



Can Public Procurements Contribute to Fighting Trading in Persons?

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Abstract

Various forms of human exploitation, including human trafficking and forced labor are on the rise globally. The article proposes that governments have the means to act as end buyers, regulators, and law enforcers at the same time to contain and eliminate human trafficking from all supply chains they may reach. The article revisits three legislative models and examines the question whether the policies they represent can be rendered sufficient. The article finds that all regimes have their unique shortcomings. Furthermore, legislators tend to avoid rigor by applying back-door exceptions.

Keywords Public procurement · Human rights · Trading in persons · Forced labor · Global supply chains

Introduction

Public procurement regulations may have an important role in fighting various forms of human exploitation. According to the Global Slavery Index (2019), currently there are approx. 50 million people in modern day slavery which is one of the most poignant public policy challenges currently. Contracting authorities are necessarily interconnected with global supply chains but are under moral and legal scrutiny to filter out partners affected by any form of human exploitation either directly or indirectly. Public institutions are between two contradicting interests: fulfilling their public duties seamlessly and efficiently but on the other hand they must comply with all applicable legal and moral requirements. Should the two be in conflict, the legal and moral requirements must prevail.

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This article considers the following primary research question:

1. Do legal provisions regarding public procurements provide appropriate means against forced labor and other forms of human exploitation globally?

The paper addresses three secondary research questions as follows:

- 2.1 Is US False Claims Act (FCA, Federal Acquisition Regulation 52.222–50) sufficient in its current form or more could be achieved by an amendment?
- 2.2 How does FCA perform in an international comparison?
- 2.3 Is there any field experience regarding FCA and what may be concluded from it?

Using public procurements as means of public policy ends was first analyzed by McCrudden (2004). In his seminal article the author offers a historical context to using procurements to pursue human rights, social inclusion such as non-discrimination and affirmative action for underprivileged groups. Cleaning public procurements from forced labor or any form of human exploitation has become a vehicle of pursuing human rights through global supply chains. The Commission of the European Union recently announced that it would introduce policies to ban goods produced with forced labor from the EU market (ec.europa.eu, 2022).

The Applied Research Method

The applied research method is legal analysis supported by secondary empirical research using qualitative and quantitative findings from the recent past. The empirical part of the research contains empirical legal research (cases) and findings of public contracting literature. The legal analysis relies strongly on the legal definition of the different forms of human exploitation having been applied in public procurement provisions. The research contrasts the normative realm with the referred empirical findings and makes the conclusion that major regulatory changes are inevitable.

Legal Analysis

Legal Definitions Applied

In this paper a terminology is used which had been crystallized by the State Department in its annual TIP Reports (TIP Report, 2022) that refer to the Trafficking Victims Protection Act (TVPA) of 2000 as follows:

- “sex trafficking ...;” or
- “the recruitment, harboring, transportation, provision, or obtaining of a person for labor or services....” (Ibid. p. 5)

Sure enough, TIP is a general term, applicable both as a strictly legal, as well as a vaguer public policy notion. According to the TIP Report 2022, in „the United States, the term ‘victim’ means a person who has suffered direct physical, emotional, or pecuniary harm as a result of the commission of a crime.” (Ibid, p. 6.)

There are over 12 global and 300 bilateral treaties against various forms of TIP, including forced labor (Cockayne, 2015). One may add the number of various domestic regulations which might be in the thousands. The most important international treaties affecting public procurements and TIP – apart from the United Nation’s Universal Declaration of Human Rights are the following:

- The International Labor Organization’s eight Fundamental Conventions on forced labor, child labor, discrimination and freedom of association;
- The United Nation Convention on the Rights of the Child;
- The United Nation Convention against Corruption;
- Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (Palermo Protocol).

Legal Differences Between FAR 52.222–50 and the EU’s Public Procurement Directive (2014/24) Art. 57

Using the legal notion of TIP, public procurement regulations are used as public policy means to clean supply chains from TIP especially, that the buyers in public procurements have a major advantage over private buyers: they enjoy regulatory and market powers alike. A common legal means of cleaning public procurements from TIP is exclusion (debarment) of the given market player from public contracts.

The main characteristics of the exclusion ground regulations (Art. 57. of 2014/24 Directive of the EU Parliament and the Council, hereinafter used as ‘Directive’) are the following:

Art. 57, Sect. 1. Exclusion grounds – in terms of being excluded from participating in public procurement proceedings – apply if a concrete conviction by final judgement had taken place against a natural person in charge of decisive or representative powers barring acts of TIP as legal ground. Point f) refers to Art. 2. of the TIP Directive (2011/36) whereas the penalized TIP related conducts are enlisted.¹ Section 6. offers a waiver to companies (in the Directive’s wording: “economic operator”) under Section 1. with the condition they “provide evidence to the effect that measures taken by the economic operator are sufficient to demonstrate its reliability despite the existence of a relevant ground for exclusion. If such evidence is considered as sufficient” the consequences set forth in the Directive do not apply. Reliability is restored if compensations are paid to the victims and if the economic operator cooperated with the authorities in the investigation.

