirements for public institutions

	Corporate due diligence disclosure measures
Explicit requirements for public institutions	Australia Modern Slavery Act, Canada Supply Chains Act
Implicit requirements for public institutions	UK Modern Slavery Act

Adherents like Australia, Canada, and the UK have recognised the importance of including the government under corporate due diligence disclosure laws to boost trust and to serve as a role model in transparency. Each country presents unique approaches to how they define the role of government in their legislation. Australia and Canada's disclosure laws present the most explicit requirements on government institutions, mandating compliance with the same reporting and transparency measures as the private sector (see Box 3).

Box 3. Corporate due diligence disclosure laws with requirements for government institutions

Australia's Modern Slavery Act (2018)

The Act states that certain Australian entities and those conducting business in Australia and Corporate Commonwealth entities and companies must provide annual modern slavery statements to the Minister. The law applies to entities that have a consolidated revenue of at least AUD 100 million (EUR 61.7 million), irrespective of their public or private nature (Modern Slavery Act, 2018^[44]). The law stipulates explicitly that the Commonwealth must also comply. The implementation is decentralised across non-corporate Commonwealth entities while guidance and reporting is centralised – the responsible Minister must prepare a modern slavery statement for the Commonwealth, covering all non-corporate Commonwealth entities and their activities (Modern Slavery Act, 2018^[44]).

The government published a toolkit for procurement officers to develop capability and expertise in identifying, assessing, and managing modern slavery risks in operations and supply chains (Australian Government, 2018^[47]). This includes a risk screening tool, model modern slavery contract clauses, modern slavery tender clauses, and guidance and a supplier questionnaire (Australian Government, 2018^[47]). The toolkit is complemented by training and guidance for employees who are engaging in public procurement and contract management. These resources are designed to be used with the existing Commonwealth Procurement Framework (Australian Government, 2018^[47]).

Canada's Fighting Against Forced Labour and Child Labour in Supply Chains Act (Supply Chains Act, 2024)

The Act requires government institutions to report on (Supply Chains Act, 2024^[48]):

- The steps it has taken during its previous financial year to prevent and reduce the risk that forced labour or child labour is used at any step of the production of goods produced, purchased, or distributed by the government institution
- its structure, activities, and supply chains
- its policies and due diligence processes regarding forced labour and child labour
- the parts of its activities and supply chains that carry risks of forced labour or child labour and the steps it has taken to assess and manage that risk
- any measures taken to remediate any forced labour or child labour
- any measures taken to remediate loss of income to vulnerable families that results from steps taken to eliminate the use of forced labour or child labour in its activities and supply chains
- training provided to employees on forced labour and child labour, and
- how the government institution assesses its effectiveness in ensuring forced labour and child labour are not used in its activities and supply chains

The head of every government institution must report to the Minister of Public Safety on or before May 31 of each year. All reports are made publicly available in an online catalogue. Government institutions must also publish their report in a prominent place on their own websites (Supply Chains Act, 2024^[48]).

The reporting obligation also applies to any government institution producing, purchasing, or distributing goods in Canada or elsewhere. Under the Supply Chains Act, a government institution has the same meaning as in section 3 of Canada's Access to Information Act :

- any department or ministry of state of the Government of Canada, or any body or office, listed in Schedule I; and

- any parent Crown corporation, and any wholly-owned subsidiary of such a corporation, within the meaning of section 83 of the Financial Administration Act

Source: Modern Slavery Act (2018^[44]), The Commonwealth Modern Slavery Act 2018, <https://www.legislation.gov.au/C2018A00153/latest/text>
 Australian Government (2018^[47]), Addressing Modern Slavery in Government Supply Chains: A toolkit of resources for Government procurement officers, <https://modernslaveryregister.gov.au/resources/>
 Supply Chains Act (2024^[48]), Canada's Fighting Against Forced Labour and Child Labour in Supply Chains Act, <https://laws.justice.gc.ca/eng/acts/F-10.6/page-1.html>

Both the Australian and Canadian laws establish explicit requirements for public institutions, but the implementation and the application of the laws differ. Australia's mechanism for reporting is centralised through the Minister, who must prepare a modern slavery statement for the Commonwealth, covering all non-corporate Commonwealth entities, incorporating widespread reporting across each Commonwealth portfolio. On the other hand, Canada's decentralised approach involves widespread reporting from a range of federal government departments and agencies, as well as federal Crown corporations and wholly-owned subsidiaries thereof. Australia's Modern Slavery Act includes corporate Commonwealth entities or companies as reporting entities if they have a consolidated revenue of at least AUD 100 million for the reporting period, which is the same revenue-based threshold as for businesses in the Modern Slavery Act. Canada's law captures government institutions in their role as a producer, purchaser, or distributor of goods. Australia's law does not directly mention public procurement activities in the reporting requirements, but requires reporting entities (including the Commonwealth) to describe the actions taken to assess and address those risks. This is also reflected in accompanying guidance documents that mention procurement as one of the areas that the Commonwealth is expected to report on.⁷ Canada's law, on the other hand, acknowledges the role of public procurement in addressing forced labour and places reporting obligations on federal government institutions engaged in purchasing goods in Canada or elsewhere. Reports submitted to Public Safety Canada on behalf of the government institutions are publicly accessible in an online catalogue.⁸ Similarly, Australian modern slavery reports are also available on a central register, including commonwealth reports.⁹

Laws in the UK and US, of the same type, adopt a different approach regarding government institutions. The UK and US laws do not specify concrete requirements for public institutions. On the basis of the UK Modern Slavery Act, disclosure for some types of public institutions is mandated – however, this requirement is set in the implementation guides rather than in the law itself. The UK law itself includes limited, broad detail on which types of institutions have to submit a modern slavery statement. Section 54 (2) of the law requires disclosure by “commercial organisations” that “supply goods or services” and have a certain turnover to be defined (Modern Slavery Act, 2015^[43]). Section 54 (12) of the law defines “commercial organisation” as “body corporate” or partnership (Modern Slavery Act, 2015^[43]). As highlighted by some scholars (e.g. Martin-Ortega), certain public institutions might indeed meet the specified criteria of a commercial organisation under the Modern Slavery Act (Martin-Ortega, 2017^[49]). Many public institutions in the UK voluntarily commit to implementing the transparency requirements of the UK Modern Slavery Act and publish annual modern slavery statements (see Box 4).

Box 4. United Kingdom: A case of voluntary disclosure

The UK's Modern Slavery Act (2015)

The Transparency in Supply Chains (TISC) provision in the UK Modern Slavery Act seeks to address the role of businesses in preventing modern slavery from occurring in their supply chains (Modern Slavery Act, 2015^[43]). The Act requires that every organization carrying out business in the UK with an annual turnover of GBP 36 million (EUR 41.6 million) or more is required to produce a statement detailing the steps they have taken to ensure there is no modern slavery in their business and supply chains statement every financial year (Modern Slavery Act, 2015^[43]). If a business fails to produce a statement, the Secretary of State can seek an injunction through the High Court requiring compliance (Modern Slavery Act, 2015^[43]). Section 54 of the law defines the parameters of which organizations fall under the scope. The law does not directly mention public institutions and is not clear which public institutions are included, but they fall under the same requirements if they provide goods and services and meet the annual turnover parameters (Martin-Ortega, 2017^[49]).

The Government's voluntary commitment to publish modern slavery statements

In 2020, the government announced its intention to extend the modern slavery reporting requirement to public bodies with a budget of GBP 36 million (EUR 41.6 million) or more (Home Office, 2020^[50]). While an amendment to the Modern Slavery Act is still under discussion, in the meantime many public institutions are publishing voluntary modern slavery statements each year. The National Crime Agency, the General Medical Council, several universities and schools, and the Metropolitan Police Service are examples of institutions that publish such statements.

The government also published a Procurement Policy Note with modern slavery procurement guidance that sets out steps to identify and mitigate slavery risks in procurement, as well as a tool to help agencies assess risks in their contracts (Action Note PPN 06/20, 2020^[51]). Additionally, the government launched a Social Value Model, to encourage the integration of social objectives in public procurement.

Source: Modern Slavery Act (2015^[43]), UK Modern Slavery Act, <https://www.legislation.gov.uk/ukpga/2015/30/contents>
 Martin-Ortega (2017^[49]), Human Rights Risks in Global Supply Chains: Applying the UK Modern Slavery Act to the Public Sector, <https://doi.org/10.1111/1758-5899.12501>
 Home Office (2020^[50]), Transparency in supply chains consultation: Government response, https://assets.publishing.service.gov.uk/media/5f69c90ed3bf7f723e21c152/Government_response_to_transparency_in_supply_chains_consultation_21_09_20.pdf
 Action Note PPN 06/20 (2020^[51]), Procurement Policy Note – Taking Account of Social Value in the Award of Central Government Contracts, https://assets.publishing.service.gov.uk/media/5f6ccf89d3bf7f7237cf4015/PPN-06_20-Taking-Account-of-Social-Value-in-the-Award-of-Central-Government-Contracts.pdf

Public institutions in the UK, particularly the Home Office, have called for a revision of the UK Modern Slavery Act to extend the reporting requirement to public bodies explicitly in the law (Home Office, 2020^[50]). The UK Home Office voluntarily reports, integrating public procurement in the efforts towards eliminating risks in global supply chains, as demonstrated through their policy notes and procurement guidance materials. These reports are public, enabling civil society to scrutinise government activity. The UK Modern Slavery Act represents an important example of how RBC due diligence legislation can place implicit requirements on governments that result in voluntary compliance.

Another key piece of legislation regarding corporate due diligence disclosure is the California Transparency in Supply Chains Act. The Supply Chain Act only covers businesses, but mentions public procurement by pointing towards other California laws that set forth the responsibilities of contracting institutions related to disclosure or RBC objectives. The Act also points towards another bill related to public procurement, that

explains the core responsibility of contracting authorities to prohibit companies that support conflict minerals from being awarded a state contract.

Other disclosure-related laws, such as the EU Sustainable Finance Disclosure Regulation, do not cover public institutions and do not contain implicit requirements that result in any action.

