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# CLR News

## Trade - procurement - labour standards

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# Note

from the editor

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The basic principle of the European social model as formulated by the founders of the European Economic Community was respect for the well-balanced regulatory framework for social policy, including social security and labour standards that existed in the member states. This regulatory framework was characterised by a mixture of labour legislation and collective bargaining and, as this mixture was different in every country, European social policy was also about how to live and deal with that diversity. The introduction of economic freedom principles in the European Union created an attractive open market for businesses. Along with the removal of the internal borders, the member states and the European Commission started to work out an unrivalled deregulation agenda. After the introduction of the internal market principles, some Member States had clear rules regarding the working conditions that applied for everyone working on their territory, other Member States had rules with regard to the applicable labour standards and legislation that did not necessarily apply to a temporary foreign workforce. But, although former

president of the European Commission Jacques Delors was a firm promoter of European unification, the European Union had to strike in his view a balance between economic integration and social cohesion. In recent interviews, Delors has deplored the fact that the primacy in Europe has completely shifted to a primacy of the economy.

One of the first items as the internal market project got off the ground, back in the late 1980s, to be taken up by the European building workers unions was the inclusion of a social clause in the European public procurement Directives which were completely renewed. And, although it was possible to reach a majority in the European Parliament for a firm social clause that said that labour legislation and collective agreements had to be respected in the country where the work was pursued, this majority did not obstruct the European Council of Ministers from watering down the relevant articles that were dedicated to the social clause. Instead of prescribing to all tenderers the applicable working conditions that belong to the regulatory framework in the host country, the Directives stated 'The

contracting authority may state in the contract documents, or be obliged by a Member State to do so, the authority or authorities from which a tenderer may obtain the appropriate information on the obligations relating to the employment protection provisions and the working conditions which are in force in the Member State, region or locality in which the works are to be executed and which shall be applicable to the works carried out on site during the performance of the contract'. The tenderers or those participating in the contract procedure had the duty to indicate, when drawing up their tender, that they had taken into account the obligations relating to employment protection provisions and the working conditions in force in the place where the work was to be carried out. From the very beginning, the trade unions had serious problems with this unbinding procedure. This has led to a lobby for stronger social and environmental clauses. In this issue of CLR-News we report on the long track that was necessary to improve the procurement rules, in order to get rid of the lowest price dogma. Public procurement is about spending public money, and that is

not a technical thing, as the business lobbyist are used to arguing, but a political decision with social and environmental implications that are not only worth considering but should be an integral part of the decision-making. The issue starts with an historical overview that I have written, followed by a larger account of the lobby work carried out by the trade union movement in strong and fruitful cooperation with a large group of social and environmental non-governmental organisations (NGOs). The account is written by Penny Clarke and Christine Jakob from the European public sector trade union federation EPSU. EPSU coordinated the lobby work and worked closely with the EFBWW in this area.

Recently the global dimension of trade agreements and labour clauses became a prominent political item because the European Union is pursuing a policy to conclude new or revised free trade agreements with numerous countries and continents around the world. Representatives from the AFL-CIO and ETUC concluded in May 2014 that increasing transatlantic trade could create new jobs and share

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prosperity, but must be done in a way that helps all working people. According to the American and European unions, trade agreements, such as NAFTA, have helped boost the corporate bottom line, but they have suppressed wages and workplace rights. The agreements regulate many areas which interfere with subjects such as trade in goods and services, intellectual property rights, investment protection and public procurement. Therefore, we include in this issue also a Global Labour Column dedicated to the issue of trade agreements and labour standards that was written by Vasco Pedrina and Zoltan Doka and published in the autumn of 2014. The EC-president Juncker promised a reasonable and balanced free trade agreement with the United States; we have to wait and see if this will lead to trade clauses that are less problematic for human rights protection and workers' rights.

To illustrate what the impact of procurement rules can be at the local level, Linda Clarke reports on what local authorities have done in Britain, including a firm position that the London local authority Islington has taken with regard to companies that have blacklisted workers in the past.

Finally, you will find two reviews that are related to earlier issues of our Quarterly and that we take on board because of the topicality of their content. As usual any input from your side is welcome.

## EU PUBLIC PROCUREMENT AND SOCIAL CLAUSES – AN OVERVIEW

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### Introduction - Social risks at public procured projects

In November 2014 the Dutch building workers' union FNV Bouw accused the transport ministry's Department of Waterways and Public Works (Rijkswaterstaat) of a passive attitude towards the exploitation of workers on public procured works despite the evidence of substantial abuses. The trade union stated that the department has a variety of options to check and monitor building companies working on its behalf but fails to do so. As a major road project client, Rijkswaterstaat was in the past repeatedly confronted with violations of the law and exploitation of construction workers on its sites, such as on the road work on the A2 and A4 motorways. Based on a report, commissioned by the trade union to the research foundation SOMO, FNV Bouw concludes that the Dutch Department of Waterways and Public Works, Rijkswaterstaat, has thus far taken very few steps to avert social abuses on its public procured sites. The SOMO report documents how responsible public procurement can play a role in the tendering and awarding of contracts. The research institute spoke to large contractors, like VolkerWessels and Heijmans, and interviewed Rijkswaterstaat as the public client. The conclusion of the interviews is that the workers' terms of employment are not yet included in tender procedures and contract negotiations. And above, there is evidence that the public customer fails in the monitoring of the subcontractors that are operating on its projects. Experience has shown that the risk of abuse is highest among subcontractors, who try to save on labour costs and often do not comply with labour legislation and provisions covered by collective labour agreements. One of the SOMO-researchers stated that it is very striking that the government, as a major client of these contractors and subcontractors, has no clear policy in place to eliminate the abuses<sup>1</sup>.

1. <http://www.fnvbouw.nl/SiteCollectionDocuments/Nieuws/De%20overheid%20en%20de%20bouwvakker.pdf> and <http://somo.nl/news-en/social-risks-at-government-construction-projects>

These conclusions are all the more distressing as the Dutch government ratified international standards, such as the UN Guiding Principles on Business and Human Rights. These standards require the public client to conduct due diligence into the social risks at its public works and to actively take steps to alleviate these risks. Besides, Dutch law provides an opportunity for public clients to impose social conditions on contractors and to encourage and reward a company's positive social policies.

### **Is Europe still blocking social clauses and dictating the lowest price?**

In recent years we have reported about several comparable large public procured projects all over Europe with similar abuses and a lack of enforcement and control by the public client. One of the stereotypical arguments was and is that the European legislator does not permit the public authorities to formulate social (and environmental) clauses in public procurement procedures and that a tender has to be given to the cheapest bidder; almost automatically leading to low cost subcontracting practices at the detriment of the involved workers. Against the background of the ongoing economic crisis and austerity measures, national, regional and local authorities may find it, with reference to European Union (EU) law, a good alibi to choose for the lowest price. Thus, the quality and sustainability of public services and goods may get compromised and wages, working conditions and collective agreements will come under pressure. In order to assess these arguments we have to go back in time and deal with the EU rules on public procurement.

The regulation of the procedures to be applied for public procurement has played an important role ever since the internal market project started in mid-1980s in the (then) European Economic Community. The European Commission initiated in those years a legislative package composed of Directives for public works, services and concessions. The EU public procurement rules had to create a legal environment guaranteeing at the same time access for all European undertakings to public contracts and efficient public spending. These rules were supposed to have an important impact on the overall economic performance of the European Union. In that first period, the European



Commission presented the drafting of the procurement legislation as merely a ‘technical affaire’ that should not be ‘polluted’ with social or environmental concerns. However, trade unions and environmental groups had serious problems from the start with the one-sided economic reasoning that was adopted in the 1980s by the European legislator. The reasoning was that the most effective way to spend taxpayers’ money in bringing the best benefit to the community was by looking for the cheapest bid. As a result, public procurement has been for quite a while dominated by the narrowed dogma of the lowest price, without taking into account the effect for workers or the environment.