¹Art. 2. Section 1. of the TIP Directive of the EU No. 2011/36. <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32011L0036&from=en>

Section 7. grants the Member States the right to regulate the interval of exclusion not exceeding 5 years in TIP cases.

From the public policy point of view the weaknesses of the Directive's wording are obvious regarding the efforts of cleaning supply chains:

- Subcontractors, partners of the given economic operator are not affected even that supply chain risks are not typically confined to a single company, let alone a company used for bidding for government contracts, therefore, it is possible to win public contracts with subcontractors that otherwise would be banned from being main contractors.
- Legal consequences apply only in completed criminal cases which means that the Directive accepts bidding of economic operators whose managements have been accused with TIP at court which process may take years to complete.
- It is a major shortcoming of the Directive that to whom exactly compensations must be paid is undefined. It is typical for TIP cases that the majority of the primary victims remain unknown to the authorities, secondarily, the European Victim Support Directive (2012/29) determines that secondary victims who suffer any form of harm caused by the crime and family members of the deceased victim also fit the legal definition of a victim.

Apart from the legal ambiguity of the Directive, it can be inferred that it fails to address the concerns raised in the literature review part of this paper. It appears from the September 14, 2022 Communication of the Commission² of the EU Commission that the decision makers discerned the shortcomings of their policies and this may prompt them to policy action, preferably starting with cleaning EU public procurements.

Debarment as a legal means of cleaning public procurements according to FAR has certain unique characteristics. The US Congress adopted the current Combatting Trafficking in Persons regulations of FAR in October, 2020. FAR 52.222–50 contains detailed regulations on preventing certain forms of human exploitation within supply chains connected to public procurements. The referred segment of law contains the prohibition of TIP in connection with public procurements whereas the contractors, contractor employees or subcontractors are legal subjects of the obligations. This approach is fully in line with the United Nation's Guiding Principles on Business and Human Rights 13. b.³ The Congress has recently passed S.3470-End Human Trafficking in Government Contracts Act of 2022,⁴ which amplifies the focus on compliance by making human trafficking more readily grounds for debarment (since debarment and compliance are tied together in the U.S. system, under FAR Subpart 9.4).

FAR provides a brief catalogue of conducts that qualify for TIP, enhanced by a wide list of definitions. The enlisted legal notions resemble the wording of the TIP

² https://ec.europa.eu/commission/presscorner/detail/en/ip_22_5415

³ For more information see: <https://www.unglobalcompact.org/library/2> United Nations, 2011.

⁴ Public Law 117–116, <https://www.congress.gov/bill/117th-congress/senate-bill/3470>

Protocol of the UN⁵ and thus the Modern Slavery Act of the UK⁶ as well as Art. 4. of the European Convention of Human Rights. Prohibited conducts regarding TIP are described in the following. Forced labor, slavery, servitude, prostitution, other forms of sexual exploitation and removal of organs (corresponding Art. 3. of UN TIP Protocol⁷) conducted by “any individual, including a director, an officer, an employee, or an independent contractor, authorized to act on behalf of the organization” as agent (FAR 52.222–50), regarding commercially available goods excluding bulk cargo such as agricultural and petroleum goods.

Having compared EU and the US approaches, it is to be concluded that FAR avoids the pitfalls of the Directive by effectively including partners and subcontractors and steps over the narrow circle of convicted criminals in order to focus on the purpose of this policy, namely: protecting public procurements from TIP. FAR’s provisions of TIP are in line with the National Defense Authorization Act (NDAA) which also regulates termination of contract, suspension of payments until correction of conducts, and debarment.

The Element of Coercion as a Matter of Differentiation Between the US and the EU Models of Fighting TIP in Public Procurements

The element of coercion is essential in connecting the victim as a legal subject to the perpetrator. It’s correct legal encapsulation is also crucial in actually achieving the policy aims regarding TIP in public procurement.

According to the wording of the FAR, “Coercion means (1) Threats of serious harm to or physical restraint against any person; (2) Any scheme, plan, or pattern intended to cause a person to believe that failure to perform an act would result in serious harm to or physical restraint against any person; or (3) The abuse or threatened abuse of the legal process.” (FAR 52.222–50) Additionally, debt bondage, recruitment fees of any kind or form, and sexual exploitation also constitute coercion.