3.4. Mandatory due diligence measures

Mandatory due diligence measures require corporate entities to conduct due diligence on adverse impacts linked to their own operations or in their supply chains. Mandatory due diligence laws have been emerging in France, Germany, Norway, the Netherlands¹⁰, and Switzerland, and seek to strengthen corporate accountability by requiring companies to identify, respond to, or report on adverse human rights and environmental impacts connected to their operations (OECD, 2024^[41]). The literature on RBC due diligence legislation points out that due diligence conduct legislation differs from corporate due diligence disclosure measures, in that it focuses more directly on mandating due diligence from corporate entities with the purpose of strengthening both availability of information and promoting concrete actions on due diligence (Chambers and Vastardis, 2021^[31]). By requiring businesses to conduct due diligence, and communicate the steps they have taken to prevent, mitigate, and remediate identified risks, accountability should increase (Chambers and Vastardis, 2021^[31]).

The French Corporate Duty of Vigilance Law is the first of its kind, and requires companies over a certain size to implement annual vigilance plans aimed at identifying and preventing human rights and environmental risks and impacts in their domestic and international operations (Chambers and Vastardis, 2021^[31]; LOI n° 2017-399, 2017^[52]). The French law requires both human rights and environmental due diligence as well as transparency measures (LOI n° 2017-399, 2017^[52]). Similar to the French law, Germany and Norway also adopted laws mandating human rights due diligence by businesses (LkSG, 2021^[53]; Prop. 150 L (2020–2021), 2021^[54]).

The majority of mandatory due diligence legislation does not explicitly cover public institutions – with the exception of the German Supply Chain Act and the EU CSDDD (see Table 4 below). The Norway Transparency Act implicitly covers public institutions, while the French, Dutch, and Swiss laws do not explicitly or implicitly cover or comment on the role of government as an economic actor. (LOI n° 2017-399, 2017^[52]; Prop. 150 L (2020–2021), 2021^[54]; SR 221.433, 2021^[55]; Staatsblad 2019-401, 2019^[56]).

Table 4. Mandatory due diligence measures with requirements for public institutions

	Mandatory due diligence measures
Explicit requirements for public institutions	Germany Supply Chain Act, EU CSDDD
Implicit requirements for public institutions	Norway Transparency Act

The German Supply Chain Act brings together the public and private sphere under the same law by directly including public institutions, and particularly public buyers, in its scope (see Box 5). The German Supply Chain Act underlines the importance of integrating RBC objectives into public procurement decisions, and creates expectations on public buyers to respect sanctions on private contractors not compliant with the Act, which is further detailed in a complementary law. As detailed below, under certain circumstances, public entities might need to apply the Act as well.¹¹ This presents a different approach to the previously discussed corporate due diligence disclosure laws in Australia and Canada – rather than enacting requirements for public institutions at large, Germany’s law focuses specifically on public buyers and how they are involved in the implementation and enforcement of the law (see Box 5).

Box 5. German Supply Chain Act: Public procurement as a tool for implementation

German Supply Chain Act (2021)

The German Supply Chains Act requires enterprises in Germany with at least 1 000 employees to conduct human rights and (limited) environmental-related due diligence in their supply chains to prevent adverse impacts (LkSG, 2021^[53]). This includes establishing risk management systems, performing risk analyses, creating policy statements, establishing preventative measures, taking remedial action, establishing complaints procedures, implementing the due diligence obligations with suppliers, and documentation and reporting. Division 5 of the Supply Chains Act focuses on public procurement, and stipulates that enterprises that have violated the supply chain law may be excluded from awards of supply, works, or service contract by public contracting authorities given an administrative fine has also been imposed above a certain minimum level (the threshold depends on the severity of the violation) (LkSG, 2021^[53]).

Linkage to public procurement: the Competition Register (2016)

The implementation mechanism for the German Supply Chains Act is supported by the Competition Register. The Competition Register logs companies in violation of a number of laws, and facilitates the exclusion of these companies from public tenders. The Supply Chain Act is one of the German laws with implications for the Competition Register. If a company is in breach of the Supply Chain Act (among other German laws), it may be included in the register. Contracting authorities are obliged to consult the register for contracts with a volume of more than EUR 30 000, and may exclude tenderers (GWB, 2016^[57]). The explicit requirement on contracting authorities, through the Competition Register law, demonstrates how mandatory due diligence laws can have direct implications on public procurement. However, some discretion remains with the contracting authority. The contracting authority itself decides on any exclusion, in accordance with the procurement law (GWB, 2016^[57]).

Source: LkSG (2021^[53]), Lieferkettensorgfaltspflichtengesetz, <https://www.gesetze-im-internet.de/lksg/>
GWB (2016^[57]), Gesetz gegen Wettbewerbsbeschränkungen, <https://www.gesetze-im-internet.de/gwb/>

The German Supply Chain Act creates a possibility that certain public entities – under specific circumstances – have to apply the Act and conduct due diligence. According to the justification of the act (part B of the Supply Chain Act) and further elaborated in guidance by the German Federal Office for Economic Affairs and Export Control (Bundesamt für Wirtschaft und Ausfuhrkontrolle, BAFA), whether or not an entity has to apply the law does not depend on its legal form, but the nature of the entity's activities. This means that (theoretically) public entities might have to implement the Supply Chain Act. The decisive factor is the commercial nature of the entity's activities. A commercial activity, in turn, implies offering a product or service in a competitive market. That said, a public entity might need to apply the Supply Chain Act if it is commercially active and offers for example a service in competition with private sector entities (BAFA, 2024^[58]). In addition, all other conditions required by the Supply Chain Act apply (BAFA, n.d.^[59]). Given these requirements, the Supply Chain Act could have been considered as part of the category mandatory due diligence measures with "implicit requirements." The Supply Chain Act presents both: implicit requirements on public entities that apply under certain circumstances, and explicit requirements to include sanctions stemming from the Supply Chain Act in public procurement.

There are many public buyers within the scope of the Supply Chain Act, such as Deutsche Gesellschaft für Internationale Zusammenarbeit (GIZ) GmbH and others. The activities outlined in the BAFA guidance could also comprise the work of central purchasing bodies, who make available products or services to other public entities in Germany.

Guidance for public buyers on possibilities for implementing due diligence in public procurement by GIZ reiterates BAFA's guidance that public entities with commercial activity have to implement due diligence, but highlights the responsibility of all other public actors and public buyers in particular. The guide further explains how public buyers can integrate corporate due diligence – such as required by the German Supply Chain Act – into tender processes (Deutsche Gesellschaft für internationale Zusammenarbeit (GIZ) GmbH, 2023^[60]).

In summary, Germany presents explicit requirements for public institutions through the primary legislation. In the Supply Chain Act, the focus is on using public procurement as an implementation mechanism for the law's rules. The guidance by BAFA also directly interprets the legislation as applying to government economic activity by defining when public actors can be considered as acting in a commercial sense. Thus, the German case is similar to other countries in that it uses guidance to further define requirements, but Germany is the only country that specifies the actual parameters for the government's role as an economic actor under the scope of the legislation.

A number of mandatory due diligence laws do not explicitly reference obligations for public institutions. As will be seen in Chapter 4, legal requirements set by laws of this type can still have implications for governments in their role as economic actor. An example for this type of law is the Norwegian Transparency Act. The legislative process at the root of this law offers interesting insights for implementing policy coherence between procurement and RBC in practice. The Norwegian Public Procurement Act mandates contracting authorities to implement measures promoting the respect of fundamental human rights in public procurement, particularly where a risk of violation exists. The Transparency Act sought to use similar terminology as the Public Procurement Act to ensure coherence between the laws. The Transparency Act further enhances human rights accountability by requiring companies to carry out human rights due diligence across their operations and supply chains in accordance with the Guidelines, and to disclose their due diligence efforts in relation to potential and actual impacts on human rights and decent working conditions. Whether or not an entity has to apply the Transparency Act is regulated via the Accounting Act: only entities that meet the characteristics set by the Accounting Act have obligations under the Transparency Act. Guidance by Norway's Consumer Authority states that many public agencies like municipalities do not fall under the Accounting Act (or Transparency Act), while other public entities do (Consumer Authority, 2024^[61]). Some public buyers, like healthcare purchaser Sykehusinnkjøp HF, conduct due diligence in line with the Transparency Act (Sykehusinnkjøp HF, 2024^[62]).

This presents a distinct approach from the other RBC legislation previously discussed in Australia, Canada, the UK, and Germany. These countries used RBC legislation as an opportunity to integrate the role of government, while Norway seeks to use procurement legislation to scale up RBC principles (such as socially responsible public procurement) in government activities.

Box 6. Norway: A different approach to RBC and public procurement policy coherence

Norway's Supply Chain Transparency Act (2022)

The Act applies to large enterprises (fulfilling two of three conditions: revenues of over NOK 70 million (EUR 6.2 million), balance sheet totals over NOK 35 million (EUR 3.1 million), or average number of employees over 50) that are resident in Norway and that offer goods and services in or outside Norway (Prop. 150 L (2020–2021), 2021^[54]). It also applies to large foreign enterprises that offer goods and services in Norway and are subject to Norwegian tax legislation (Prop. 150 L (2020–2021), 2021^[54]). The enterprises are required to carry out due diligence in accordance with the Guidelines, and to publish an account of the due diligence guidelines, policies, significant risks, and plans to cease or mitigate the significant risks for adverse impacts (Prop. 150 L (2020–2021), 2021^[54]). The law is a mandatory due diligence measure at its core, but also requires reporting that overlaps with corporate due diligence disclosure measures. The Consumer Authority in Norway monitors compliance with the Act. Enforcement penalties may result in case of non-compliance (Prop. 150 L (2020–2021), 2021^[54]).

From 2024, the Norwegian Agency for Public and Financial Management (DFØ) also recommends that contracting authorities, when procuring high risk products, ask suppliers to document that they are adhering to the Transparency Act. In practice, companies subject to the Act have to include in their bids the link to the website where their due diligence report is published. Other suppliers are requested to send their due diligence report, but are not required to make it publicly available. The aim of this selection criteria is to ensure that suppliers gaining public contracts are adhering to Norwegian law.