### **The 2004 revision and the ECJ rulings**

Trade union demands, formulated since the start of the Single Market project in the mid-1980s, have been partially met during the revision of the procurement rules in 2004. That review of the EU public procurement directives allowed the integration of social and environmental criteria into public contracts; also to be applied by third country services providers, provided that such criteria were in tune with the fundamental principles of EU law as enshrined in the Treaties. However, almost in parallel with the 2004 revisions of the procurement rules European Court of Justice (ECJ) rulings watered down the applicable social legislation and the possibilities to control contract compliance by the Member States, notably the competence for Member States to formulate mandatory labour standards and provisions to be respected by all undertakings and for all those that are pursuing paid work within the territory. In addition, parts of the national regulatory frame (of labour standards and working conditions), based on labour legislation and collective bargaining, were unilaterally ruled out by the ECJ. The ECJ judgments (notably in the Luxembourg and Rüffert cases) create a situation whereby domestic service providers have to comply with mandatory rules that are imperative provisions of national law, whilst foreign service providers do not have to respect these obligations. The European Trade Union Confederation (ETUC) concluded in 2008 that the Rüffert judgement ignored Public Procurement Directive 2004 which explicitly allowed for social clauses. The judgement did not recognise the rights of Member

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States (MS) and public authorities to use public procurement instruments to counter unfair competition on wages and working conditions of workers by cross-border service providers, as these would not be compatible with the Posting Directive. Nor did it recognise the rights of trade unions to demand equal wages and working conditions and the observance of collectively agreed standards applying to the place of work for migrant workers regardless of nationality beyond the minimum standards recognised by the Posting Directive.

Along the same line of thoughts as the ECJ rulings, the European Commission came up with a selective and partial applicability of ILO Conventions. In a footnote to its 2011 guide 'Buying Social: a guide to taking account of social considerations' the European Commission limited the applicability of ILO Conventions for work pursued with posted workers in the public procurement area to eight core ILO Conventions that have been ratified by all 27 EU Member States. As a consequence, for instance ILO Convention 94, formulated and concluded as early as 1949 and ratified by several Member States (but not all MS), and of high relevance for fair public procurement procedures, was brought outside the scope.<sup>2</sup> These and other public positions of the EU institutions made it possible for procurement authorities to wrongly argue that EU directives prevent them from using social clauses.

The EU public procurement rules are to be applied by the member states. However, there is of course also an external trade dimension (see also the Doka/Pedrina contribution). The EU as an international trade actor has obligations to promote decent work, equality, respect for fundamental rights, freedoms and labour standards and environmental protection and energy efficiency in third countries. These are not principles that are left behind when economic activities are pursued at global level. Therefore, the trade unions have argued in the past that more needs to be done at EU level to improve social and environmental standards in cross-border supply chains, and has to be

2. [http://europa.eu/rapid/press-release\\_IP-11-105\\_en.htm](http://europa.eu/rapid/press-release_IP-11-105_en.htm)

addressed simultaneously in foreign trade policy. The EU legislation in the area of public procurement should pay more attention to the persistent imbalance in openness of public procurement markets between the EU and its main trading partners. In order to create a level playing field, EU public procurement legislation should not create opportunities for third country bidders to circumvent basic standards. In this respect, ratified ILO conventions and Human Rights have to be respected by all players, Member States and third countries alike. In the slipstream of the 2004 revision, and heartened by the neglect paid by the legislator, the trade unions and a large group of NGOs continued their plea for an EU policy that makes social responsible procurement a tool for national, local and regional government actors to maintain and enhance the quality of services, contribute to preventing social dumping and to ensure that wages and working conditions are in accordance with standards laid down in legislation and/or in collective agreements. Thereby, contracting authorities should use procurement as a lever to promote social and societal concerns such as employment, skills training, equality and social inclusion influencing the market in a positive direction.<sup>3</sup>

### **The recent revision**

Not least because the member states were confronted with serious problems in their own constituencies, the narrow vision advocated by the majority of the Barroso-led European Commission and the ECJ was more and more discredited. In reaction to rulings like the Ruffert case political space was created for an opening up of the rigid system. As a result, voices to use public procurement as a policy instrument to acquire supplies and services with a higher societal value, including the social and environmental effects, were becoming louder. The European Commission made in recent years new legislative proposals that led to a revised and modernised framework for public procurement policy in the whole of the EU. One of the aims was to enable constituencies to work with public contracts that can be put to better use in support of

3. The Network for Sustainable Development in Public Procurement (NSDPPP) was installed as a European network uniting social and environmental NGOs and trade union organisations with the joint aim to achieve progress in sustainable development through enabling EU public procurement legislation and policies. See <https://sites.google.com/site/sdppnetwork/>

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other policies. The necessary legislation on public sector procurement, utilities sector procurement and the procurement of works and service concessions by contracting bodies in the public and utilities sectors was concluded in December 2013 and finalised with the publication in early 2014.<sup>4</sup>

Price is no longer allowed to be the sole determining factor<sup>5</sup>. The Network for Sustainable Development in Public Procurement (NSDPP) welcomed the revision of the public procurement Directives, approved by the European Parliament, as the new rules will allow social aspects to be considered amongst other criteria for determining which bid is the most economically advantageous to accept. Contracting public authorities in Europe have the opportunity to make truly sustainable choices and spend taxpayers' money wisely<sup>6</sup>. NSDPP participants interpret the revised rules as an affirmation of the authorities' competence to introduce social and environmental considerations throughout the procurement process as long as these are linked to the subject matter of the contract. The NSDPP says: 'Additionally, public authorities can differentiate what they purchase on the basis of the process and production methods that are not visible in the final product. It will be easier for them to rely on labels and certifications as a means to prove compliance with the sustainability criteria they have set'. Members of the NSDPP were especially pleased with this aspect as it will allow public authorities to give preference to bidders who offer better working conditions to their workers and offer sustainably produced goods. Another important and controversial internal market issue was also settled as the right for public authorities to provide services directly was approved and concepts of 'in-house' and 'public-public cooperation' were defined. Public authorities thus have the possibility to limit competition for specific health, social and cultural contracts.

4. Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC.

5. <http://www.twobirds.com/en/news/articles/2014/uk/how-will-the-uk-implement-the-new-public-procurement-directive>

6. <http://www.epsu.org/a/10125> and <http://www.efbww.org/default.asp?Index=906&Language=EN>

The rules state that all member states shall take appropriate measures to ensure that in the performance of public contract economic operators comply with applicable obligations in the field of social and labour law established by Union law, collective agreements or by international social and labour law. The revision offers scope for individual EU member states to set mandatory grounds for excluding suppliers from competitions for contracts, including where a bidder breaches labour legislation (next to taxation). According to NSDPP participants, compliance with environmental, social and labour obligations, including collective agreements, is thus enshrined in the principles of the procurement legislation and tenderers can be excluded in case of non-compliance.

#### **Political will of the member states decisive**

On the trade union side, it has been pointed out that the opening up of the procurement rules consigns the duty to develop and materialise a sound and decent public procurement policy that includes societal objectives back to the member states and to the procuring public authorities. The new Directives have to be implemented into national law in 2 years; the deadline for transposition in national law will expire on 17 April 2016. Member states have the responsibility to implement the EU Directives in such a way that full account can be taken of the introduction of environmental and social clauses. For instance, they can prohibit or restrict the 'use of price only' criterion, and leave contracting authorities the choice between either assessing other aspects in addition to cost effectiveness, or base their purchasing decisions solely on the cheapest price option. Moreover, they have the possibility to effectively blacklist companies and prevent them from bidding for public contracts.

The European Trade Union Confederation (ETUC) has published a list of key points for the transposition into national law. In the introduction, the ETUC general secretary Bernadette Ségol stresses that there is work to do for the trade union movement and the NGOs. First of all trade unions should strongly resist a literal transposition of the Directives and call for an ambitious approach. A literal transposition into national law would probably defeat the effectiveness of the new

rules. According to the ETUC, there are gaps to be filled, and vagueness to be corrected. Besides, a number of provisions leave the choice open to the national legislator; the rules remain complex and much is left for member states to decide, such as the possibility for member states to reserve contracts for health, social and cultural services.<sup>7</sup>

The shift from the almost 'mandatory' procurement for the lowest price to an optional use of social clauses in the award procedure also poses a challenge for the trade unions and the NGOs that have lobbied for the broadening up of the public procurement rules; now it is their turn to keep the finger on the pulse. Local, regional and national governments no longer have the possibility to hide behind the lowest bid dogma. This begs for both active involvement in the preparation of the national legislative implementation and for local action during the practical application (see the Clarke contribution in this issue of CLR-News).