Typical criminal behaviors in TIP tend to avoid physical restraint and seek other – not less effective – forms of bondage such as drug addiction (typical in sex trafficking), alcohol addiction (typical in domestic servitude), codependency, sexual blackmailing, taking child or relative as hostage – oftentimes in another country (widely used in all forms of TIP). Efforts are frequently made to deepen dependency by creating multiple lines of bondage. A group of interlinked cases provide empirical evidence to the latter observation. For instance, a certain group of cases contain sex trafficking acts additional to forced labor by defense contractors, which involved Armor Group North America Inc. patronizing brothels in Afghanistan, similarly, Amina Enterprise Group’s and Glenn Defense Marine Asia’s engagement in prostitution.⁸ Coercive

⁵ See: <https://www.ohchr.org/en/instruments-mechanisms/instruments/protocol-prevent-suppress-and-punish-trafficking-persons> Retrieved: 10. 10. 2022.

⁶ See: <https://www.legislation.gov.uk/ukpga/2015/30/contents/enacted>

⁷ See: <https://www.ohchr.org/en/instruments-mechanisms/instruments/protocol-prevent-suppress-and-punish-trafficking-persons> Retrieved: 29. 11. 2022.

⁸ https://en.wikipedia.org/wiki/Fat_Leonard_scandal Retrieved: 12. 07. 2022.

deeds regarding migration and illegal migration appear to have rightfully deserved additional attention from the US legislature (FAR 52.222–50 b).

The Achilles' heel of regulations regarding coercion in TIP is the subtle inflexion point between overwhelming coercion and free will. Legislation tends to bridge this issue by penalizing potential misconducts such as harm or threat of harm to another person (child) or debt bondage. Still, authors (Howard & Forin, 2019) hint that perpetrators are aware of the risks of being charged with TIP therefore they engineer their business in a form that ensures their scheme being undisturbed: instead of outright violence, they prefer economic coercion which may appear identical to non-criminal “black” or “grey” labor or even less. In this regard, I refer to the Directive Measure published by the Attorney General of Hungary⁹ which proved instrumental in fighting TIP in Hungary (TIP Report, 2022, p. 273). The referred argumentation is based on the Palermo Protocol's notion of exploiting one's vulnerability. According to Art. 3. point a) of Palermo Protocol: “...forms of coercion, of abduction, of fraud, of deception, of the *abuse of power or of a position of vulnerability* or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation.” Vulnerability is substantiated even if the victim is intentionally left without any other acceptable option with the purpose to benefit the perpetrator. In addition to providing a yardstick for recognizing indirect deeds, the referred document emphasizes that TIP perpetrators typically “teach” their victims what to say, how to behave and that perpetrators tend to distribute work among themselves to minimize outsider interactions (Howard & Forin, 2019; Caruana et al., 2021, p. 264).

Remarks on the UK's Modern Slavery Act's Approach on Fighting TIP in Public Procurements

The UK's Modern Slavery Act of 2015 contains specific regulations on British participation in global supply chains (Part 6, Art. 54.). According to this, all corporations above £36 million annual turnover¹⁰ are obliged to prepare a human trafficking statement. This is a general obligation regardless if the given company participates in public procurement proceedings. Art. 54 excludes most public bodies, however, there is evidence that public services are affected by TIP in the UK – especially social care (Emberson & Trautrim, 2019). In the case study presented by the authors, out-sourced social care service providers extensively used migrant workers as caregivers in Nottinghamshire who were kept in unsuitable housing conditions and were forced to shop in the company store, furthermore, the workers were even physically threatened, and their wages were withheld while physical and sexual abuse were present. The astonishing findings are in connection with the £ 36 million threshold and to the non-applicability of Modern Slavery Act to public bodies.

⁹ See: <http://ugyeszseg.hu/en/> Retrieved: 12. 10. 2022. Number of the referred document: KSB 3771/2018/5-I. Issued: October, 25, 2018.

¹⁰ See UK Home Office Corporate Report <https://www.gov.uk/government/publications/uk-government-modern-slavery-statement-progress-report/uk-government-modern-slavery-statement-progress-report-accessible-version>

The British law is ripe for profound modification for legislators had not considered the possibility of such abusive practices upon formulating Modern Slavery Act.

Remarks on the OSCE Model Guidelines¹¹

The OSCE Model Guidelines on Government Measures to Prevent Trafficking for Labour Exploitation in Supply Chains – published in February, 2018 – provide a comprehensive overview of available public procurement policy solutions to all OSCE participant states and partners.

The Model Guidelines' Model Law embraces the principle of due diligence in a way that contracting authorities shall award contracts only to bidders who provide for a satisfactory compliance plan consisting of the following elements (*awarding criteria*):

- Recognition of risks.
- Details of due diligence to contain these risks.
- Define activities on suspected TIP.
- Remedies and managing grievances.
- Preventive public policies.
- Training and awareness programs.
- Recruitment plans: prohibiting recruitment fees.
- Transparency in wages.
- Housing plan if necessary.
- Procedures of preventing subcontractors of any tier to engage in TIP.