Alignment with Norway's Procurement Regulation

Norwegian legislators considered including provisions on public procurement in the Supply Chain Transparency Act, but instead chose to align the Act with the language in the country's procurement law, which was recently revised to include RBC-related objectives such as human and labour rights and the environment. The amendments to the Public Procurement Act, which went into effect in June 2023, seek to promote better social and labour conditions and overall better business practices (Oware and Reinertsen, 2023^[63]). Section 5a allows the imposition of obligations on state, county, and municipal authorities, as well as public legal entities, to establish contractual provisions to protect against labour market offenses, limits the number of sub-suppliers in industries with a high risk of labour market crime, and expands mechanisms for non-compliance with contractual provisions (Oware and Reinertsen, 2023^[63]). There are also changes to Section 6 on wage and employment conditions in public contracts, which seeks to ensure more standardized wage and employment conditions based on universal or national agreements, regulates compliance with other wage and employment laws, and attempts to provide a healthy and safe working environment (Oware and Reinertsen, 2023^[63]).

Source: Oware and Reinertsen (2023^[63]), Amendments to the Public Procurement Act - strengthened measures against labour market crime and social dumping, <https://www.wr.no/en/news/amendments-to-the-public-procurement-act>
Prop. 150 L (2020-2021) (2021^[54]), Lov om virksomheters åpenhet og arbeid med grunnleggende menneskerettigheter og anstendige arbeidsforhold, <https://www.regjeringen.no/no/dokumenter/prop.-150-l-20202021/id2843171/?ch=13>

A law that many expect to have a particularly important role towards greater corporate accountability is the CSDDD. The recently passed EU CSDDD, as previously mentioned, establishes unprecedented obligations on businesses to perform and report on due diligence activities. The Directive establishes that member states must ensure compliance with the CSDDD (and with its due diligence obligations) can be a criterion for the award of public contracts (Directive (EU) 2024/1760, 2024^[38]). This development emerged after a long debate around the inclusion of public procurement in the CSDDD, based mostly in considerations around possible legal challenges. For more than a decade, the EU Directives on Public Procurement (2014) have set the common public procurement legal and regulatory framework across EU

countries for procurements over a certain threshold. EU Members have transposed the EU public procurement directives into national laws (Trevino-Lozano and Uysal, 2023^[64]). The CSDDD Recital 92 directly highlights the opportunity for the Commission to explore updating related legislation on public procurement to “ensure compliance with the sustainability and due diligence obligations throughout procurement and concession processes” and greater consistency between legal frameworks (Directive (EU) 2024/1760, 2024^[38]).

The explicit inclusion of public procurement in the CSDDD Directive will change the status quo for public buyers contracting with the private sector across the EU. It reflects a growing recognition that public procurement authorities have a significant role to play in shaping the private sector’s conduct, and that governments have a responsibility to consider responsible business conduct in their role as economic actors. Moving forward, there are likely to be visible effects of public procurement being included in the CSDDD, given the volume of public procurement spending in EU countries (but will depend on the uptake by contracting authorities). Beyond these concrete implications, the CSDDD is poised to further elevate the discourse around the role of public procurement in promoting RBC in the EU, as demonstrated by the calls in the Directive to consider pursuing further policy alignment. In the future, EU countries may work to enact concrete changes in public procurement systems to align with the CSDDD goal of promoting more responsible, sustainable, and transparent supply chains.

3.5. Product and market-based measures

The third and final type of national RBC legislation covered by this analysis are product and market-based measures. Product and market-based measures require importing or exporting companies, or regulated persons, to prove, through risk-based due diligence, that their products are not associated with human rights abuses or environmental harm, or that they meet a certain risk level (i.e. “negligible” risk, for example) (OECD, 2024^[41]). Scholars consider these market-related measures as distinct from other past European bans on certain products, such as on cat and dog fur and seal products, because they not only ban or regulate products, but they expect due diligence or reporting around supply chains (Hoffmeister, 2022^[65]). These measures also seek to reorient importers and consumers towards suppliers observing higher labour and environmental standards (OECD, 2024^[41]). Product and market-based measures can involve public procurement in two ways: by setting rules in an overall product market that public buyers may interact in, or by involving public institutions in enforcement of the law (such as through exclusionary mechanisms). Product and market-based measures in the EU and US, as presented in Table 5, present specific requirements for public institutions.

Table 5. Product and market-based measures with requirements for public institutions

	Product and market-based measures
Explicit requirements for public institutions	EU Deforestation Regulation, EU Batteries Regulation
Implicit requirements for public institutions	US Uyghur Forced Labor Prevention Act

Market measures typically focus on a specific commodity or sector, such as the EU Batteries Regulation. They can also focus on a topical RBC issue such as forced labour, like the US Uyghur Forced Labor Prevention Act, or environmental issues like the EU Deforestation Regulation. The EU Batteries Regulation and the EU Deforestation Regulation include explicit requirements for public institutions, and more specifically on public procurement (see Box 7). Both laws require due diligence around the import and export of certain commodities, but the Deforestation Regulation uses public procurement as a possible mechanism to help enforce the law. The EU Batteries Regulation on the one hand requires supply chain due diligence for batteries, and on the other hand includes provisions for the public procurement of batteries in its scope. In line with the requirements of the Regulation overall and the requirements placed

on companies, contracting authorities are expected to “take account of the environmental impacts of those batteries over their life cycle with a view to ensuring that such impacts are kept to a minimum” (Art. 85) (Regulation (EU) 2023/1115, 2023^[66]). The EU Batteries Regulation could prove particularly impactful because contracting authorities must directly consider this regulation in their decision making, and adapt the entire procurement process.

Box 7. EU-level legislation with explicit requirements for public institutions

EU Regulation on Deforestation-free Products

Any operator or trader who places certain commodities on the EU market, or exports from it, must be able to prove that the products do not originate from recently deforested land or have contributed to forest degradation (Regulation (EU) 2023/1115, 2023^[66]). These goods subject to due diligence include commodities like soy, beef, palm oil, wood, cocoa, coffee, rubber and some of their derived products, such as leather, chocolate, tires, or furniture (Regulation (EU) 2023/1115, 2023^[66]).

The Deforestation Regulation presents direct requirements for public institutions to enforce the law. Under Article 25 “Penalties”, one of the possible penalties for actors that infringe upon the regulation is a temporary exclusion for a maximum period of 12 months from public procurement processes and from access to public funding, including tendering procedures, grants, and concessions (Regulation (EU) 2023/1115, 2023^[66]). Member State Competent Authorities impose such penalties in a proportionate, effective, and dissuasive manner.

EU Batteries Regulation

The EU Batteries Regulation aims to prevent and reduce adverse impacts of batteries on the environment and ensure a safe and sustainable battery value chain for all batteries, taking into account considerations such as the carbon footprint of battery manufacturing, ethical sourcing of raw materials and security of supply, and facilitating re-use, repurposing and recycling (Regulation (EU) 2023/1542, 2023^[67]).

The general provisions of the law lay down requirements for green public procurement when procuring batteries or products into which batteries are incorporated (Regulation (EU) 2023/1542, 2023^[67]). The law also states that contracting authorities (as defined in various EU Directives) shall, when procuring batteries in situations covered by those Directives, take account of environmental impacts (Regulation (EU) 2023/1542, 2023^[67]).

Source: EU Regulation 2023/1115 (2023^[66]), Regulation (EU) 2023/1115 of the European Parliament and of the Council of 31 May 2023 on the making available on the Union market and the export from the Union of certain commodities and products associated with deforestation and forest degradation and repealing Regulation (EU) No 995/2010 (Text with EEA relevance), <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32023R1115&qid=1687867231461>

EU Regulation 2023/1542 (2023^[67]), Regulation (EU) 2023/1542 of the European Parliament and of the Council of 12 July 2023 concerning batteries and waste batteries, amending Directive 2008/98/EC and Regulation (EU) 2019/1020 and repealing Directive 2006/66/EC (Text with EEA relevance), <https://eur-lex.europa.eu/eli/reg/2023/1542/oj>

The Uyghur Forced Labor Prevention Act, which enacts a market ban on all goods into the US that might have been manufactured with forced labour from Xinjiang, results in implicit requirements for government institutions. The ban applies to US borders broadly, meaning that government institutions must also comply because the import ban addresses the whole market (see Box 8). This means that government institutions cannot source goods from Xinjiang without performing the required due diligence and supply chain tracing.

Box 8. United States: Market ban on goods made using forced labour

The US Uyghur Forced Labor Prevention Act (2021)

The Act prohibits importing goods into the US “manufactured wholly or in part with forced labour in the People’s Republic of China, especially from the Xinjiang Uyghur Autonomous Region” (Public Law No. 117-78, 2021^[68]). The Act determines that any goods coming from Xinjiang must be assumed to be the product of forced labour unless proven otherwise by “clear and convincing evidence” (Public Law No. 117-78, 2021^[68]). The US Customs and Borders Agency enforces that Act, having authority to seize goods that violate the law. The US Forced Labor Enforcement Task Force developed a strategy and guidance for importers, and gives instructions for companies on how to conduct human rights due diligence and supply chain tracing to prove that goods were not sourced from Xinjiang, or if they were, that they did not use forced labour. Products from Xinjiang are found in many supply chains, including manufacturing, agriculture, apparel, energy, healthcare, and chemicals.

Although government institutions are implicitly covered by the market ban, the US is taking this opportunity to call for a broad revision of Federal Procurement Law to expand restrictions on federal contracts with entities associated with labour abuses (Flacks, 2023^[69]). Federal procurement law already prohibits US government contractors from having recourse to forced labour (Flacks, 2023^[69]). The proposed bill would broaden this to include specific requirements related to purchases originating in Xinjiang, and also to include all goods procured by public institutions, regardless if they are imported or not (Flacks, 2023^[69]). Government contractors, who already follow the Uyghur Forced Labor Prevention Act, would then also need to undertake the same processes for other goods delivered to US locations overseas (Flacks, 2023^[69]).

Source: Public Law No. 117-78 (2021^[68]), An act to ensure that goods made with forced labor in the Xinjiang Uyghur Autonomous Region of the People's Republic of China do not enter the United States market, and for other purposes, <https://www.govinfo.gov/app/details/PLAW-117publ78>

Flacks (2023^[69]), What’s Next for the Uyghur Forced Labor Prevention Act?, <https://www.csis.org/analysis/whats-next-uyghur-forced-labor-prevention-act>

3.6. Overarching reflections on the role of government and RBC policy coherence

RBC legislation varies in the way it considers and utilises the role of government as an economic actor, and particularly in the way it leverages public procurement. Taken together, the analysis of this chapter harbours preliminary insights of how RBC due diligence regulation enhances and shapes the role of government in promoting RBC through areas like public procurement.