Transposition has to be thoroughly followed and practical measures have to be assessed and monitored from pre-procurement till post-procurement. The inclusion of social clauses in public contracts for instance can require public purchasers and suppliers to protect the vulnerable, support the disadvantaged, develop the social economy, protect the environment and promote other social goals and community benefits during the course of a project as a condition of the contractual award. But without a decent design, this policy will fail. Initiatives have to be well prepared. In the meantime member states have started the preparations of the transposition and some initiatives are worth mentioning. To give just one example, the Irish government started a pilot (in a Social Clauses Project Group) led by the Office of Government Procurement to proactively look at public contracts where social clauses could be deployed to contribute to employment or training opportunities for the long term unemployed. The aims are to identify policy priorities to be addressed through the insertion of social clauses and to come to adequate guidance in relation to suitable project types.<sup>8</sup>

7. New EU Framework on Public Procurement – ETUC Key points for the transposition of Directive 2014/24/EU, Brussels, October 2014.

But there are also first signals of member states that opt for a plain and unambitious transposition. This could result, for instance, in non-application of social clauses, thus leaving space for the lowest price to stay upright as the basic award criterion. The potential incentives to contribute to stimulating green and social procurement would get lost though the legal obstacles to adopting social criteria and criteria to promote sustainability in public procurement procedures have in theory been removed.

8. <http://www.per.gov.ie/minister-simon-harris-td-second-stage-speech-social-clauses-in-public-procurement-bill-2013/>. Read also the reaction of a MP: <http://oireachtasdebates.oireachtas.ie/debates%20authoring/debateswebpack.nsf/takes/dail2014101700003?opendocument>

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# THE NEW EU DIRECTIVES ON PUBLIC PROCUREMENT: A STEP FORWARD FOR GREEN AND SOCIAL PUBLIC PROCUREMENT

## Introduction

Public procurement accounts for one-fifth of the EU's GDP. There have been EU Directives in place since the 1970s, principally aimed at ensuring non-discrimination and transparency for economic operators wishing to bid for public contracts. The adoption of the EU directives on public procurement in 2014 has put a better European framework in place for sustainable public procurement. The European Federation of Public Services (EPSU), member of the European Trade Union Confederation (ETUC) as well as the Network for Sustainable Development in Public Procurement (NSDPP)<sup>1</sup> welcomed the adoption of the revised public procurement Directives as a step towards supporting public authorities to make sustainable choices and spend taxpayer's money wisely. Importantly, the right for public authorities to provide and organise their services directly was approved and concepts of 'in-house' and 'public-public cooperation' were defined. Public procurement remains only one of many alternative ways of providing public services.

The 2014 Directives affirm that contracting authorities may introduce social and environmental considerations throughout the procurement process as long as these are linked to the subject matter of the contract. Additionally, public authorities can differentiate what they purchase on the basis of the process and production methods that are not visible in the final product. It will be easier for them to rely on labels and certifications as a means to proof compliance with the sustainability criteria they have set. This will allow public authorities to give preference to bidders that offer better working conditions, favour the integration of disabled and disadvantaged workers, and offer

1. The Network for Sustainable Development in Public Procurement (NSDPP) is a European network uniting social and environmental NGOs and trade union organisations that have the joint aim to achieve progress in sustainable development through enabling EU public procurement legislation and policies. <https://sites.google.com/site/sdppnetwork/>



sustainably produced goods. Compliance with environmental, social and labour obligations, including collective agreements, is now enshrined in the principles and tenderers can be excluded in case of non-compliance. It is crucial that this 'mandatory social clause' is fully implemented and adhered to, including throughout the supply-chain. The new law makes it easier to identify subcontractors along the supply chain - although it is up to member states to establish their joint liability.

We regret that the European Parliament and Council did not agree to include a reference to ILO Convention 94 in the Directives in spite of substantial cross-party support for this. The absence of a reference to ILO Convention 94 means that the application of collective agreements and other social clauses such as 'living wages' to posted workers remain contested. In 2015 a ruling from the CJEU is expected (Oberlandesgericht Koblenz, Germany - Case C-15/14 RegioPost GmbH & Co. KG v Stadt Landau) to clarify further the Ruffert judgment regarding pay clauses in public contracts. The ETUC and others have raised concerns about this case and argue that with the new Directives the way is open for a more positive and constructive ruling from the Courts.

In implementing the rules, member states should improve some of the elements left to their discretion in the text. For instance, they can prohibit or restrict the 'use of price only' criterion, and leave contracting authorities the choice between either assessing other aspects in addition to cost effectiveness, or base their purchasing decisions solely on that criterion. Regrettably, the adopted text of the Directive still allows the purchase of the cheapest option - despite objections from many groups - subsequently adding confusion to the criteria for assessing tenders. Although life-cycle costing provisions have been improved, social externalities are still difficult to include in the life-cycle calculation.

Some elements will need careful monitoring. For example, member states have the option to reserve contracts for health and social services to social enterprises, but the definition of 'social enterprise' is

ambiguous and potentially open to abuse. Having a clearer legal framework for social procurement is a first step but positive measures to support its application are necessary. The European institutions need to take a coherent approach to sustainability and to develop a 'buy socially responsible and sustainable' strategy with targets and a monitoring and evaluation programme. Furthermore, austerity policies and cuts in public spending need to be reversed if Europe is to tap the benefits that long-term investment in public services and infrastructure can bring. EPSU will work with national members and with the NSDPP network to ensure the best possible implementation of the social and environmental provisions in the Directives and encourage public authorities to think, act, and buy 'sustainable'. Many EPSU members produce guides and other material to support more trade union capacity and influence on public procurement. Additionally, EPSU is a member of an EC public procurement stakeholder group that discusses both green and social procurement.

### **The context - benchmarking the delivery of public services against better working conditions**

The starting point for EPSU's engagement with public procurement is the demand that the EU should shift towards more sustainable development and to realise a 'social market economy', including quality public services, in line with the Lisbon Treaty. Integrating sustainability as 'strategic objective' into public procurement rules - and bringing procurement into line with the Lisbon Treaty - is part of doing this. A strong regulatory framework, an efficient public sector, and high quality public services are part of the solution to the economic crisis as well as the long-term development of our societies. The internal market should contribute to this – as said by the previous Commissioner Michel Barnier in the European Parliament hearings before his appointment, *'I will work to put the internal market at the service of human progress, fight social dumping and protect services of general interest'*.

EPSU's response to the EC Communication on the Single Market Act COM (2010) 608 argued that Europe and the EU 2020 strategy should acknowledge the role the public sector and public services play in

building sustainable growth and a fair inclusive society. Part of this role includes good governance and indeed the right to good administration is part of the Charter of Fundamental Rights. Not everything in life can - or should - be bought. Public authorities need to assess why, as much as how, they want to use public procurement to provide public services. There are sound economic, political and social reasons for public authorities - often local authorities - to provide public services directly to the citizens that elect them, or to provide them in other ways than through public procurement. The 'in-house' provision of public services in particular, including public-public cooperation, remains a legitimate, sustainable and transparent way of providing public services. Indeed we see many municipalities bringing previously outsourced services back under their control, not least because of negative experiences of liberalisation.<sup>2</sup>

EPSU has always argued that the EU should make more and better use of the Charter of Fundamental Rights and the provisions on public services that are now firmly enshrined in the Treaty, in particular including the Protocol 26 on services of general interest to 'benchmark' how public services are provided. Assessments are also needed for service concessions and public-private partnerships (PPPs). State Aid rules should not promote public procurement as an 'easier' way of complying with EU competition rules and avoiding challenges of 'over-compensation'. Cooperation between public authorities and non-profit providers of public services can be a much better option than public procurement procedures that run counter to the long-term relationships that are so important for quality and sustainability.

When public procurement is used it should always ensure good pay and working conditions and aim to provide for 'best value' in the broad sense of the term. In this sense, public procurement can be a lever to promote good employment, skills and social inclusion - influencing the market in a positive direction. Whether public procurement achieves these goals can only be assessed by evaluating the real outcomes, not just the procedural costs of awarding a contract.