In addition to preconditions of awarding a contract, the Guidelines contain contract clauses which entitle contracting authorities to enforce anti-TIP policies under contractual bondage in terms of the following (*mandatory contract clauses*):

- Prohibitions of TIP related misconducts.
- Actions regularly reported on TIP prevention and containment.
- Disclosing information on the internal complexities of the supply chain, annual reporting.
- Apply monitoring mechanisms including third parties, potentially including auditors having direct and confidential access to workers.
- Mandatory progress reports regarding the protection of human rights.
- In case of any violation, the contractor is obliged to report on victim support and informing the law enforcement in charge.
- In case of missing deadlines or failing to take corrective actions, daily fines are imposed in either a numeric or a percentage-based form. As a result of corrective actions, “relevant improvement” is needed, otherwise the contract may be terminated.

¹¹ See the full text here: <https://www.osce.org/files/f/documents/1/9/371771.pdf> Retrieved: 12. 02. 2022.

The Model Law included in the OSCE Model Guidelines offers a balanced and comprehensive system of obligations to the OSCE member states which throws light on the previously discussed laws (the EU Directive, the Federal Acquisition Regulation 52.222–50, nor the Modern Slavery Act Art. 54.). The latter do not apply the differentiation of awarding criteria and mandatory contract clauses, instead, they address the contracting authorities and the contractors with obligations and prohibitions, leaving them to decide the concrete procedural position of the given obligation, while prohibitions are obviously applicable throughout the entire awarding and contract fulfillment phase.

The Potential of FAR in Fighting TIP Globally

FAR 52.222–50 is not a piece of criminal law, unlike Modern Slavery Act of the UK but is not an idle declaration of human rights either. Its sanctions system is specific to public procurements, still, the legal notions applied by it are far from unique and had been crystallized by both constitutional and criminal law. FAR 52.222–50 has its own sanctions' and procedural system, while it's legal hypotheses are borrowed from criminal law but FAR does not take the route of the Directive that subsumes the cleaning of public procurements to criminal law. Instead, FAR determines a regime that is oriented to effectively exterminate tainted procurements where and when they may occur. The EU logic is that of clear deduction, easy to comprehend, but without much connection to reality: 1. No one is guilty unless proven otherwise in a due process at a legitimate court (criminal court). 2. If one is not guilty, he cannot be held otherwise – not even in public procurement proceedings – regardless of any external circumstances. On the other hand, FAR applies the practical approach of the following: Banning TIP is a policy objective regardless of any other proceedings.

It is definitely a morally sound policy to ban contractors, subcontractors, services, and goods connected to TIP from being financed by taxpayer's money. Furthermore, any public entity purchasing goods or services tainted with such grave human right violations would be – even if unwittingly – found complicit in those violations, thus it appears logical to pursue government policies to block any connections with TIP culprits of any legal nature.

Literature Review: TIP in Global Supply Chains

Grouping the Theoretical Works on TIP in Supply Chains

The enormous literature of TIP as a human rights issue would exceed the limits of this article, instead, the object of this inquiry is the connection between TIP as a legal notion and policy objectives pursued through public procurements. Academic inquiry on public procurements is a part of general purchasing and supply chain theory. Therefore, first the academic literature on TIP and supply chains is introduced according to the following categorization.

Literature on TIP as a Supply Chain Challenge

Despite most countries' taking regulatory measures against TIP, it still has increased in many global supply chains especially in the form of forced labor (Han et al., 2022; Kelly, 2014; Tickler et al., 2018). This pessimistic tone is common to those, including the UN and the EU, who measure the number of TIP victims. Similarly, state jurisdictions appear to have disadvantage to global supply chains pertaining regulatory standards (Zheng et al., 2021). Nolan and Bott (2018) add that end buyers are in controlling position in global supply chains while players on the lower echelons, possessing no leverage on determining prices, drift towards opaque, often illegal practices.

Literature on TIP and Global Supply Chains Amidst New Challenges of COVID-19 and Mass Migration

Current global challenges, such as the COVID-19 pandemic and mass migration highlighted further aspects of TIP in global supply chains. The Biden Administration realized this in the 100 day Report on Executive Order No. 14017 (whitehouse.gov, 2021) in which TIP is viewed as one of the major risks that might harm, compromise or disrupt global supplies. Higher global demand on certain goods further diminished the bargaining position of the most vulnerable groups (Trautrimis et al., 2020), even to the extent that the US Customs and Border Protection lifted the ban against a surgical gloves' producer – that had been accused of forced labor – to ease domestic shortage (US CBP, 2020). This is an example of a morally laden decision in which the interests of public health or the interests prevailed over banning forced labor. Such behavior is not unknown in international anti-TIP regulations which tend to take exceptional circumstances into account. For example: Art. 4. Section 3. point c) of the European Convention of Human Rights excludes cases of “any service exacted in case of an emergency or calamity threatening the life or well-being of the community...” (ECHR, p. 7.) Apart from COVID-19, some authors hint that mass migration, especially illegal migration should be considered a risk-aggravating factor regarding TIP (Benstead et al., 2021; Howard & Forin, 2019; New & Hsin, 2021) while migration and debt bondage combined (Hsin, 2020) disproportionally broaden the populace exposed to the risks of TIP without any meaningful means of protection.