Corporate due diligence disclosure measures at times require similar transparency about adverse impacts from government operations and supply chains as they do for businesses (i.e., that the government “walk the talk” on due diligence and RBC). Where RBC due diligence disclosure requirements are not legally required for government actors, corporate-focussed laws nevertheless can inspire government agencies to adopt similar commitments and follow the law’s spirit.

Product and market-based measures appear to be most relevant for government action, both by explicitly asking government institutions to observe market bans and by issuing a blanket ban, where it is stated that all actors must follow the measure and the applicability to government is implied.

RBC due diligence requirements on public institutions can be broad and overarching, or be applied to a certain type of institutional level or activity. Some RBC legislation places requirements on all public

institutions indiscriminately, whereas others enact requirements on public institutions involved in procurement and investment, or on public buyers, for example.

These developments hint at a potential need for governments to anticipate and prepare for their effects. As demonstrated previously and in chapter 4, public procurement represents a great share of GDP in OECD countries. Whether these laws address the role of procurement or not, the integration of RBC objectives with procurement presents a gateway for governments to further increase the positive impacts of their supply chains. The following section will further discuss the effects of binding legislation on RBC due diligence for public procurement, with a goal of presenting key considerations for public administrations seeking to pre-empt or adapt to market changes.

4

Effects of RBC due diligence regulation on public procurement and public procurement supply chains

The developments discussed in the previous chapter entail a policy coherence dimension – visible in the effects. Governments have taken steps to respond to requirements emerging in RBC due diligence regulation, for example to facilitate implementation, increase capacity, or update related legislation. Governments also adapt to a changing marketplace now covered by RBC due diligence regulation, regardless of the direct impact of these laws on public procurement. Implications throughout global supply chains are to be expected, given the high monetary value of public procurement. Thus, public actors can have a notable impact on RBC-related outcomes such as labour standards, human rights, and environmental impact throughout the supply chain – and face greater pressure to manage this impact well by greater attention to RBC policy coherence.

However, an evaluation at this stage of the implications of policy choices remains limited. As with general RBC policies, supply chain effects and impacts on people and the planet are difficult to link to policy decisions. In both RBC and public procurement, data related to policy impacts remains scarce. The emerging regulatory developments around RBC due diligence discussed throughout this paper are recent, and data on implementation and impact has not yet emerged in full. Researchers have advanced insights on certain aspects of the questions at hand. Analysing the existing literature that combines public procurement and social and environmental outcomes, for instance, can demonstrate the potential impact of better aligning policy making on RBC and public procurement.

The following sections analyse examples of how governments are adapting to explicit and implicit requirements on public institutions, to highlight the importance of pre-empting and preparing for these changes and aiming for greater RBC policy coherence. The section outlines the types of effects of RBC due diligence regulation on public procurement that policy makers should be aware of. The chapter concludes with reflections on key considerations for future policymaking and policy implementation.

4.1. Explicit requirements: Immediate adaption in the public administration

With explicit requirements on public institutions to report on RBC risks, to conduct due diligence, or to abide by a product and market-based measure, governments must scale up capabilities, allocate additional resources, or formulate new guidance to implement the laws. In these cases, public institutions are bound by the law to act, and thus expectations on steps towards implementation tend to be clearer. The following laws include the most explicit requirements for public institutions: the Australian Modern Slavery Act, the Canadian Supply Chains Act, the German Supply Chain Act, the EU Deforestation Regulation, and the EU Batteries Regulation.

Australia's Modern Slavery Act presents a clear case of how government is adapting to the implications of emerging RBC due diligence regulation. Accompanying implementation guides point towards public procurement as one of the key areas for government reporting. To facilitate implementation, the Australian Government created the Modern Slavery Expert Advisory Group, and tables annual implementation reports on the Act in the Australian Parliament. To directly define the responsibilities and increase capabilities surrounding public procurement, the government published a toolkit for procurement officers to ensure they are identifying, assessing, and managing modern slavery risks in operations and supply chains. An online training course has been developed to train government officials to increase their capacity and expertise in modern slavery in public procurement and their understanding of compliance with modern slavery legislation. The toolkit includes a risk screening tool, model modern slavery contract clauses, model tender clauses, and guidance, and a supplier questionnaire. These tools are designed to help Commonwealth agencies to identify, assess, and mitigate modern slavery risks in its supply chains and (Australian Government, 2018^[47]). The procurement toolkit also offers guidance on how to consider modern slavery risks in the procurement process, from planning and evaluation of bids to contract negotiation and contract management (Australian Government, 2018^[47]). To address legal complexities related to bringing together these two distinct areas of policy, guidance documents for these tools clarify that they are meant to be used in combination with the existing Commonwealth Procurement Framework, and primarily the Commonwealth Procurement Rules (Australian Government, 2018^[47]).

While these guidance documents are optional, and do not come with any mandatory provisions, they still illustrate how explicit requirements on public institutions from RBC regulations can affect public procurement systems. The government is addressing resource and capacity needs that emerge from the new regulation by designing and implementing new tools, building capacity, and providing guidance on how procurement decisions should change to keep up with the laws. Recognising that Canada's Supply Chains Act only came into force in January 2024, implementation of the Act is not as advanced as Australia's Modern Slavery Act; Canada's efforts in the first year focused on establishing the new reporting process, issuing public guidance, and providing tools to support government institutions on their procurement activities,

Implications from the German Supply Chain Act differ slightly, but affect the capacity of contracting authorities through concrete requirements towards them. To date, BAFA has not yet sanctioned companies and therefore the Competition Register does not yet include companies non-compliant with the German Supply Chain Act. However, depending on the level of implementation by companies, contracting authorities might face a situation in which their purchasing decisions could be immediately affected by the German Supply Chain Act. In addition, BAFA guidance, as discussed in Chapter 3, sets out when public institutions can be considered as enterprises and be covered by the requirements of the act. Public institutions must consult the Competition Register and may exclude companies that are listed in the register (GWB, 2016^[57]).

The EU Batteries Regulation and the EU Deforestation Regulation passed in 2023; the impact they will have at the country-level remains to be seen. There are not yet any implementation reports or guidance documents. Given the direct requirements on public procurement in these two regulations, the impact on public buyers is expected to be considerable. For the Deforestation Regulation, EU countries will not only need to adjust their procurement systems to adhere to any importing or procurement requirements, but also to prepare for exclusion if actors violating the law have received a penalty from their Member State Competent Authority in the form of temporary exclusion. In Germany, a similar exclusionary provision is operationalised through a register of companies found guilty of violating the Supply Chain Act, among other laws. Such a register would require additional resources for its maintenance. Similarly, for the EU Batteries Regulation, which requires consideration of "green" public procurement criteria when procuring batteries or products into which batteries are incorporated, means that countries may need to strengthen and expand their green public procurement systems. With over 250 000 public contracting authorities in the EU (European Commission, n.d.^[70]), tangible effects might be seen.

4.2. Implicit or no requirements: A push to update procurement regulation

RBC due diligence regulation with implicit requirements or no requirements on public institutions can still implicate country public procurement systems. The UK, Norway, and the US have taken steps to integrate RBC and public procurement policy coherence not through RBC regulation, but by reforming public procurement legislation to align with broader development goals related to public procurement and with legal requirements on RBC for the private sector. The RBC regulations in these countries do not directly address public procurement, nor public institutions at large, thus they do not present direct legal requirements. However, each case led to a call for a change in legislation or resulted – in the case of the UK and Norway – in an actual revision of public procurement legislation to promote more responsible purchasing practices. These legal reforms have been extensive, advancing policy goals on RBC through the legal and regulatory framework for public procurement rather than through the RBC regulations themselves. Effects for public procurement might be tangible, albeit achieved through different channels than the previous category of direct requirements for public authorities in RBC regulation itself instead of requirements being ‘catalysed’ by RBC due diligence regulation. Considering the large value of public investments in different areas of the economy, this stands to present implications for the public administration in turn.

The UK government accompanied the update to the procurement legislation with RBC policies, as well as the government’s voluntary compliance with the Modern Slavery Act’s requirement to publish modern slavery statements. That means that the UK presents a case where implicit requirements for public institutions under RBC due diligence regulation result in direct effects on public procurement. The requirements for the government under the Modern Slavery Act are broad and implicit, and do not specifically point towards public procurement as an area of implementation. However, as discussed in Chapter 3, the most concrete result of the implicit requirements on the public institutions in the UK is the amended public procurement regulation which makes certain modern slavery offences under the Act grounds for mandatory exclusion of bidders from public procurements. Complementary policies for the public sector on how exactly to voluntarily implement the Modern Slavery Act (elaborated in Box 9) go beyond the amendments to the procurement regulation, intending to scale up capacity and expertise to follow the RBC regulation. This demonstrates the growing role that RBC policy makers and experts have moving forward to adapt RBC due diligence rules for different areas of government – such as public procurement.

Box 9. The impact of the UK Modern Slavery Act on public procurement

The UK's complementary policies on public procurement

To accompany the update to the procurement regulation, the UK government established key mandatory provisions for central purchases to encourage social objectives in public procurement by launching a “Social Value Model.” The Model stipulates that government procurement must consider social value criteria in the award of contracts, and that these criteria must weigh a minimum of 10% of the total score in bidding (Home Office, 2021^[71]). The Model applies to procurements covered by the Public Contracts Regulations 2015, and applies to all Central Government Departments, their Executive Agencies and Non-Departmental Public Bodies (Home Office, 2021^[71]). Under the policy, central procurements related to construction, capital investment, and infrastructure above GBP 10 million (EUR 11.55 million) must use the priority themes and outcomes in the social value model with a minimum weighting of 10% of the total score for social value that should be applied to the procurement decision. This policy involves multiple sectors and thus represents a large amount of public funds, illustrating the cross-cutting implications of policy coherence across different types of governmental spaces.

To concretise the implementation of the policy, the government also established training and e-learning modules as well as a guide aimed at procurement practitioners advocating for a risk-based approach to tackling modern slavery in government supply chains. Like the Australian guide, the UK guidance advocates adopting this risk-based approach throughout all contract stages. The guide also comes with a modern slavery assessment tool, which supports public bodies and suppliers in assessing risks and provides recommendations on how to improve modern slavery identification processes. These extensive implementation mechanisms for their Modern Slavery Act demonstrates how policy coherence in public procurement can come in many different forms.