2. See EPSU remunicipalisation report <http://www.epsu.org/a/8688>

### **The 2004 public procurement Directives - a lost opportunity for social criteria**

It is worth recalling that during the adoption of the previous 2004 Directives, social and environmental aspects were hotly debated. The end result however was unsatisfactory, especially for social procurement. Too much of the wording relating to encouraging and clarifying the scope to use social considerations was confined to the recitals of the Directives and as a result was not reflected in European regulations. The lack of clear wording in the articles themselves gave rise to uncertainty and a 'fearful' approach towards integrating social criteria, including related to employment conditions. The disappointing outcome was in spite of clear positions from trade unions and civil society, and from the European Parliament. The European Parliament resolution from Tappin, 1998 point 12, declares: *'Notes the Commission's intention to interpret the basic principles for the consideration of social aspects in public procurement contracts in an interpretative communication; nevertheless calls urgently for binding legislation at European level to ensure compliance with social legislation by all suppliers, including subcontractors, in the context of procurement procedures in order to prevent unhealthy competition with regard to the price of labour or other terms and conditions of employment; calls on the Commission, in future directives on public procurement, also to include provisions permitting social clauses to be included in contracts, in order to enable purchasers to develop positive action in employment and to promote social objectives'*.

Following the adoption in 2004, EPSU and a coalition of groups tried to make the most of text. The coalition produced in 2005 a guide called *'Making the most of public money: a practical guide to implementing and contracting under the revised (2004) EU public procurement directives'* to support members. The European Commission could have clarified how criteria relating to all three pillars of sustainability - social, environmental, and economic - can be integrated into public procurement policies, in accordance with the Lisbon Treaty and the Integration Principle established by Article 9 TFEU. Instead, the EC produced in 2004 a 'Buying Green' guide and it was not until six years later that the EC published a Guide on Socially Responsible Public

Procurement (SRPP). The process of producing the Guide showed that social procurement remained contested ground. The EC received 40 contributions from stakeholders and 13 from governments in response to a consultation it organised on the draft SRPP Guide. The EC indicated that the replies represented a wide range of opinions that needed to be taken into account, but it chose not to publish the contributions. The final result (published in December 2010) left more questions open than it resolved. One of the examples (p. 23) used in the Guide - concerning a public authority that wants to build a school and ensure that the construction workers have good working conditions - is telling '*... On the other hand, the labour conditions of the workers building the school cannot be part of the subject-matter of the contract, as they are not linked to the object of the contract, but only to the way in which the procurement contract will be performed. However, requirements relating to labour conditions could be included, under certain circumstances, in the contract performance clauses*'. The EC put forward a restrictive interpretation on what is allowed limiting social considerations to 'contract performance' issues, without the possibility for contracting authorities to use the social considerations into technical specifications or to distinguish between offers at the moment that contracts are awarded. The issue of costs was used as an argument against considering a variety of social and ethical approaches to procurement which the Guide was supposed to be promoting. There was little attempt to argue that higher cost can arise when social and environmental considerations are not taken into account, even if this cost may appear harder to quantify, at least at the time when the contract is awarded. Neither effort was made to evaluate the entry costs into public procurement.

Nonetheless, during this period the EU social partners in the textiles, cleaning, catering and private security industry produced guides to encourage social procurement in their sectors. National social partners developed monitoring tools - for example the Italian social partners in contract catering regularly documented the number and volume of contracts and whether these were awarded to economically most advantageous offer or to lowest price. Social partners in local and regional government also addressed social considerations in

procurement and in 2010 by adopting a joint statement on the SRPP Guide<sup>3</sup>. Other networks were active, Eurocities and ICLEI for example, but progress was limited and there was uncertainty about sharing good practices should they be challenged. The EU also indicated support for certain issues, for example including equal pay in public contracts although this did not seem to make any difference on the ground. However, underneath the legal discussions, support for sustainable public procurement remained strong, as indicated in a Eurobarometer survey in 2010.<sup>4</sup>

### **EPSU and NSDPP contribution to the evaluation of the 2004 public procurement Directives**

When the EC launched in 2010 an evaluation of the 2004 public procurement Directives, this provided an opportunity to 'revisit' the discussions on social procurement. In its paper (of 26.05.2010) the EC stated *'the evaluation will provide an opportunity to take stock of whether the EU Procurement legislation has realised its objectives, whether those objectives remain relevant in a changing context, and the balance between the costs and benefits of the current regulatory framework'*. In particular, the EC outlined two justifications as to why the evaluation was launched:

- to identify scope for greater cost-effectiveness (..) allowing the delivery of public services at lowest cost
- and to enhance the impact of public procurement for the support of other policy objectives and whether the current rules can be improved to support other policies.

EPSU welcomed the recognition of the role of EU public procurement policy and legislation in delivering key wider policy objectives but noted the conflict between the two considerations: the drive for lowest cost combined with insufficient solid scope and encouragement to consider other policy objectives, particularly social, decent work and employment objectives, means that low cost too often triumphs in the

3. EPSU/CEMR statement [http://www.epsu.org/IMG/pdf/SRPP\\_Joint\\_Statement\\_Final\\_Annex.pdf](http://www.epsu.org/IMG/pdf/SRPP_Joint_Statement_Final_Annex.pdf)

4. A Eurobarometer 'International Trade' report (9 November 2010) showed that 'Almost 40% [of EU citizens] are willing to pay more for products if they were produced under certain social and environmental standards or to support a developing country' (page 35): <http://ec.europa.eu/trade/trade-growth-and-jobs/public-opinion>

award of public contracts over important policy objectives aimed at improving social outcomes. The Monti report on the future of the internal market acknowledged that there is room for greater use of public procurement as tool to achieve the policy objectives mentioned above, but chose to focus on energy and climate change more specifically.<sup>5</sup>

EPSU and the NSDPP network contributed to the EC evaluation, stressing the many benefits of using public procurement to support the transition to sustainable development. We argued that the 'lowest price' option should be removed in principle in order to encourage public authorities to think, act, and buy 'sustainable' goods and services. Quality of work, fair trade, environmental protection are not the enemy of the internal market. Giving incentives to companies - both large and small - to respect workers' rights, labour standards and collective agreements, to provide training for employees and to promote equality of opportunities makes sense, also for companies. We urged the EC to make a thorough assessment of how far procurement legislation and policy has contributed to achieving the wider goals of the EU, including greater emphasis on areas such as decent work, equal pay, gender equality, sustainable development, fair trade, social cohesion, social dialogue and promoting collective agreements, environmental and climate protection, supporting international development, and considering supply chain liability as well as promoting transparency. We believed that it has under-achieved in all of these areas, and this situation needed to be remedied. We argued that the evaluation process should focus on what needs to be done to make public procurement a more effective tool in contributing to these objectives in the future.

The EC still gave the impression that including 'non-economic' - and especially social - considerations in public procurement increased complexity without bringing clear added value, not least as monitoring of outcomes is weak. We found this unfair and misleading. Unfair, because the EC report did not mention that this is largely due to the

5. [http://ec.europa.eu/commission\\_2010-2014/president/news/press-releases/pdf/20100510\\_1\\_en.pdf](http://ec.europa.eu/commission_2010-2014/president/news/press-releases/pdf/20100510_1_en.pdf)

ambiguities in the Directives and lack of positive measures to support public authorities develop sustainable development (more so in social rather than green procurement); and misleading, because there was very little - if anything - in the evaluation report on the broader costs and benefits of public procurement in general.

The EC seemed to consider that public procurement is perfect in terms of outcomes, except when it includes sustainability criteria. The EC phrases accompanying the evaluation report proclaimed *'EU public procurement framework has saved around 20 billion euros'* even though no analysis was made of the social and environmental impacts of this cost-saving (for example 'lost' wages due to social dumping). Indeed, even from an economic perspective, the 20 billion is an incomplete estimate because it includes only the costs up to the award of contracts - not the 'post' contract costs; e.g. costs that occur when contracts have to be modified/terminated. The EC said that it has only limited information on the number of contracts that have to be modified. From our own experience however we have good proof of public procurement contracts gone wrong, precisely because they do not include sustainability considerations.<sup>6</sup> Interestingly, although the EC quantified the cost of an average public contract, it could not say in 2010 whether these costs had gone down since the 2004 Directives had been adopted.