TIP Research in Concrete Industries Connected to Global Supply Chains

Concrete cases have prompted a significant chunk of academic thinking with the following examples:

- Clothing and chocolate industries (Balch et al. 2019),
- cacao farming and chocolate production with child labor (Amadu, 2018),
- Italian tomato farming exploiting migrants (Howard & Forin, 2019),
- seafood supply chains in Thailand (Wilhelm et al., 2020),
- cotton farming (Cole & Shirgholami, 2021).

Seasonal agricultural jobs represent a high risk of TIP, especially to forms of slavery (Trautrimis et al., 2020) but fashion and sporting goods industries appear not to be less threatened, especially in Bangladesh (Anner, 2019). Accordingly, the Rana Plaza disaster of 2013 is also mentioned in the related academic literature (Nolan & Bott, 2018) where more than a thousand workers died as a result of the collapse of a textile factory having been improperly built.

Literature on Prevention and Remedies

Regarding TIP prevention and remedies, the main train of thought is that this work primarily ought to be done by corporations themselves through corporate codes of conduct which corresponds to the “self cleaning” mentioned in the EU Public Procurement Directive (2014/24). This solution is apparently cost-effective from the side of public expenditures but raises the logical question of ‘Quis custodiet ipsos custodes?’ (‘Who will guard the guards?’) If firms are to guard themselves, the guarantees may be lost in conflict of interest. To handle this challenge, the “Modern Slavery Toolkit” was developed through co-creation to operationalize the involvement of NGOs while keeping suppliers on board by offering them development instead of monitoring (Benstead et al., 2021). Accordingly, the importance of combined state and corporate remedies are also emphasized (Nolan & Bott, 2018). The rationale behind this approach is that the top-down approach resulted in risk avoidance from the corporate side either severing connections with “problematic” partners without providing opportunity for improvement or bore mock compliance with fake reports even to the further detriment the situation (Jiang, 2009; Huq and Stevenson, 2020; Stevenson & Cole, 2018).

Empirical Research on TIP in Supply Chains

In terms of factual inquiry, accounts of concrete success or failure cases were collected in company declarations as primary sources. The analysis of the corresponding declarations of top Australian (ASX100) companies brought the conclusion that the content of the declarations regarding TIP was scarce and shallow (Christ et al., 2019). The authors hinted that TIP declarations were formal without any real intent to improve the situation.

Still, there are efforts on the corporate side as well. In Rio Tinto’s declaration of 2020 (Rio Tinto Co, 2020) for example, one can observe corporate screenings, risk assessments, and education efforts within the company itself and among its partners which measures are promising (Han et al., 2022). Still, one cannot help thinking that such efforts are not primarily created to make specific findings (“None of our business conformance audits in 2020 identified modern slavery-related findings.” Rio Tinto Co, 2020, p. 14.) but rather to create a business environment in which taking any risk being connected to such grave misconducts were out of the question. “During the year, we logged two ‘high’ risk ratings relating to other labor rights concerns” (p. 15.). Moreover, the secondary analysis of disclosures of 101 companies under the UK’s Modern Slavery Act was carried out to scrutinize if TIP regulations were enforced globally (Stevenson & Cole, 2018). The researchers found that certain firms

acknowledged the limitations of their audits in this field and thus developed further policies including on-site interviews, risk assessments, whistle-blowing support, and third-party self-assessment methods.

Such level of corporate compliance efforts requires corresponding management attention which has been amply mentioned by supply-chain management literature but scarcely represented in social impact management publications (Caruana et al., 2021). “Work here could investigate a number of substantive corporate practices in administering rights beyond codes of conduct and other private governance regimes...”. (p. 262.)

Normative Literature: Increased and Improved Transparency

“Normative” research – as mentioned above – is not necessarily legal research. “Normative” in this sense refers to the approach of the authors that they appear to promote an idea of betterment (idealistic-normative approach) or confront reality with what could or should be achieved. In this realm of thought, Mol (2015) argues that transparency ought to be further developed in supply chains whereas transparency is tarnished by (economic) power struggles. Busse et al. (2017) support the idea that voluntary disclosure motivated by the moral expectations of vigilant stakeholders might be a viable option. The authors hint that civic society could be the primary means of enhanced corporate transparency instead of strictly enforced law.