Source: Home Office (2021^[71]), Home Office Modern Slavery Statement 1 April 2020 - 31 March 2021, https://assets.publishing.service.gov.uk/media/61698b948fa8f5297d57de32/Modern_Slavery_HO_Statement.pdf

Similar implications on public procurement appear in Norway as in the UK, despite the different approaches to regulate RBC in the two countries. Like the UK, Norway presents implicit requirements for public institutions in its transparency act, and also took a similar approach as the UK where they integrated RBC objectives into public procurement regulations. As discussed in Chapter 3, the Norwegian Transparency Act and the simultaneous revision of the procurement law to establish mandatory provisions on labour and employment is another example on how countries can pursue policy coherence for RBC and public procurement. These rules now require public buyers in a decentralised public procurement system to apply RBC considerations in public procurement. In 2018, an evaluation estimated that Norway had at least 536 contracting authorities (likely more) (Methodology for Assessing Procurement Systems, 2018^[72]) for a population of 5.4 million. Expected needs for capacity building and resources are considerable, as well as cross-governmental coordination, given how Norway is bridging together different parts of public administration to implement RBC-related requirements.

Finally, the US Uyghur Forced Labour Prevention Act serves as further testimony on how product and market-based measures with implicit requirements or no requirements for public institutions can also prompt a change in behaviour for public procurement authorities. A blanket ban on the market, such as the US Uyghur Act, will naturally affect public institutions that operate in the same marketplace even if the requirements are just implied. As presented in Chapter 3, government institutions are not directly mentioned in the legislation, but the law does state that all actors importing goods from Xinjiang must undertake the required due diligence. Just like Norway and the UK, there is a push in the US to expand

the Federal Procurement Law to include restrictions on labour issues, but this has not been adopted to date (Flacks, 2023^[69]). Regardless of the future of any revision to the procurement law in the US, public institutions must still abide by the market ban, and thus are affected by the law.

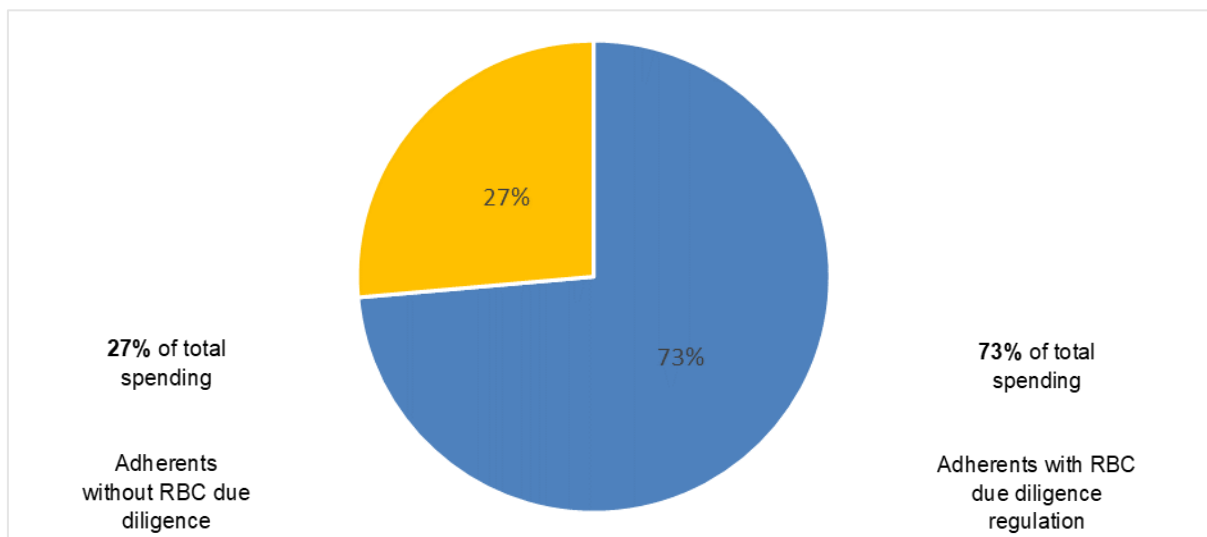
While the impact of RBC due diligence regulation with implicit requirements (or no requirements at all) on public procurement may appear less evident, countries are taking diverse approaches to apply RBC to the public sector. Governments like the UK and Norway are targeting broader policy coherence around RBC with their public procurement regulations. Comparing and contrasting the different approaches of countries in implementing requirements from RBC regulations reveals the range of options at governments' disposal for scaling up commitments to RBC in the public sector to achieve policy coherence.

4.3. Potential effects on global supply chains

The value of public procurement in countries with RBC due diligence regulation is vast – and helps demonstrate the significance of the potential impact on global supply chains. In 2021, Adherents to the Guidelines spent over USD 8.3 trillion on public procurement (OECD, 2023^[73]). Over 73% of this sum is spent by countries with some form of RBC due diligence regulation (corporate due diligence disclosure measures, mandatory due diligence measures, or product and market-based measures). 27% of the USD 8.3 trillion is attributed to countries without RBC due diligence legislation (see Figure 1).

Figure 1. The majority of public procurement spending by Adherents takes place in countries with some form of RBC due diligence regulation

RBC due diligence regulations affect a vast sum of public procurement spending. What percentage of total adherent spending takes place in countries with corporate due diligence disclosure measures, mandatory due diligence measures, or product and market-based measures?



Source: OECD, (2023^[73]) OECD Government at a Glance Indicators 2023, <http://data-explorer.oecd.org/s/n4>

Therefore, taken together, the combined public procurement spending of countries with some form of RBC due diligence regulation amounts to over USD 6 trillion (OECD, 2023^[73]), a sum greater than the third highest national GDP in the world.

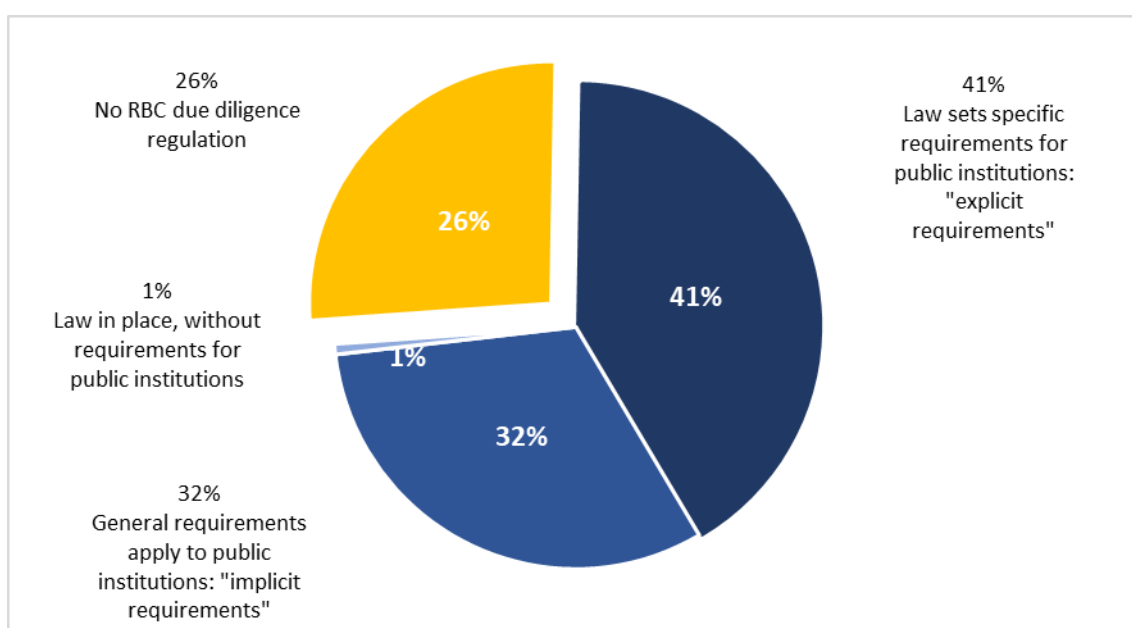
Of the total spending on public procurement in Adherents:

- 41% is attributed to countries with RBC due diligence regulation that has explicit requirements for public institutions
- 32% to countries with implicit requirements for public institutions
- 1% attributed to countries with no requirements for public institutions.

Thus, when there is regulation in place, the vast majority of spending on public procurement is attributed to countries that do present requirements for public institutions in some form (see Figure 2).

Figure 2. A majority of public procurement spending is affected by RBC due diligence regulation

Adherents spent approximately USD 8.3 trillion (PPP) on public procurement in 2021. What percentage of this spending is subject to what kind of RBC due diligence regulation?