In particular, we underlined the need to fully respect the new Treaty provisions that reinforce social Europe, such as Article 3.3 of the TFEU, and enable us to develop a modern Social Market Economy. Article 14 TFEU acknowledges that Services of General Economic Interest (SGEI) are an intrinsic part of Europe's social model. And protocol 26 states clearly the responsibilities of member states in the delivery of such services, while the European Charter of Fundamental Rights recognises the right of citizens to access SGEI. In the EC Communication on the strategy for the effective implementation of the Charter of Fundamental Rights the Commission recalls that all EU legal acts *'must be in full conformity with the Charter'*.<sup>7</sup>

6. The construction, cleaning and care sector provide many examples

7. COM (2010) 573 final



The Lisbon Treaty contains a ‘horizontal social clause’ (Article 9) that states *‘in defining and implementing its policies and activities, the Union shall take into account requirements linked to the promotion of a high level of employment, the guarantee of adequate social protection, the fight against social exclusion, and a high level of education, training and protection of human health’*. As mentioned in a paper prepared by the 2010 Belgian Presidency, the horizontal social clause *‘calls for an intensified focus on the social dimension of EU policies. Taking into account the social effects of all EU policies demands a structural dialogue across and within all EU institutions. It requires all strands of the Council and the Commission to benefit from the expertise inside the social strand’*.

With the NSDPP we listed the following areas where public procurement could make a real contribution to improving social conditions:

- ***Social Europe – getting it back by procuring socially responsible***

In recent years there has been growing concern that the economic/ internal market freedoms and rights related to the EU are being allowed to carry far more weight than the social rights and freedoms of workers and of EU citizens generally. Public procurement should promote employment, inclusion, decent work, labour standards; or to support good working conditions, collectively agreed terms and conditions, and to foster respect for trade unions’ role in industrial relations. However, the effect of the ECJ cases, Laval, Rüffert and Luxembourg in particular, created uncertainty in areas of public contracting. This conflict must be resolved if we are to preserve any integrity in the term *Social Europe*. Public money should not be used to support companies undermining and undercutting local labour terms and conditions, standards, and job security, and undermining individual or collective labour rights, as has become the threat since these rulings. The rulings also discourage the ratification and application of ILO Convention 94 (Labour Clauses in Public Contracts Convention)<sup>8</sup>

8. The Convention is ratified by 59 countries among them several EU member states : Austria (1951), Denmark (1955), France (1951), Finland (1951), Belgium (1952), Spain (1971), Italy (1952), the Netherlands (1952) and Cyprus (1960)

which stipulates that all tenders apply no less favourable conditions of employment than are in force at the local level. The EU should support collective agreements in general and not undermine them. Pay clauses have a long history, dating back to the second half of the 19th century (UK Fair Wage Resolution (1891/1909/1946), France: National Decree (1899), USA: National Acts (1931/1936). A positive reference to the ILO's labour clauses Convention 94 would be very helpful as the Convention, *'requires the insertion of clauses into public contracts to (a) ensure that workers are entitled to wages, hours of work and other labour conditions at least as good as those normally observed for the kind of work in question in the area where the contract is executed, and (b) also ensure that higher local standards, if any, are applied'*. The Convention therefore helps to counter arguments that only 'universally' applicable agreements are compatible with the EU's internal market. This is not only important for EU/EEA countries but also other countries, as the EU plays an important role within the ILO. It also brings its 'internal market' logic into trade relations.<sup>9</sup>

- **Social cohesion**

The EU social inclusion programme calls on public authorities to create the 'framework' to integrate vulnerable groups into the labour market. The agreement by the cross-sectoral social partners on *'inclusive labour markets'* also points to the need for policy incentives to encourage concrete actions.<sup>10</sup> The public procurement legislation needs to be much more flexible to promote employment opportunities for those excluded from the labour market. This is particularly important during the economic crisis, where as unemployment increases, the scope for employment opportunities for vulnerable groups decreases even more dramatically.

- **Sustainable development**

The Lisbon Treaty includes as objectives the sustainable development of Europe and of the earth. Although it has been affirmed by the EU

9. To support our arguments, EPSU published a study on pay and other social clauses in European public procurement, Thorsten Schulten, Kristin Alsos, Pete Burgess, Klaus Pedersen, December 2012 (EN/RU) <http://www.epsu.org/a/9152>

10. [http://www.etuc.org/IMG/pdf\\_20100325155413125.pdf](http://www.etuc.org/IMG/pdf_20100325155413125.pdf)

that sustainable development entails social and environmental as well as economic considerations, much more progress is needed, in particular on social considerations. In most cases, whether or not a product or service is sustainable will require consideration of whether it flows from a sustainable production process - a process, which is sustainable socially, environmentally, and economically. The Lisbon Treaty affirms the role of sustainable development at the heart of EU objectives, including through its external relations. That the Integration Principle requires EU policies and activities to integrate sustainable development objectives - and not just environmental objectives, social objectives, and economic objectives standing alone - has significant ramifications. The comprehensive concept of sustainable development interweaving economic, environmental, and social components is a prerequisite of development that is environmentally sustainable over the long term.

- ***Environment, climate and emissions***

There is a big gap between stated commitment and practice in this area. Much of the focus in trade and procurement procedures for materials/natural resources/energy is on getting goods, products, materials and energy sources cheaply and in abundance. Insufficient care is taken with environmental considerations in the country of source, particularly in developing countries, encouraging instead unsustainable exploitation in production at the lowest cost. Supplier countries and their inhabitants see relatively little benefit at these bargain basement prices, with wage suppression and dreadful working conditions. Yet they bear unimaginable costs in environmental, social, health and climate damage. Crops are produced using banned pesticides which penetrate vital water supplies and soil, causing ill health and, too often, death. Workers are often not protected in the spraying of these chemicals and suffer illness and disability. Mass deforestation causes devastating landslides, and leads to the extinction of flora and fauna. Procurement and trade policies must build in mandatory requirements to prevent such destructive practices.

- ***Development and the external dimension to EU***

The Lisbon Treaty includes poverty reduction and free and fair trade as EU objectives, yet EU legislation and European Commission guidance documents do not make it easy for contracting authorities to give preference to Fair Trade products in public procurement. Internal and external EU policies should be coherent, not undermine each other, as recognised by the 'EU Coherence for Development' Policy.

The EC's trade agenda (November 2010) included proposals on the external aspects of public procurement policies, covering bilateral trade agreements with third countries. While recognising the importance of foreign public procurement markets for the competitiveness of European industries, the EC should not narrow or restrict policy scope, but rather encourage the EU trading partners to promote sustainable development across all its dimensions in their public procurement policies and develop measures to prevent undermining labour standards and workers' rights and conditions, and exploitation of the environment.

- ***'Best value' - not lowest price***

The economic and financial crisis budget pressures are pushing even more authorities to award to lowest price rather than assessing wider benefits across the life of the contract and the long term benefits of adopting a more socially responsible procurement policy. Public authorities need to assess the costs of not taking into account wider social considerations. Going for lowest price can jeopardise the quality of jobs and services. Danish trade union organisations, for example, recently examined the 15-20% cost savings achieved by outsourcing local care services. The unions found that the difference was because the new firms used staff with lower levels of training, relied more on part-time workers, and paid no overtime. In other words, cost cutting at the expense of workers and reducing the quality of the service provided clearly a false economy.

- ***Decent work***

The EU has a policy on decent work, yet in EU trade policy and public procurement there is too little focus on decent wages and conditions, labour standards and health and safety. If workers in developing

countries are exploited and in poverty they will not generate any spending power/demand and there will be no basis on which to build social and economic development in their countries. All employment should be fairly remunerated.<sup>11</sup> Supply chain liabilities must be strengthened and responsibilities of sub-contractors tightened, monitored and enforced with penalties. Procurement also needs to take into account the specific characteristics of particular services, which demand a specific organisation and regulatory arrangements, and properly trained and skilled personnel in adequate numbers to provide a quality and effective service.

- **Social Dialogue**

At EU level there are cross-sectoral and sectoral social dialogue committees. However, consultation with these structures and promotion of their involvement and role in procurement policy is not evident at all.

At national level trade unions should be able to give input from the earliest stage of the procurement process, i.e. long before any consideration is given to whether to outsource the contract. Trade unions and social partners can play a vital role in guarding against abnormally low tenders involving undercutting and social dumping, in promoting equitable wages, decent work and good conditions, equality, health and safety and product and service quality and accessibility

- **Gender equality**

The EC in its 2007 Communication *'Tackling the pay gap between women and men'* called on *'national authorities to make every effort to reduce the pay gap for their own staff and encourage their service providers to adopt equal pay policies in the performance of public contracts'*. The EC should develop mandatory provisions to improve equality through public procurement. Some member states do have legal provisions in this area, but there is a need for more consistency in this area, and for more mandatory requirements to be set at EU level.