It is a classical bureaucratic response to increase transparency by applying indicators and reports. Corporate sustainability indicators – the authors identified 87 of them – have the potential to clean global supply chains, admitting though that the indicators scrutinized by them were lacking consistency (Koslowski et al., 2015). Still, others (Benstead et al., 2021) emphasize that the novel regulations on TIP in supply chains, especially the UK’s Modern Slavery Act of 2015 had beneficial impact on global supply chains’ transparency, furthermore, certain organizational innovations have been developed, for instance, participation in outlining a co-created ‘modern slavery audit toolkit’. Benstead et al. (2021) mentions the following approaches regarding the rectification of a supply chain:

- Ethical audit: partnership building with subcontractors and/or with social partners, and NGOs (LeBaron et al., 2017.).
- Worker’s involvement in monitoring (Outhwaite & Martin-Ortega, 2019; Prieto-Carrón et al., 2006).
- Complete supply chain auditing enhanced by international NGOs and constant street-level presence simultaneously (Benstead et al., 2021).

Criticism in the Literature

The entire academic literature of corporate self-cleaning is embroiled with a certain level of skepticism. LeBaron et al. (2017) hold that the government and NGO realms appear to outsource and delegate the entire issue to the corporates which creates an illusion of incremental improvement. New and Hsin (2021) step beyond general

skepticism and corroborate their disillusionment with detailed analyses of company statements issued due to the UK's Modern Slavery Act. They conclude their investigation with the following remarks:

“The lack of clarity in reporting requirements compounds the difficulty: CSOs have little resources for time and effort required to undertake ‘deep dives’ of the type conducted here.” (Ibid. p. 29.).

Secondary Empirical Legal Research

Quantitative Analyses

Quantitative analysis regarding whether public procurement has proven an effective policy tool with regards to TIP in the United States is not without difficulties due to the lack of available and accessible databases. To bridge this gap between the research question and the available data, the data of the following reports were used:

1. The Attorney General's Annual Report to Congress, FY 2020 and 2019.
2. Analysis of the Department of Defense spendings FY 2020, 2019, and 2018.
3. The Department of Justice's statistics on False Claims Act cases 2015–2021.

The inquiry into the Attorney General's Annual Reports to Congress appears necessary if one intends to extract reliable data on TIP in public procurements. The number of cases in relation to FAR 52.222–50 are lower than one would expect. The Attorney General's Annual Report to Congress on US Government Activities to Combat Trafficking in Persons (FY 2020)¹² contains the annual statistics for public procurement-related cases investigated by the Department of Defense in two categories:

- CFR 52.222–50 Trafficking-related activities: 48 cases and 312 victims.
- 48 CFR 52.222–50 Trafficking-Related Activities; 48 CFR 252.225–7040: 8 cases and 683 victims.

Regarding the internal composition of these cases, the Report states that a decisive chunk of cases were related to exploitative labor practices including misleading recruitment and violations under Defense Base Act and Longshore and Harbor Workers' Compensation Act of 1927.

Other extensive remarks of the Report in relation to FAR 52.222–50 are in connection with preventive trainings, workshops and information bulletins for employees and contractors, other hard data on the effectiveness of this regulation are not accessible. The report on fiscal year 2019¹³ similarly lacks hard data on cases regarding the application of 52.222–50, however, the Report refers to the efforts of the Department

¹² https://www.justice.gov/d9/pages/attachments/2022/03/24/fy20_ag_ht_report.pdf Retrieved: 12. 01. 2022.

¹³ https://www.justice.gov/d9/pages/attachments/2022/03/24/fy19_ag_ht_report.pdf Retrieved: 12. 02. 2022.

of State in bringing about the OSCE Model Guidelines on Government Measures to Prevent Trafficking for Labour Exploitation in Supply Chains¹⁴ which puts emphasis on due diligence on the bidders' side and risk assessment on the side of the contracting authorities.

Crouch, Morris and Peaslee carried out an analysis on the Department of Defense spendings in 2021 (Willis et al., 2021.). Their method was based on filtering data according to the country of spending and the affected industry. The authors found that considerable risks could be identified according to geographical patterns and product categories so they categorized the public procurement data according to the classification of the TIP Reports of the Department of State using Special Case, Tier 2 watchlist and Tier 3 categories. The product categories taken into consideration were: personal protective equipment, construction, and food and food products.

The results of the spending analysis show that throughout the fiscal years 2018–2020, 11,141 contracts were awarded and 18,144 contract actions were taken by the DoD worth USD 13.1 billion which roughly accounted for one fifth of the total DoD foreign spending. In addition, the DoD spent USD 6.66 billion for personal protective equipment during the fiscal years of 2019 and 2020 which— according to the authors— signifies that a large chunk of DoD spendings were at risk of having been affected by TIP. It is important to note that items of personal protective equipment are commercial-off-the-shelf (COTS) goods and therefore do not fall under the prohibition of FAR 52.222–50. DoD spent a total of \$6.66 billion for personal protective equipment (PPE) in FY2019 and FY2020. In this important product category, FAR 52.222 was not applicable despite obvious risks of TIP.