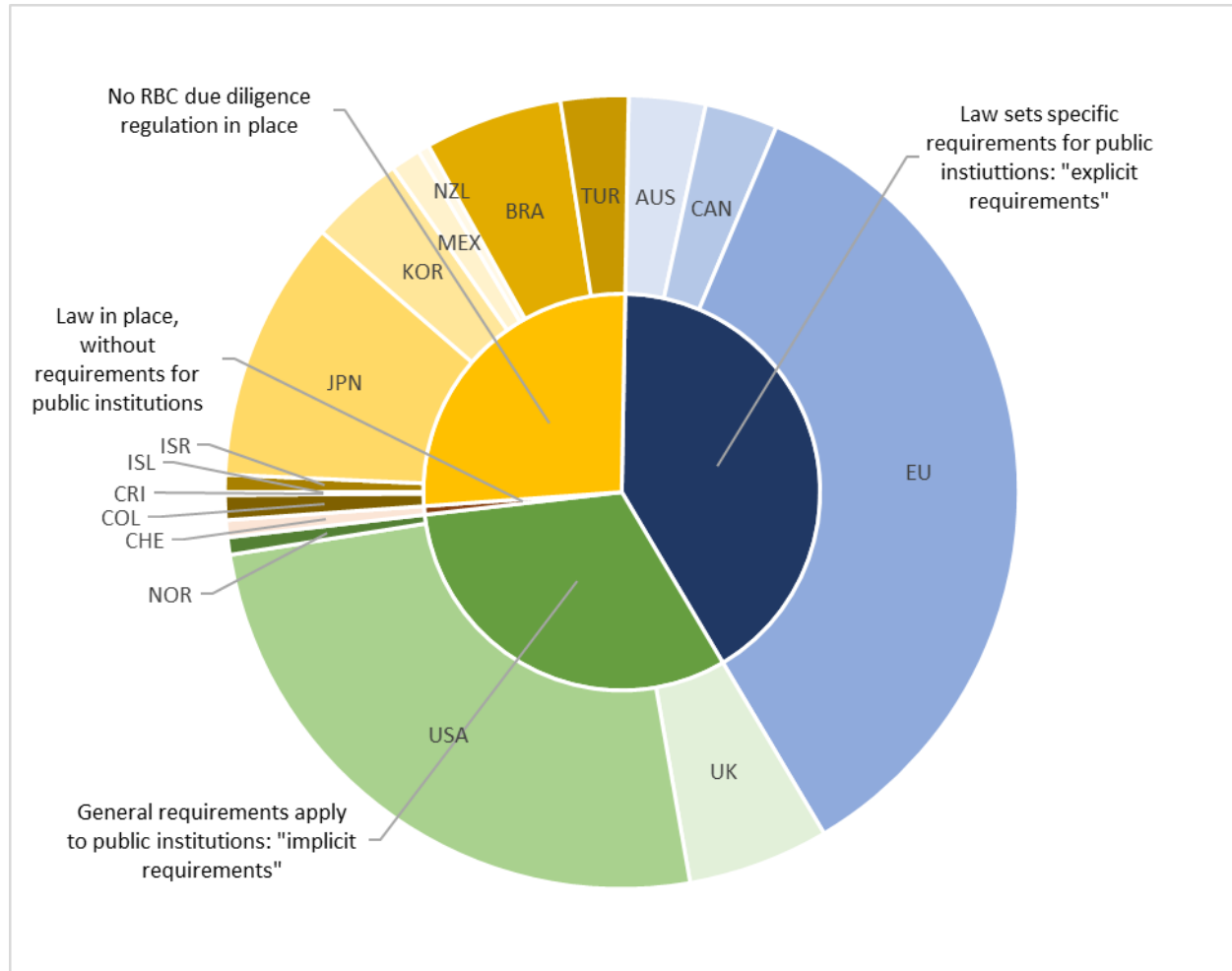
Note: data calculated based off of USD PPP prices for the year 2021. Data missing for Argentina, Chile, Egypt, Jordan, Kazakhstan, Malta, Morocco, Peru, Tunisia, Ukraine, and Uruguay. Based on third-party data from 2017, the public procurement spending for these countries amounts to approximately USD 210 billion, corresponding to about 2.5% of the total (Open Contracting Partnership, 2020^[74]). The overall distribution would change insignificantly. None of these countries have regulation in place. Data for Brazil and Türkiye unavailable for 2021 and calculated using 2020 data.

Source: OECD, (2023^[73]) OECD Government at a Glance Indicators 2023, <http://data-explorer.oecd.org/s/n4>

Several of the biggest global spenders on public procurement have regulations on RBC due diligence. These large spenders (i.e. the US, the EU, the UK, etc.) also tend to have explicit or implicit requirements for public institutions in their RBC due diligence regulation (see Figure 3).

Figure 3. The largest spenders on public procurement directly require action from public institutions or infer actions on RBC due diligence

Adherents with RBC due diligence regulation spend vast sums through public procurement. What types of requirements do the largest global spenders on public procurement set in their RBC due diligence regulation?



Note: data calculated based off of USD PPP prices for the year 2021. Data missing for Argentina, Chile, Egypt, Jordan, Kazakhstan, Malta, Morocco, Peru Tunisia, Ukraine, and Uruguay. Based on third-party data from 2017, the public procurement spending for these countries amounts to approximately USD 210 billion, corresponding to about 2.5% of the total (Open Contracting Partnership, 2020^[74]). The overall distribution would share insignificantly. None of these countries have regulation in place. Data for Brazil and Türkiye unavailable for 2021 and calculated using 2020 data

Source: OECD, (2023^[73]) OECD Government at a Glance Indicators 2023, <http://data-explorer.oecd.org/s/n4>

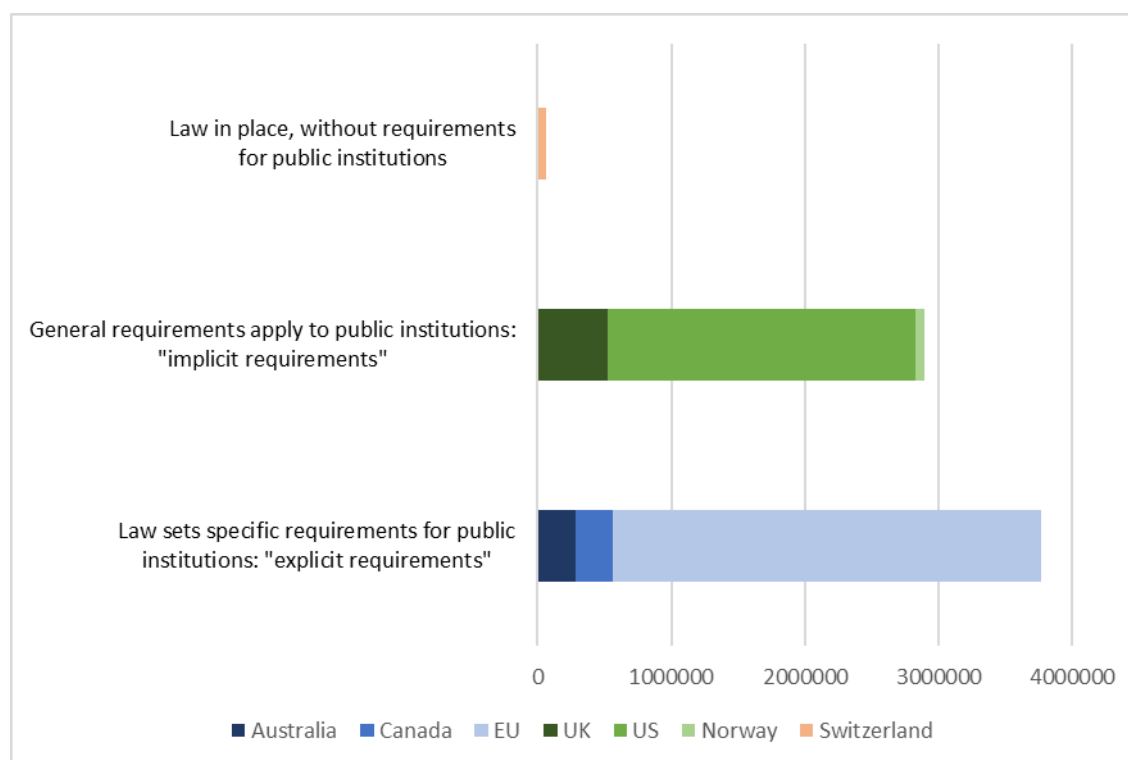
As discussed throughout this chapter, countries with RBC due diligence regulation with no requirements for public institutions often still see effects in the public administration. Thus, the effects of RBC due diligence regulation may implicate a majority of procurement spending by adherent countries.

The proportion and amount of spending on public procurement of countries with explicit or implicit requirements for public institutions is significant. In 2021, the Australian government spent USD 286.04 billion on public procurement, while Canada spent USD 271.25 billion and the UK spent USD 526.04 billion (OECD, 2023^[73]). The US, one of the biggest global spenders on public procurement, spent USD 2.21

trillion on public procurement in 2021 (OECD, 2023^[73]). Several EU countries already present RBC due diligence regulation, and as with the EU's new CSDDD, this monetary impact would only increase – EU countries spend almost 15% of their GDP on public procurement (OECD, 2023^[11]) and collective EU public procurement spending is estimated to be as high as USD 3 trillion. Thus, implications of RBC due diligence regulation on public money might arise (see Figure 4 for a comparison of procurement spending in countries with different types of RBC due diligence regulation).

Figure 4. RBC due diligence laws have explicit requirements for public institutions for a majority of public procurement spending

What types of requirements for public institutions in RBC due diligence regulation account for the largest amount of public procurement spending?



Note: in millions USD PPP 2021

Source: OECD, (2023^[73]) OECD Government at a Glance Indicators 2023, <http://data-explorer.oecd.org/s/n4>

The size of public procurement spending only explains a part of the possible effects on global value chains stemming from RBC due diligence regulation. In addition, public procurement can affect a variety of policy outcomes. The linkages between strategic and sustainable public procurement and the areas covered by RBC due diligence regulation are considerable. Governmental policy goals related to strategic public procurement take diverse shapes, but are often linked to labour and human rights issues (such as child and forced labour, freedom of association, occupational health and safety, and wages), environmental protection (water use, ecological impact), and business ethics issues (corruption, bribery, and conflict of interest) (Andrecka and Mitkidis, 2017^[75]) – many of the same areas featured in RBC due diligence regulation. Thus, the potential impact of integrating RBC due diligence in public procurement on global supply chains can be partially understood by examining the usage of public procurement as a tool for improving similar socioeconomic and environmental outcomes. For example, modern slavery regulations that mandate supply chain transparency about labour-related risks can be compared to strategic public

procurement efforts that focus on labour rights throughout supply chains, given that these two interventions would likely result in similar outcomes.

As discussed in Chapter 2, for decades, and before the emergence of RBC due diligence legislation with implications for public procurement, governments have primarily been using strategic or sustainable public procurement to integrate economic, social, and environmental considerations into procurement frameworks – as encouraged by the OECD Recommendation on Public Procurement (OECD, 2015^[9]; OECD, 2020^[2]). Very few studies measure the impact of integrating strategic policy objectives related to RBC into public procurement – especially on effects across jurisdictions (Martin-Ortega and O’Brien, 2017^[76]; Howe, 2011^[77]). Yet, some researchers are aiming to address this gap by conducting specific studies on how certain procurement interventions have had an impact on social, economic, and development outcomes throughout the supply chain.