11. The Commission's Opinion on equitable wages stated that all employment shall be fairly remunerated. Together with 10 'dimensions' of job quality, and the ILO's 'decent work' concept (which add social protection) these provide a common framework for improving the quality of employment.

Public procurement could be a major tool in addressing the gender pay gap. The European Commission has repeatedly acknowledged that the persistent failure to achieve this long established principle is unacceptable. It provides a vehicle for the EU and member states to kick start this objective through leading by example with a combination of effective incentives and sanctions; they must now commit to using it in this area.

- **Transparency**

Transparency regarding how and where public money is spent needs to be increased. Transparency is also important as a social objective on a number of levels relating to how contracts are carried out and by whom. Such information should be in the public domain, including quality and accessibility criteria, employment and conditions criteria. Public authorities should be obliged to monitor service delivery and employment standards as a matter of course. Public contract should not be kept secret on the grounds of ‘commercial sensitivity’, where there are clear public interest issues at stake in so many of these decisions. Transparency sometimes appears to be used as an excuse for avoiding the use of qualitative procurement criteria. Proponents of such a view argue that qualitative criteria are more difficult to apply in a consistent and objective fashion, and therefore cannot be applied transparently. The European Court of Justice clarified, however, that the requirement of transparency does not mean the contracting authority must adopt criteria which are ‘quantitative or related solely to prices’<sup>12</sup>. Instead, it has observed that ‘even where criteria which are not expressed in quantitative terms are included in tender specifications, they may be applied objectively and uniformly in order to compare the tenders and are clearly relevant for identifying the most advantageous tender’. Moreover, the Court has repeatedly asserted that the way to ensure that qualitative procurement criteria are applied objectively and uniformly is to make tender selection processes and the criteria used to assess tenders - including the relative weight accorded to various criteria - clearer, more transparent, and more easily subject to review.

12. Case No. T-59/05 *Evropaiki Dinamiki – Proigmena Sistimata Tilepikinonion Pliroforikis AE v European Commission* [2008] All ER (d) (Sep), at paragraphs 58-59.

### **The 2014 public procurement Directives – social criteria catch up**

The new public procurement Directives adopted by the European Parliament and Council in 2014 go some way towards improving the framework for sustainable public procurement and in particular some of the unhelpful ambiguities about social criteria have been tackled. Key elements of the public procurement Directives include:

- A confirmation of the right for public authorities to provide services directly and a clarification of concepts of ‘in-house’ and ‘public-public cooperation’.
- All parties and operators of public procurement contracts are obliged to meet national employment and labour laws and collective agreements (see ETUC guidance on this aspect).<sup>13</sup>
- MEAT (Most Economically Advantageous Tender) is the main basis for contract criteria and no longer cost or price.
- Life-cycle concept is included (but it is not clear if it can cover social elements).
- It will be easier for contracting authorities to include social and environmental factors throughout the procurement process, i.e. can now include in award criteria (in line with positive ECJ rulings).
- There is more transparency in the supply-chain; including obligations to provide details of sub-contractors, which should make it easier to ensure compliance.
- Stronger possibilities to exclude suppliers with poor track record.
- Substantial modifications of contracts will have to be retendered.

On the other hand:

- There is no real improvement on transparency for citizens, ‘commercial confidentiality’ and lack of freedom of information requirements on private companies remain an obstacle to getting ‘best value’.
- There is no reference to ILO labour clauses (public contracts) Convention 94 and therefore certain collective agreements / social clauses can still be contested.
- Social criteria not mentioned in the section on technical specifications (i.e., minimum requirements for all tenderers).

13. Key points for the transposition of the new EU framework on public procurement <http://www.etuc.org/issue/public-procurement>

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- Member states will have the option to reserve contracts for certain services (including health and social services) to certain types of social enterprises, but the definition of ‘social enterprise’ is ambiguous and potentially damaging.
- Measures to promote the measuring and monitoring the qualitative aspects of contracts remains limited.
- Joint liability for subcontractors and direct payment to subcontractors by the authority are optional to member states.

The EC is working on the transposition of the Directives with the Expert Group on public procurement that should complete its work by April 2016.<sup>14</sup> During the first stage the EC indicated that it was clarifying questions from member states and that they will then deal with ‘horizontal issues’. At the national level EPSU’s members, and more often the national confederations, are involved in this process to a varying degree. The EC seems hesitant to advance discussions in the Expert Group on social considerations but has indicated that it will make sure that member states are aware of the new possibilities in the Directives. It has not said whether it will update the SRPP Guide or develop further materials to support member states.

14. See <http://ec.europa.eu/transparency/regexpert/index.cfm?do=groupDetail.groupDetail&groupID=2679> for agendas and minutes but not the names of Government representatives



## SWITZERLAND-CHINA FREE TRADE AGREEMENT AND LABOUR RIGHTS<sup>1</sup>

Vasco Pedrina and  
Zoltan Doka<sup>2</sup>

After four years of negotiations, Switzerland has become the second European country to sign a free trade agreement (FTA) with China. The importance of the FTA rests in the fact that China regards it as a significant trial run for further FTAs with industrialised countries and the European Union (EU). This has led to political controversies accompanying the negotiation process.<sup>3</sup>

Right from the start, the Non-governmental Organisations (NGOs) and the trade unions successfully committed the Swiss negotiating party to the inclusion of a 'durability chapter' in this FTA, which emphasises human rights and labour rights as well as environmental standards. Swiss officialdom, which had long upheld a taboo on mixing trade issues with commitments to such standards by building them into an FTA, changed course in 2010 – mainly due to an international trend.<sup>4</sup>

### Durability provisions in the FTA – a controversial outcome

The Swiss Business Federation and the political Right were raring to secure privileged access to the massive Chinese market ahead of all the competitors in the EU countries and disregarding human and labour rights! The fact that they were dealing with a one-party state that tramples such rights was treated by them as a side issue. But civil

1. Published in October 2014 as Global Labour Column: <http://column.global-labour-university.org/2014/10/switzerland-china-free-trade-agreement.html#more>
2. Vasco Pedrina, former Co-President of the Swiss Unia trade union and Vice-President of BWI (Building and Wood Workers' International), representative of the Swiss Trade Union Confederation on the EFTA (European Free Trade Association) Consultative Committee. Zoltan Doka, Chief of Staff/Desk China Program, Solidar Suisse
3. The following three agreements are part of the Switzerland-China FTA ([www.seco.ch](http://www.seco.ch)):
  - Free Trade Agreement between the Swiss Confederation and the People's Republic of China (2014)
  - Agreement on Labour and Employment Cooperation between the Federal Department of Economic Affairs, Education and Research of the Swiss Confederation and the Ministry of Human Resources and Social Security of the People's Republic of China (2014)
  - Memorandum of Understanding regarding Cooperation on Labour and Employment Issues (2011).
4. ILO. 'Social Dimensions of Free Trade Agreements', International Institute for Labour Studies, 2013.

society opposed the notion of leaving out any substantial durability chapter, leading to petition campaigns and other action. Despite having an impact, the outcome was controversial, driving a wedge between the NGOs and the unions. Ultimately their differing assessments of the negotiations came down to whether, they had delivered a half-empty or a half-full glass. Essentially, the NGOs contested the outcome, citing a lack of clear commitment with respect to human and minority rights, including all eight ILO core labour standards. To further substantiate this frustration, there was no clear reference to the Universal Declaration of Human Rights in the agreement. However, the preamble to the FTA cites the protocol of understanding reached between Switzerland and China in 2007 on what is termed a 'human rights dialogue'. In addition, both sides confirm their commitment to upholding the UN Charter, which is the basis for the subsequently elaborated UN human rights instruments. Regarding ILO core standards, both countries commit to respecting those that have been ratified; China has ratified only four (excluding the standards protecting freedom of association and prohibiting forced labour). This is highly problematic. However, the agreement does contain a reference to both parties' obligations arising from membership of the ILO and from the major ILO declarations on labour rights and social justice, observing all 8 core standards.