Department of Defense Empirical Data on TIP in its Supply Chains

The search engine of the website of the Inspector General of the Department of Defense does not offer statistics for FAR 52.222–50 cases.¹⁵ However, the researchers of the Naval Postgraduate School (NPS) have conducted an important empirical research as part of the Acquisition Research Program Sponsored Report Series (Willis et al., 2021).

The most important critical remarks of the authors of the NPS study are the following:

- Lack of standardization in DoD acquisition process (p. 2.)
- High level of TIP in COTS (over-the-counter on off-the-shelf items, p. 2.)— which in its effect contradicts the zero-tolerance to TIP policy of the DoD.
- Federal Procurement Data System Next Generation DoD database has restricted access.
- Reference to FAR 52.222–50 was missing in DoD solicitations and contracts.
- The proportion of COTS items in the DoD budget is too high to leave without compliance plans.

¹⁴ <https://www.osce.org/files/f/documents/1/9/371771.pdf> Retrieved: 12. 02. 2022.

¹⁵ See: dodig.mil leading to <https://search.usa.gov/search?query=FAR%2052.222&affiliate=dodig&utf8=%26%23x2713%3B> Retrieved: 12. 06. 2022.

- Counter-TIP Acquisition Representatives and relevant training is needed periodically.

In 2019 the Inspector General of the DoD published a report on DoD's efforts to combat TIP in Kuwait¹⁶ and the follow-up in 2022. The Inspector General's scrutiny was initiated by a criminal investigation which had found that the given contractor violated FAR counter-TIP regulations in the following instances:

- irrationally high employment fees at interest,
- wages below the legally mandatory minimum,
- failing to pay monthly salary,
- salaries were used to pay off employment fees which substantiated debt bondage,
- constant overwork without compensation, no days off, no sick leave,
- substandard housing.

Apart from the results of the criminal investigation, including FAR-conform clauses in DoD contracts were recommended by the Inspector General with corresponding monitoring and surveillance mechanisms in order to strengthen the enforcement of zero-tolerance counter-TIP policies in defense procurements. In June, 2019, a follow-up evaluation was published which admitted that 8 of the 22 recommendations were not fully implemented especially regarding the application of counter-TIP clauses and monitoring requirements. Therefore, enhanced contractor compliance monitoring, including past performance evaluation was agreed by the Commander of the US Air Forces Central.

The Organizational Element Regarding TIP in Public Procurements

Apart from the obvious economic interest of the contractors to keep labor costs as low as possible, a web of other vested interests is present. The middlemen who benefit from advertising, recruiting, transporting, housing, guarding (preventing flight), and usuring the workers and their families, are interconnected with economic, cultural,¹⁷ and informational ties. It is a matter of multiple principal-agent problems that the given contractor tends to have informational advantage over the contracting authority and the subcontractor over the contractor.

In TIP cases in public procurements, the motivational system of the interested parties (contracting authorities, contractors and subcontractors) can be characterized by informational asymmetry and contradicting interests regarding transparency which are detailed in the following Table.

Table 1. presents that contracting authorities are generally interested in low price and high transparency to fulfil the requirements of government institutions under

¹⁶ <https://www.dodig.mil/reports.html/Article/1874544/evaluation-of-dod-efforts-to-combat-trafficking-in-persons-in-kuwait-dodig-2019/> Retrieved: 12.15.2022.

¹⁷ A good example of the cultural aspect of TIP is the "kafala system" is a known, culturally embedded, legally underpinned institutional setting.

Table 1 Preferences of public procurement actors in TIP cases

	Economic interest	Transparency interests	Field information
Contracting authority	Low cost	High transparency	Scarce information
Contractor	High profit	Low transparency	Moderate information, deniability
Subcontractor 1-N	High profit	Minimum transparency	Maximum information

democratic control of being cost efficient while maintaining accountability. Still, information at the level of the contracting authority is confined to secondary sources such as internal reports while the reporting staff have an interest not to report any serious problems (Dery, 1998). This bureaucratic attitude is further aggravated in TIP cases because honest reporting—by nature—transfers unwanted knowledge to the higher bureaucratic echelons whereas acquiring the least official knowledge of TIP cases automatically induce grave individual and institutional legal concerns. Therefore, bureaucratic stonewalling is a common organizational phenomenon which is enhanced by endemic deniability embedded in the intricate principal-agent structure. Obviously, the more the layers of subcontractors and agents (in Table 1. represented by 1-N), the higher the incentive for the contractor and the contracting authority to look the other way and not to perform due diligence. On the contractor level the incentive for profits is an apparent driving force. However, even sufficient monetary means tend to evaporate in the chain of subcontractors. This statement is substantiated by the empirical findings of Howard and Forin (2019) on Italian tomato farming. In their case study, the company or companies on top of the supply chain, having access to the market, shape the entire value chain in the following way: Out of every EUR 1 made of the tomato business, EUR 0.83 are taken by the top companies while the rest are distributed between agro-industrial companies which are doing the processing work (EUR 0.1) and the production companies (EUR 0.07) which employ the agricultural workers who are exposed to the actual threat of being exploited in the form of TIP. This example in a market of an ordinary commodity can be used as an analogy to other industries in which public procurements are more dominant: it throws light on the risk potential of partaking government contractors in TIP by disproportionately distributing monetary means and purposefully using a web of subcontractors to pursue their economic ends. The latter risk is a lack of fairness in the supply chain which has an inherent trait of regenerating risks of TIP. At this point, a remark must be made regarding COTS products. Connecting to what Willis et al. (2021) have hinted, COTS purchasing is one of the major source of TIP risks in public procurements, including PPE (personal protection equipment), food products, and other essential commodities. It can be concluded that the lack of economic fairness in supply chains poses very actual TIP risks for COTS and non-COTS products and services alike.