The United Nations Environment Programme (UNEP), for instance, conducted eight case studies on the impact of sustainable public procurement on several socioeconomic outcomes such as water use, emissions, labour conditions, competitiveness, and more (UNEP, 2012^[78]). Their case study of Brazil showed that public procurement of notebooks made out of recycled paper for schools resulted in positive impacts on water consumption, and even resulted in better outcomes in the waste collecting sector as more jobs were needed to collect paper for recycling (UNEP, 2012^[78]). A case study on Scotland aimed to use public procurement to improve conditions for flexible and temporary staff in the Scottish public sector, and to increase SME participation (UNEP, 2012^[78]). Such measures might be similar to what public institutions would adopt following risk mapping and reporting related to labour and modern slavery risks as required by Modern Slavery Acts, for example. The intervention resulted in 33 Scottish SMEs gaining access to business opportunities, and 3 000 temporary work placements were made through companies that were then required to improve worker’s training (UNEP, 2012^[78]). These examples demonstrate the potential impact of cohesiveness between RBC principles and procurement, albeit their limited scope and narrow areas of intervention. Since the time of the UNEP case studies, there have been very few notable studies on the impact of strategic or sustainable public procurement, nor on any other RBC considerations – a key gap in the evidence base on the impact of public procurement on RBC-related policy objectives. OECD countries have begun measuring the effect of green public procurement policies on sustainable development goals – such as in Slovenia. The country examined how green public procurement impacts pollution levels, waste generation and recycling, and threats to biodiversity (OECD, 2022^[5]).

Martin-Ortega and O’Brien have extensively studied the link between procurement and better labour outcomes throughout the supply chain, focusing on the government’s ability to influence working conditions by exercising leverage over immediate suppliers and other companies they work with (Martin-Ortega and O’Brien, 2017^[76]). Labour in particular can uniquely demonstrate the impact of responsible and sustainable public procurement in global supply chains, as public procurement often seeks to address labour conditions beyond the borders of the purchasing country by also including countries of production in scope (Martin-Ortega and O’Brien, 2017^[76]). Several pieces of emerging RBC due diligence regulation focus specifically on labour rights across borders (e.g. UK and Australian Modern Slavery Acts) – with the Australian Modern Slavery Act including provisions on public procurement that further highlight the linkages with labour outcomes. The US is also an example of a country that has also long used procurement to combat labour abuses abroad – the Federal Acquisitions Act prohibits forced child labour in contracts sourced outside the US (Martin-Ortega and O’Brien, 2017^[76]). Swedish County Councils have prioritised social criteria in public procurement and implemented a code of conduct for suppliers (Martin-Ortega and O’Brien, 2017^[76]). However, evidence of impact is limited. In a study on the results of the Swedish County Council’s policies on labour outcomes in Pakistan, a production location for the Councils, working conditions improved but only for the workshops producing for the Councils and not in neighbouring workshops (Martin-Ortega and O’Brien, 2017^[76]). Thus, while procurement is an important tool for advancing labour outcomes globally, there is still more research that needs to be done to better understand both the short- and long-term effects

throughout all tiers of global supply chains. RBC due diligence regulation focusing on labour-related risks face similar questions around impact across supply chains – another area for further research.

The case of COVID-19 demonstrates the impact public procurement had on global supply chains – in this case, on the health and safety outcomes of workers. As previously emphasized, RBC due diligence regulation often targets labour rights in global supply chains, which include health and safety-related concerns. An OECD report on policy responses to the COVID-19 crisis showed that procurement strategies developed prior to COVID-19 influenced outcomes in access to health supplies, such as the availability of masks and tests (OECD, 2020^[79]). The strength, quality, and adaptability of public procurement systems thus influenced how a country fared in the response phase. The report highlighted the importance of risk management and control during emergency procurements, which are often exposed to greater integrity risks (OECD, 2020^[79]). The authors recommended that public buyers establish risk management strategies, such as gathering data on supply chain risks (OECD, 2020^[79]). The OECD developed a public procurement risk framework to support countries in implementing this recommended risk-based approach with regards to risks to procurement outcomes. Thus, the potential role of even more holistic risk-based due diligence in public procurement systems, as is increasingly required or encouraged by emerging RBC due diligence regulation, could be significant. In an emergency context, strategic public procurement policies were also advantageous for public buyers, who were afforded the flexibility to assess alternative products and take into account environmental, innovative, and social requirements into the procurement process (OECD, 2020^[79]). Moving forward, the use of public procurement as a strategic policy tool has been posited as a crucial component of post-pandemic recovery and resilience – not just for boosting economic growth and recovery, but also in promoting inclusive and sustainable growth (OECD, 2020^[79]).

While public procurement supply chains are intricately linked to global supply chains, the integration of social and environmental objectives into procurement often has a domestic focus, and has stopped short of an RBC supply chain due diligence approach to public procurement (Hamilton, 2022^[80]). Beyond the more concrete potential effects (i.e. improvements in working conditions, reduced emissions and water use, etc.) of integrating RBC supply chain due diligence into public procurement, there are also possible broader effects on behaviour of contractors and businesses throughout the supply chain. The government has the ability, not only as a purchaser but also given its large influence in their economic relationships over contractors and businesses, to change the way the market works. Procurement harbours an ability to become a “market-shaper” and determine and guide the social responsibility of global markets (Hamilton, 2022^[80]). It is difficult to measure the ability of government to shape and influence markets through their procurement, but procurement’s historical role as a policy tool provides some important context for further exploration and future research. Considering the size and significance of public procurement globally, better understanding its impact internally on public administration systems and externally on social and environmental outcomes can help delineate the real effects of responsible public procurement and its ability to shape markets.

4.4. Limitations and challenges: Procurement and RBC policy coherence

This chapter sought to delineate the implications of emerging RBC due diligence regulation on public procurement, and in turn the global value chains governments reach through these activities, providing an indication of opportunities in governments’ role as economic actor. As these two policy areas – RBC and public procurement – intersect, tension points can emerge. In order to bridge these two policy areas for a more holistic and aligned governmental policymaking, governments will need to consider several broad challenges and limitations to accurately gauge and manage the diverse effects.

Challenges in creating coherence of legal and regulatory frameworks

By nature, aiming for greater policy coherence entails bringing different policy areas into alignment. Likewise, RBC and public procurement have developed as two distinct areas of policymaking, presenting challenges in harmonising objectives across the two frameworks. The EU exemplifies this challenge, as the RBC policy environment generally recognises the importance of integrating RBC in public procurement. The EU Procurement Directives allow contracting authorities to include social and environmental criteria for specific supplies they want to purchase. Challenges persist in implementation: if contracting authorities wish to require a supplier to adhere to certain RBC policies, these requirements must be linked to the subject matter of the contract (Ankersmit, 2020^[16]), which in practice might limit government entities in how they consider RBC criteria.¹²

In this context, it is helpful to consider policy evolution in general and how different speeds of policy advancements in different areas might create hurdles for policy coherence. Researchers consider three options for lawyers and policymakers when laws change: Policy makers can 1) *work within the limits* of existing laws such as by supplementing them with additional guidance that reflects RBC expectations, 2) *change* the existing law (e.g., reform a public procurement law to meet the expectations set by an RBC due diligence law), or 3) *restrict* the use of procurement in line with policy preferences (e.g., prohibit the public purchase of goods associated with irresponsible business practices) (McCrudden, 2007^[15]). Additional legal reforms bring a unique opportunity to streamline regulatory bodies within countries, but can also result in more complexity to legal systems, especially if there is not broad and high-level alignment. Buy-in is needed across all levels of government, from the top-down to the bottom-up, to ensure cohesive design and implementation of legal and regulatory reforms.

Limited evidence on effects of integrating RBC due diligence into public procurement

As demonstrated, there is a lack of evidence on the impacts of public procurement and of RBC in turn on global supply chains. This chapter has relied on research related to sustainable and strategic public procurement to extrapolate on the effects of more responsible and sustainable public procurement on global supply chains and on social outcomes. However, as the policy integration of RBC and public procurement has not been holistic, there are singular examples of procurement being used for improving labour standards, or addressing environmental concerns, but no broad policies that integrate all RBC aspects into procurement. In only analysing small pieces of a larger puzzle, it is difficult to make systematic conclusions on how RBC and public procurement policy coherence will truly impact global supply chains.

Some observers have voiced concerns about potential negative impacts that can result (McCrudden, 2007^[15]). These include, but may not be limited to: increases in the cost of procurement (when considering RBC-related objectives in the purchasing of goods and services), a reduction in transparency, greater bureaucratization of procurement, higher chances for corruption, and reduced competition (McCrudden, 2007^[15]). Considering social and environmental objectives in procurement is sometimes seen as directly contradictory to the economic objectives of procurement (Andrecka and Mitkidis, 2017^[75]). Some observers commented that the perception of efforts associated with the integration of RBC considerations might negatively impact willingness of public buyers to pursue RBC objectives. (Andrecka and Mitkidis, 2017^[75]). RBC and public procurement policy coherence can also require managing both negative perceptions and competing objectives, as well as adverse externalities. Current trends do show greater accommodation of RBC-related policy objectives (Martin-Ortega and O'Brien, 2017^[76]).

Scaling up government resources (both financial and human) is thus necessary not only to enhance implementation and training around RBC due diligence in public procurement, but also to measure impact as well as to assess enforcement related to the emerging regulations in this area. Relatedly, it is also necessary for managing any potential trade-offs between greater integration of RBC and potential higher costs in procurement associated with such integration. Resources must be set aside to gather appropriate

data and analyse the short-, medium-, and long-term effects of integrating RBC due diligence into procurement. As this paper seeks to demonstrate, implications of RBC due diligence regulations on procurement are visible; further research is needed to understand the full effects of policy coherence.

Capacity and resource-related challenges

Countries hoping to scale up their policy alignment of RBC and public procurement will grapple with how to address resource and capacity constraints. No matter their formulation or type, changing – and increasing – requirements regarding RBC due diligence have resulted in changes to the public administration generally and to public procurement approaches specifically. Across the board, these changes will require resources to ensure proper implementation. As demonstrated above, to implement the new regulatory requirements, additional capacity in the public administration is needed. Capacity building is a key part of the smart mix of government approaches to promote and enable RBC (OECD, 2023^[81]). One dimension where the government faces capacity needs is around policies and policy coherence related to RBC due diligence itself. Additional expertise around policy coherence might be required of civil servants – including in public procurement – notably to coordinate legislative processes or implementation of key measures within laws, and often in collaboration with other parts of the public administration. Beyond these immediate actions to implement regulation, public buyers have to adapt to market changes as companies implement RBC regulation. This might mean additional market analysis, but more importantly, public buyers might be able to develop new sources of information for decision making processes, such as using legally required RBC reporting for tender decisions.