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*Excerpts from the Agreement on Labour and Employment Cooperation  
between Switzerland and China*

*Art.2*

- 1. The Parties reaffirm the obligations of China and Switzerland as members of the ILO, including their commitments under the ILO Declaration on Fundamental Principles and Rights at Work and its Follow-up.*
- 3. The parties recall the obligations deriving from the membership of China and Switzerland to the ILO to effectively implement the ILO Conventions which they have ratified.*
- 4. The Parties reaffirm the ILO Declaration on Social Justice for a Fair Globalisation...*

## Art. 3

1. *The Parties reaffirm the importance of cooperation to further improve their respective labour standards and practices in line with their national labour policy objectives and according to the obligations set out in applicable ILO Conventions.*

2. *In pursuit of this objective, the Parties agree that cooperation relating to labour and employment, including administrative and technical cooperation as well as capacity building, shall be conducted under the bilateral Memorandum of Understanding...*

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After considerable debate, the unions accorded a 'critical YES' to this FTA, based on their conviction that:

- first, a policy of economic opening towards China is better than one of isolating that country, if it is to be gradually convinced to change course on human rights and labour rights
- secondly, the durability provisions that were negotiated (and China has never made so many concessions in any other FTA, including the one with New Zealand) provide a better means of pressing both countries to combat human and labour rights breaches than would have been the case without such an FTA.

On the other hand, employment considerations were on the back-burner of the unions' position, notably because the two national economies are highly complementary, so competition holds few terrors for them.

The monitoring mechanism provided in the FTA is a three-level model, which is also to be applied to the durability provisions. 'Contact points', to which questions and complaints can be addressed, are being set up by both sides. At this first (technical) level, those responsible for these contact points will attempt to clear the matter up. If disagreement remains, a second technical level will be triggered, as part of which a 'mixed committee' of diplomats and technical experts will meet if needed. The third, political level is the ministerial meetings, which are scheduled to take place every two years.

That kind of monitoring mechanism is relatively weak - all the more so

as no real sanctions are envisaged. But the same goes for all the FTAs that Switzerland has negotiated so far, either alone or as part of the European Free Trade Association (EFTA), and for most other countries' FTAs. The NGOs and unions demanded the following within this political process:

- the creation of a support and supervision body including representatives of the social partners, NGOs and environmental organisations for all FTAs with a durability chapter
- the creation of a supervisory mechanism, within the administration, for the durability provisions of all FTAs and investment protection agreements, with the involvement of all the governmental departments concerned. This mechanism should collect observations and reports from the partner countries involved, as well as from civil society, get them deepened out, assess them and then lead on to targeted action.

In this respect, joint pressure by the NGOs and the unions has indeed already ensured that:

- the social partners and NGOs are regularly consulted on the effective implementation of the durability provisions, within the framework of existing federal commissions
- the government has committed itself to report back to parliament on this subject every year.

As part of a current discussion, within EFTA, on the role of civil society in the monitoring of FTAs, the trade unions are, generally, trying to convince the governments of the four participating countries (Norway, Iceland, Liechtenstein and Switzerland) that a more far-reaching solution is needed.

### **Union campaign for Chinese labour rights**

It remains to be seen whether this FTA can really become a lever in the struggle for human and labour rights in China. Much will depend on civil society's actual determination and commitment to act and campaign on the issue. In this regard, the Swiss multisectoral trade union, Unia, together with the development organisation, Solidar Suisse, has chosen an interesting approach, with the dual aim of both contributing to the application of labour rights in China and promoting the notion of solidarity among their own members and the general

public. The main element is the provision of support to rank-and-file groups in China that have set out to assist workers in their struggle to get their rights applied. Chinese labour law does provide scope for this, but the big problem is implementation. As part of this programme, support is given to grassroots organisations that advise and mentor workers regarding problems with overtime, social insurance and occupational health.

A second objective, in both countries, is to establish a link between employee representatives within Swiss firms active in China (whether subsidiaries or joint ventures). The aim here is to get labour rights respected by promoting collective agreements. In China, the conditions for this have been slightly improved recently by the creation of a new legal basis for collective bargaining policy. In several provinces, it is now quite possible to conclude collective agreements. This raises the question of the form to be given to relations with the official trade unions affiliated to the ACFTU federation. These are the only organisations with a recognised entitlement to represent employees. But can democrats and defenders of human rights principles cooperate with organisations that have no democratic legitimacy, that often adopt positions counteracting workers' interests and that are part of the Chinese party and government apparatus? Strictly speaking, the answer to that is 'No'. But in practice, in order to gain legal credentials at the workplace level, some dealings will be needed, case by case, with local ACFTU representatives and structures – but, of course, without abandoning the independent employee representation bodies that arise from social movements.

The third element is awareness-raising in Switzerland. 'My colleague Li' is the slogan that Unia and Solidar Suisse have chosen for regional events, a film, workplace leafleting etc. The aim is to inform union members about the realities of labour struggles in China today and our solidarity action, thus encouraging them to play an active part. By denouncing abuses, the intention is also to put pressure on the Swiss authorities and on China to start changing things. The durability provisions in the new FTA are to be used as a lever for this. Given the anxieties within our own ranks, it is important to get across the

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message that the Chinese workers are not to blame for wage dumping practices but firms and public authorities. Nor is it helpful to paint a black-and-white picture of China. This campaign is intended to be part of broader efforts to counter the 'national withdrawal' that is becoming more and more noticeable in Switzerland and some other European countries, with worrying consequences!

# Report

## UK LOCAL AUTHORITIES AND CLIENTS TAKE ACTION AGAINST UNFAIR AND UNEQUAL EMPLOYMENT AND TRAINING PRACTICES

Linda Clarke

Public procurement has long been a means deployed by the local authorities to set particular employment and training standards in Britain, and is becoming increasingly important also as a means used by clients with respect to setting targets for training and the employment of those often excluded from the construction industry, above all women, those from ethnic minority groups and local labour. In a new development, local authorities are also now excluding from public contracts those contractors who have been exposed for operating a blacklist against workers, predominantly trade unionists and those who have raised concerns about employment and working conditions.

### **Diversity measures**

Given the extreme skill shortages experienced in Britain, in large part attributable to the lack of a comprehensive vocational education and training programme, attention is being paid to procurement as a means to extend the recruitment base and at the same time improve diversity and increase the number of women in construction. This was evident in a conference held in 2012 by the Centre for Research in Equality and Diversity at Queen Mary, University of London, on *Promoting employment equality through public procurement* (Wright 2013). This conference highlighted the importance of the stipulation of direct employment only in the construction of Olympics and Heathrow Terminal 5, rather than the use of what is known as 'bogus' self-employment, so allowing for closer monitoring of employment and providing an infrastructure for training.

As an organisation committed to creating employment opportunities and to Corporate Social Responsibility, the Olympic Development Authority, for instance, required tier 1 contractors to meet contractual employment and apprentice targets and require their subcontractors to do likewise. In this case, there were clear requirements stipulated

through clauses set through the planning agreement with the local authorities concerned, known as Section 106s, to roll out diversity training, to use job brokerage for local people, to help change the construction sector environment by bringing in more women, and to engage with local communities (GLA 2007).

Key to ensuring that contract compliance is effective is close monitoring, as also highlighted in the recommendations given by the Greater London Authority in *The Construction Industry in London and Diversity Performance* (2007) in relation to Section 106 agreements. These include developers appointing 'a project officer with an accountability and enforcement remit' and working with target equality groups. With respect to the reliance on established informal networks and the lack of transparency and accountability in relation to diversity, subcontracting and retention processes, the GLA (2007) made the interesting recommendations, that regional public authorities work with the Construction Industry Training Board, employers and trade unions to:

- Promote employment of dedicated managers/coordinators to work on large sites with a remit for promoting different methods of sourcing applicants and ensuring equal opportunities in recruitment and subcontracting;
- Consider ways of incorporating suppliers' track record in equal opportunities and diversity performance as part of tendering processes for contracts;
- Promote the appointment of equality representatives to be kept informed of recruitment and retention processes and to liaise with workers from target groups on issues of concern such as discrimination.

### **Excluding blacklisting firms**

Blacklisting is the illegal practice of denying employment to individuals on the basis of information, accurate or not, which is held on a database. It has been common in the construction industry in Britain, where firms kept lists, often out-of-date or inaccurate, of workers involved in union and political activities and prevented them from working. Many workers were blacklisted just for raising completely



reasonable health and safety concerns. Trade unions have continued to campaign for justice for workers whose names were discovered on a blacklist five years ago, drawn up on behalf of a number of construction firms.