Conclusions

The article endeavored to ask the question *if legal provisions regarding public procurements provide appropriate means against forced labor and other forms of human exploitation globally?*

The response to this question is definite no in the light of the widely publicized figures of TIP in global supply chains and—surprisingly scarce—qualitative and quantitative sources of empirical legal research and social science. It appears in the light of hard evidence that profound change is needed globally which enables law enforcement agencies to penetrate the activities of global supply chains. Public procurements provide for a minor part of global supply chains but they have the potential to start the

changes. Empowering plaintiffs, removing COTS exceptions (US), complementing self-regulations by law enforcement oversight (UK), and removing idle proceduralism (EU) are imperative changes.

The more specific, secondary research questions were the following.

Is US False Claims Act (FCA, Federal Acquisition Regulation 52.222–50) Sufficient in its Current Form or More Could be Achieved by an Amendment?

Indeed, FAR 52.222–50 is an advanced legal means to tackle TIP from those supply chains that are depending on government buyers. Certainly, more could be achieved.

FAR has its unrivalled advantage in the global fight against TIP by being a federal law of the U.S., being enforced by sound judicial proceedings, and extraterritorial jurisdiction in terms of contractors and subcontractors throughout the entire supply chain. FAR has its current shortcomings though and further development is inevitable in the following fields:

- Plaintiffs— in TIP cases they are in an undoubtedly disadvantaged situation— need further leverage in terms of financial, institutional and informational support. It is obvious that more DoJ and DoD personnel are needed on this field. The public financing of the additional staff might be enhanced using the analogy of forfeiture rules. Furthermore, cleaning supply chains from TIPs may contribute to economic growth— according to Executive Order No. 14017.
- It appears that FCA is not yet the silver bullet for FAR-TIP claims despite its obvious potentials. By the time being, potential plaintiffs are not in the practical position to enforce their rights because they are not likely to substantiate materiality and scienter requirements against a large organization, furthermore, they are unlikely to have access to competent FCA lawyers. The unwillingness of whistleblowers may be in connection with the pure cost–benefit calculations that have to compare short-term gains discounted by a relatively high probability ratio with a certain long-term loss in terms of losing the job and starting a new life.
- Reparation rules need to be further developed. FAR is lacking means to provide full or partial reparation to TIP victims. This is a conceptual shortcoming of FAR which has to be amended.
- COTS rules need to be revised because low added value industries such as agriculture, mining and clothing are gravely affected by global TIP, furthermore, COTS products represent a high proportion of public procurement expenditures.

How Does FAR 52.222–50 Perform in an International Comparison?

FAR deserves appreciation compared to the Modern Slavery Act of the UK (resembled by Australia too) and to the European Directive on Public Procurements. The Directive is confined to idleness due to its tenacity to closed criminal proceedings which makes it virtually impracticable. The Modern Slavery Act puts all burden on the corporate policies while applying a rather high threshold (£36 million per annum) which deprives many TIP victims from legal remedies. Reality is closing in rapidly

on these regimes. The threat of reputational damage which is the basic idea behind Modern Slavery Act does not appear to affect corporate behavior. As a conclusion I propose the decisive reform of all three.

Is there any Field Experience Regarding FAR 52.222–50 and what may be Concluded from it?

Publicly accessible data on any field experience on FAR 52.222–50 are scarce. Primary data are not available, secondary data cited in this article show as if the US were immune to TIP challenges domestically. However, extraterritorial jurisdiction– based on the notion that contractors and subcontractors are legally recognized as beneficiaries of government funds– entitles FAR with a globally leading role in fighting against TIP in public procurements. Not because FAR were flawless or had no room for improvement but because the UK's and the EU's public procurement regimes respectively have much more significant shortcomings hampering their declared policy aims.

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Declarations

The research fully complies with all applicable ethical standards.

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Consent to Participate N/A.

Consent for Publication I declare my consent for the publication of this article.

Conflicts of Interest/Competing Interests N/A.

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