Policy makers and practitioners have managed general capacity constraints in public procurement systems. Integrating strategic aims, such as those related to RBC and due diligence, present additional challenges. Research shows that delivering RBC-related objectives is only possible at advanced levels of public procurement maturity (Hamilton, 2022^[80]). Sustainable public procurement requires buyers to have a knowledge of economic, legal, green, and social aspects – and procurers cannot be experts in everything (Caimi and Sansonetti, 2023^[81]). OECD research, for example, has found that public procurement officers need additional training opportunities for more ‘advanced topics’ like strategic or sustainable public procurement – and current efforts have prioritised legal and procedural aspects instead (OECD, 2023^[82]). Even where countries have achieved the inclusion of sustainability topics in training courses (such as in the EU), there are still challenges related to capability and application of knowledge learned to real scenarios (OECD, 2023^[82]).

Beyond capacity building and training, support structures are also important (Caimi and Sansonetti, 2023^[81]). On a first level, this might mean structuring expertise within government in a way that on the one hand allows specialisation, but on the other hand makes this expertise accessible to other parts of government. For instance, in the Netherlands, a 2014 risk analysis exercise by KPMG, commissioned by the Ministry of Foreign Affairs, identified several high-risk sectors procurement categories (Rijksoverheid, 2022^[83]). Based on this analysis, the Dutch government made the inclusion of RBC conditions mandatory for tenders equal to or above European thresholds in these categories. The International Social Conditions, published by the government, require contracting partners to carry out due diligence in accordance with the Guidelines and UNGPs. Normally implemented as special terms and conditions of performance in tender documentation, contract partners are required to provide, within the scope of the contract, (a) a risk analysis to identify and prioritize the most salient risks, (b) a plan to take action to stop, prevent or mitigate those risks, and (c) monitor and communicate publicly about progress made. Strengthening the focus on advanced objectives in public procurement entails well-designed capacity programs but also methodologies and guidance that can provide assistance throughout the process – such as manuals, templates, help desks, and even direct support to procurement procedures (OECD, 2023^[82]). Given the highly specialised nature of RBC issues, this would require a significant scaling up of capacity and resources within governments. Some governments have applied similar programs around capacity building for RBC with SMEs – such as guidance to increase SMEs’ due diligence awareness and understanding

as well as their technical capacity to implement it (OECD, 2021^[84]). These methods can inspire similar approaches for building capacity for RBC due diligence in public procurement. Australia and the UK have taken similar steps by carrying out training and capacity building to enable procurement officers to implement the requirements of RBC regulations in their procurements.

5 Conclusions

RBC due diligence legislation typically targets business behaviour, but – as shown in this paper – often includes requirements for governments to consider RBC as well. Public procurement is one of the policy areas where government and markets interact. This paper analysed how emerging legislation on RBC due diligence affects public procurement to inspire insights for how governments can mainstream RBC across their activities.

Two conclusions emerge in terms of implications of RBC due diligence legislation:

- First, implications for public institutions – and at times for public buyers – stem from defined asks for these institutions in the new RBC due diligence laws. Expectations for public institutions on promoting RBC are spelled out more clearly than before, requiring public institutions to consider due diligence and compliance with RBC due diligence legislation, and prompting governments to adapt their approaches.
- Second, in Adherent countries, the scale of public procurement spending intersects with a growing trend of RBC due diligence legislation with requirements for public institutions. The analysis shows that governments are influential players in global value chains both as regulators but also as commercial counterparts. On RBC, governments have to consider their active role in global value chains.

In addition, RBC policy coherence might benefit from a virtuous circle: greater uptake of RBC globally is likely to change the viability of policy measures. An example is RBC reporting or evaluation through sustainability initiatives. As businesses adopt more responsible practices, information about their “RBC performance” (such as an overview of company due diligence processes and key results that emerge, how they conduct stakeholder engagement, etc.), is becoming more available, more aligned, more reliable, and more systematic. This means that RBC-related information about businesses could serve as a new source for decision making – including by governments in their public procurement decisions in the future.

As a consequence, RBC due diligence legislation requires adaptation notably from governments in their role as economic actor. (Re-)defining the governmental role in promoting RBC is the first step towards an encompassing vision and consistent policy coherence strategy, with an effective smart policy mix. The Guidelines and OECD Recommendation on the Role of Government in Promoting RBC clarify expectations to both governments and businesses in this context, and serve as compass in identifying a course of action in this changing landscape.

No matter how a government defines its role in promoting RBC, it can draw on a rich toolbox of policy measures. Most governments already pursue aspects of RBC across their portfolio, including on issues like public procurement, SOE matters, or trade and investment policy. Greater attention to RBC policy coherence will require a more systematic approach, and an evidence-based choice of policy measures. Governments may wish to evaluate the range of options at their disposal for promoting RBC, what is already done and how effective it is (i.e., laws and regulation, policies, strategies, action plans, diplomacy, etc.). Examining structures in place to support implementation is key. This includes resource and capacity-related measures both in building RBC and public procurement capability and knowledge, but also considering what structures and systems within government would be most appropriate to expand and mainstream RBC into different areas.

The analysis presented in this paper was deliberately targeted to a specific aspect of government interaction with global value chains. Future research, especially incorporating stronger data collection and analysis on impact, will be crucial to support the integration of RBC due diligence expectations into government activity. Thematically, the paper focused on public procurement. It did not explore the implications of RBC due diligence regulation on policy areas such as trade and investment and SOEs, but examples from this analysis illustrate how regulation might affect these activities. Future research could explore interactions between RBC due diligence legislation and these other policy areas where government takes up an economic role.

One key aspect of further research could focus on one of the key limitations pointed out in this paper: the uncertainty around impacts and spillover effects of RBC policy measures. An analysis of the real, practical effects of RBC due diligence and public procurement policy integration and coherence is critical. A particularly pressing question relates to how smaller companies will be affected. While not in scope of most RBC due diligence laws, smaller and medium size companies account for a significant portion of economic activity across Adherents and are involved in public procurement supply chains. How do emerging regulations impact these companies in particular, and what is the role of government action in this impact?

Given the early stage of policy developments on RBC due diligence, limited evidence exists to inform policy choices, which thus raises the question – how to choose the *most effective* measure? Future initiatives could focus on creating evidence (based on robust data and impact analysis) to identify benefits and limitations of voluntary and binding measures, such as how requirements for the public sector could be shaped. Specifically on public procurement, future analysis could explore how the broader public administration could effectively support public buyers in implementing requirements from emerging regulation. Practically, research could identify effective initiatives to help public buyers verify compliance of tenderers with due diligence requirements objectively.

As attention to government's role in global supply chains grows, the understanding of where a government's responsibility on RBC starts and stops is sharpening. Government strategy is set to change. The evolving landscape presents an opportunity to further mainstream RBC in all areas of where the government interacts with supply chains and global markets. With an increasing appreciation for the responsibility of governments on RBC, the definition of success of government action will change: better outcomes for people and the planet are dependent on action far beyond the domestic realm. Greater clarity on RBC-related impacts in *global* supply chains will be needed to define (and finetune) efforts in mainstreaming business sustainability “at home”.

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Notes

¹ Over the last years, the terms CSR, RBC, and BHR have been used interchangeably. They all reflect the expectation that businesses should consider the negative impact of their operations and supply chains on people, the planet, and society as part of their core business considerations, while contributing to sustainable development. These concepts should not be understood to be equivalent to philanthropy.

² The OECD seeks to support countries in implementing a risk-based approach to public procurement. For instance, in 2023, the OECD developed a public procurement risk framework, to consider emerging risks to public procurement outcomes, such as financial, social, and environmental risks. (OECD, 2023^[87]).

³ Although there are no RBC due diligence laws currently in force in the region, there are proposals for legislation in Colombia, Brazil, Peru, Mexico, Chile, Korea, and Thailand.

⁴ Some laws can be a hybrid of the types or include key components that are normally associated mainly with characterized by the other types. For instance, mandatory due diligence measures can include public disclosure measures within them, and some product and market-based measures include requirements on due diligence conduct when importing the legislated products.

⁵ Primary legislation are acts passed by country legislative bodies. Countries define secondary legislation in different ways, and the types of legal documents that emerge are diverse. In the UK, secondary legislation is often used to “fill in the details” (UK Parliament, 2023^[85]) of primary legislation, providing practical measures to enable and enforce the law (UK Parliament, 2023^[85]). In Australia, secondary legislation is issued by the executive branch to further work out the application of a parliamentary act (Parliament of Australia, 2023^[86]).

⁶ The laws listed under this category of ‘no requirements’ serve as examples of laws that do not present any type of requirements for public institutions. These are not meant to be comprehensive lists of all legislation under these categories that do not present requirements for public institutions.

⁷ Additionally, Australia’s Commonwealth Procurement Rules stipulate that relevant entities must not seek to benefit from supplier practices that may be dishonest, unethical or unsafe (including modern slavery practices), and must make reasonable enquiries that procurements (above a certain threshold) consider relevant regulatory frameworks, such as those regarding fair labour. The Procurement Rules also require procurement officials to consider the Commonwealth’s reporting requirements under the Modern Slavery Act. In July 2024, Australia introduced the Commonwealth Supplier Code of Conduct which complements the Modern Slavery Act by requiring suppliers to take all reasonable efforts to ensure that they, and organisations in their supply chain, are not causing, contributing to or directly linked to human rights abuses such as coercion, involuntary and underage labour or modern slavery practice.

⁸ <https://www.publicsafety.gc.ca/cnt/cntrng-crm/frcd-lbr-cndn-sply-chns/ctlg-en.aspx>

⁹ The register is available in this link: <https://modernslaveryregister.gov.au/>

¹⁰ The Dutch Child Labour Due Diligence Act (Wet Zorgplicht Kinderarbeid) was adopted by the Dutch Senate in 2019 but as of 2024, has not yet come into force. The law was put on hold pending the outcome of the negotiations on the CSDDD. With the CSDDD in force as of July 2024, the status of the Child Labour Due Diligence Act may be revisited.

¹¹ This means that Germany could be categorised as a law presenting both explicit and implicit requirements for public institutions: explicit as it creates sanctions to be followed by contracting authorities, and implicit as it includes public entities in its scope under certain circumstances.

¹² To promote the use of public procurement as a tool to achieve social policy objectives, the European Commission published a practical guide for public buyers, with concrete suggestions and examples of how to take into account social objectives throughout the procurement process.



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