In the fight to stamp out blacklisting of construction workers a number of local authorities in Britain, including Islington and Tower Hamlets, have introduced reforms preventing contractors carrying out this illegal practice. This represents a significant escalation in on-going campaign against the construction companies found in 2009 to have used a blacklist run by what was known as the Consulting Association. Islington has announced that firms which want council contracts must show they do not use blacklists, while those that have done so in the past must prove they have stopped. Any contractor caught using a blacklist in the future would have their contracts terminated. The Council's Procurement Board - the corporate watchdog for major contracts - will scrutinise the process. Islington has subsequently become the first council in the country to exclude a construction firm identified as one of the 44 companies involved in the Consulting Association blacklist off a public contract held by the firm for 14 years, bringing the £16.5 million-a-year contract to repair 30,000 council homes back in-house. The firm's 140 former employees have now been transferred to Islington Council.

Labour-controlled Islington Council leader Richard Watts has written to the government calling for a public inquiry into blacklisting and is urging other councils to follow Islington's lead. The council's Executive Member for Finance and Performance Andy Hull said:

"Blacklisting is an immoral practice that has unfairly caused huge suffering for many workers and their families. We are making a stand against an unfair employment practice that has ruined too many lives and we are challenging the government to hold a public inquiry into this malpractice, which has been widespread."

General union GMB legal officer Maria Ludkin has claimed that:

"It is the only effective guarantee that blacklisting will be stamped out and workers who were blacklisted compensated by companies seeking public-sector contracts."

The lead taken by Islington and Tower Hamlets has been followed dozens of other local authorities in Britain that have passed motions in support of a tightening of procurement procedures. The Welsh government also plans to bar companies that blacklist workers for taking part in trade union activity from multibillion-pound public sector contracts. The Welsh finance minister, Jane Hutt, said:

"The use of blacklists is wholly unacceptable and I fully sympathise with the individuals and their families who have suffered a terrible injustice as a consequence of contractors engaging in this practice. Procurement is an important part of [our] overall policy toolkit ... I am determined to take action in Wales. I trust that other governments in the UK will take similar action if they have not already done so."

Hutt has told 103 public sector bodies in Wales, including local councils, NHS and police organisations that they can exclude such companies from public contracts unless the firms have "self-cleaned" by taking measures such as compensating victims of blacklisting. The guidance says that contracting authorities can exclude firms under the 2006 Public Contracts Regulations because blacklisting can amount to "grave misconduct" and that "exclusion is not a means of punishing operators for past wrongdoing, but rather a means of putting right past wrongdoing and ensuring that it does not re-occur". Annual public procurement spending in Wales is £4.3bn, with around £1bn a year spent on construction. The Scottish government is also now looking to introduce similar measures.

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# Reviews

## **ILO: World of Work Report 2014**

Jörn Janssen

International Labour Organisation, Research Department, 206 pp.  
[www.ilo.org/global/research/global-reports/world-of-work/2014](http://www.ilo.org/global/research/global-reports/world-of-work/2014)

The 'World of Work Report' has been produced annually by the ILO since 2008. Since its inception it was coordinated by Raymond Torres, director of the ILO Research Department, now assisted by his deputy Moazam Mahmood. But the team involved in this hugely detailed account of global labour economics is phenomenal. Over 30 names are attributed to its nine chapters and many more have contributed in various ways to the present Report of 2014.

The scope of this 206 pages volume reflects the width of the subject. Geographically and socially it encompasses 145 'developing countries' classified according to levels of development under three headings (p. 14):

- 'least developed countries' (LDCs),
- 'lower middle income countries' (LMIs),
- 'emerging economies' (EEs).

As an area of research 'Work' is equally wide ranging on the one hand, but not without focus, on the other. It is an exemplary field of study covering the 'founding mission' of the 'International Labour Organisation', the 'Fundamental Principles and Rights at Work' (ILO Mission and objectives). The 'Reports' demonstrate how unequally these 'principles and rights' are implemented around the globe, claiming at the same time that they ought to be equalised.

The Report 2014 published under the motto 'Developing with Jobs' is divided into two parts, I.) an overview of economic development and employment, II.) five chapters (5-9) on working conditions:

- decent work,
- social protection institutions,
- social protection and living standards,
- income distribution,
- migration.

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It may not be surprising that part I is basically a rather orthodox account of economic development around 'patterns of economic growth' (p. 19) as a precondition for the creation of 'jobs'. This review will only highlight some selected aspects of part II.

The decline of trade union density and rise of 'informal employment' undermining social protection are phenomena affecting developing countries even more than 'advanced economies' (AEs). (Ch. 6) 'Social protection' is not only a human right, but, according to the Report, 'can nurture economic growth' (p. 134). The general progress of social protection substantially exceeded income: 'Over the last 20 years, while per capita income more than tripled in developing countries, per capita social protection expenditure increased by a factor of five'. (p. 139) (Ch. 7) However, the figures about income and wealth dispersion are alarming for developing countries. In most of them the labour share of income has declined between 2000 and 2008 (p. 155). In this context the Report emphasises the need 'that wages grow in line with labour productivity' (p. 167) and the importance of minimum wages. (Ch. 8) The last chapter shows again the beneficial effect of migration for the host countries as well as the countries of origin. (Ch. 9) Overall, the developing countries are catching up with the advanced economies, though only slowly. The proportion of people living under the poverty line of \$ 2 has dropped from 63% in 1994 to 30% today (p. 6)

The most important policy recommendation is probably implicit in the collection of evidence based on global standards. Whether these standards ought to be those of the 'advanced economies' and whether the permanently evoked 'economic growth' is the magic lever to achieve this, is another debate not addressed in the Report. In his 'Preface' Guy Ryder, ILO Director General, suggests that 'decent work and social protection should be central goals in the post-2015 development agenda' (p. V). We shall see.

The 'World of Work Reports' are enlightening reading for everybody, who is aware that global economic developments are determinant in every individual advanced or developing country. The rich collection of

data provides an insight not only into the 'World of Work', but moreover highlights aspects of the fundamental dynamic of the global development of humanity. The labour process, not to be confused with 'jobs', is the agent of this development, quantitatively as well as qualitatively.

## Bricklayers and lung cancer risk

Jan Cremers

The article 'Lung cancer risk among bricklayers in a pooled analysis of case-control studies' in the International Journal of Cancer publishes findings of an epidemiological study (in the frame of a SYNERGY-project) dedicated to the lung cancer risk among bricklayers. An international group of experts provides robust evidence of increased lung cancer risk and reveals that the risk of contracting lung cancer increases in proportion to the length of time spent working in the occupation. The authors see the probable cause as being building workers' regular exposure to a cocktail of carcinogens that provokes what they call 'synergistic effects'. A synergistic effect is the situation where the combined effect of two chemicals is much greater than the sum of the effects of each agent given alone. Bricklayers can be exposed in their work to various airborne carcinogens, including crystalline silica and asbestos. Previous studies of cancer risk have not accounted for full employment history or smoking status and failed to establish a firm relationship between bricklaying and lung cancer. The authors point, in particular, to the role played by crystalline silica, found in sand, gravel, clay, stone, etc. and hence present in the course of numerous building operations such as the cutting of materials including ceramic products. Almost 20% of the workforce in the construction industry is regularly exposed to crystalline silica dust.

The study is based on data gathered in 13 European countries, Canada, Hong Kong and New Zealand. Currently, crystalline silica is not covered by the EU Directive on carcinogens. The revision of this Directive to extend its scope to a larger number of carcinogens has slowed down since 2004. In December 2012, the European Advisory Committee for Safety and Health at Work (ACSH) – with representatives of unions,

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employers and governments – adopted an opinion in favour of defining a binding occupational exposure limit value for silica which is so far not covered by this legislation. The international group of experts that cooperated in the SYNERGY-project aims to pave the way for better protection and compensation for workers in the bricklaying occupation. They conclude that a focus on the work environment, in particular the monitoring and control of respirable crystalline silica containing dust, may provide a further opportunity for lung cancer prevention.

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Report: <http://onlinelibrary.wiley.com/doi/10.1002/ijc.28986/pdf>  
Information about the SYNERGY-project: [http://synergy.iarc.fr/synergy\\_about.php](http://synergy.iarc.fr/synergy_about.php)



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