



EU rules on public procurement and concessions

EPSU-PERC meeting on quality public
services, Brussels 19 and 20
December 2012

Key EPSU points

- ✓ Public services = investment in society; ‘buying and selling’ logic can be problematic
- ✓ Economic crisis and cuts in public spending used as pretext for privatisation in spite of growing evidence that outsourcing not more efficient – see study <http://www.epsu.org/a/8011>
- ✓ Growing evidence of failure and long-term costs of public-public partnerships (PPPs) - see EPSU factsheet <http://www.epsu.org/a/8193>
- ✓ Renewed interest in direct public provision i.e., ‘in-house’/public-public cooperation valid option (and outside scope of internal market rules). See EPSU remunicipalisation report <http://www.epsu.org/a/8688>
- ✓ More trade union interest and knowledge about public procurement
- ✓ EU Treaty base for quality public services (QPS), fundamental rights and social dialogue

EU 'hooks' to support our demands on QPS and quality jobs

- ✓ Article 9 on 'mainstreaming' social issues in all EU policies
- ✓ Treaty Article 14 and Protocol No 26 on SGI, which gives the EU and Member States a shared responsibility for “*a high level of quality, safety and affordability, equal treatment and the promotion of universal access and of user rights*” in public services
- ✓ Articles 152-155 on social dialogue, which give the EU the responsibility to promote the consultation of social partners and facilitate the social dialogue
- ✓ The Charter of Fundamental Rights which covers workers' rights and access to public services
- ✓ The principles of good governance (transparency, participation, accountability, effectiveness and coherence) set out in the 2001 White Paper on European Governance

EPSU's demands for the revision of the procurement Directives

- ✓ No weakening of 'in-house' and public-public cooperation
- ✓ Full transparency of contracts, monitoring and evaluation of outcomes
- ✓ Mandatory respect for collective agreements
- ✓ Remove option for 'lowest price' tendering
- ✓ Include reference to ILO C94 on Labour clauses in Public Contracts in Directive and other ILO standards (not just 'core' standards)
- ✓ Secure broad possibilities to include social and environmental criteria at each stage of procurement process
- ✓ Reflect positions of trade unions and social and environmental organisations to strengthen 'sustainability'

EPSU's demands on concessions Directive

- ✓ EPSU position (November 2012) to reject EC proposal – some similarities with public procurement but many differences!
- ✓ Problems of definition, scope, transfer of risk
- ✓ No reference to need or quality public services (universality, affordability, continuity, equal treatment..)
- ✓ No reference to employment conditions and collective agreements
- ✓ EPSU/ETF joint concerns on EC proposal on concessions
<http://www.epsu.org/a/8353>
- ✓ EPSU/PSI/TUAC input into 2012 OECD principles on PPPs
“By value for money is meant the optimal combination of quality, features and price, calculated over the whole of the project’s life”
http://www.oecd.org/document/19/0,3746,en_2649_37405_50254099_1_1_1_37405,50.html

EPSU – part of the NSDPP Network on public procurement

<https://sites.google.com/site/sdppnetwork/home>



The Network for Sustainable Development in Public Procurement is a group of social, environmental NGOs and trade union organisations (individual, confederal and EU federal) united by their joint aim to achieve progress in sustainable development through enabling EU public procurement legislation and policies.

NSDPP

Green paper contribution

NSDPP develops 5 Key Demands

1. ENCOURAGE THE INTEGRATION OF HORIZONTAL OBJECTIVES IN A TRANSPARENT WAY
1. RECOGNISE THAT PRODUCTION CHARACTERISTICS CAN BE INCLUDED AS TECHNICAL SPECIFICATIONS
3. DRIVE STANDARDS AND QUALITY UPWARDS
4. ALLOW THE QUALITY OF THE SUPPLIER TO BE TAKEN INTO ACCOUNT AT THE SELECTION STAGE
5. MAKE COMPLIANCE AND ENFORCEMENT EASIER AND MORE EFFECTIVE

Network for Sustainable Development in Public Procurement

<https://sites.google.com/site/sdppnetwork>

Network for
Sustainable
Development in Public
Procurement

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Contact us

The network welcomes requests from relevant organisations with an interest in sustainable development in public procurement to join our group – whether more actively attending meetings, or to receive information.

Contact co-ordinators:

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Further reading

- ✓ NSDPP contribution to the EC evaluation of 2004 Directives from NSDPP Network (EN/FR/DE/SV/ES/RU)
- ✓ 5 Key messages on Green Paper from NSDPP (EN/DE)
<http://www.epsu.org/a/7787>
- ✓ NSDPP assessment of public procurement Directives (EN/FR/DE)
- ✓ Briefing papers ClientEarth
www.clientearth.org/sustainable-public-procurement-briefings
- ✓ EPSU research papers and Factsheet on PPPs (EN/FR/DE/ES/SV/RU)
- ✓ EPSU study on ILO C94 (<http://www.epsu.org/a/8363>)
- ✓ ILO Guide on ILO C94 in EN/FR/ES
http://www.ilo.org/global/standards/information-resources-and-publications/publications/WCMS_099699/lang-en/index.htm

Pay Clauses in European Public Procurement

Results of a project on behalf of EPSU
focusing on Denmark, Germany, Norway,
Switzerland and the UK:

Report and PR <http://www.epsu.org/a/9151>

Long history of pay clauses in public procurement

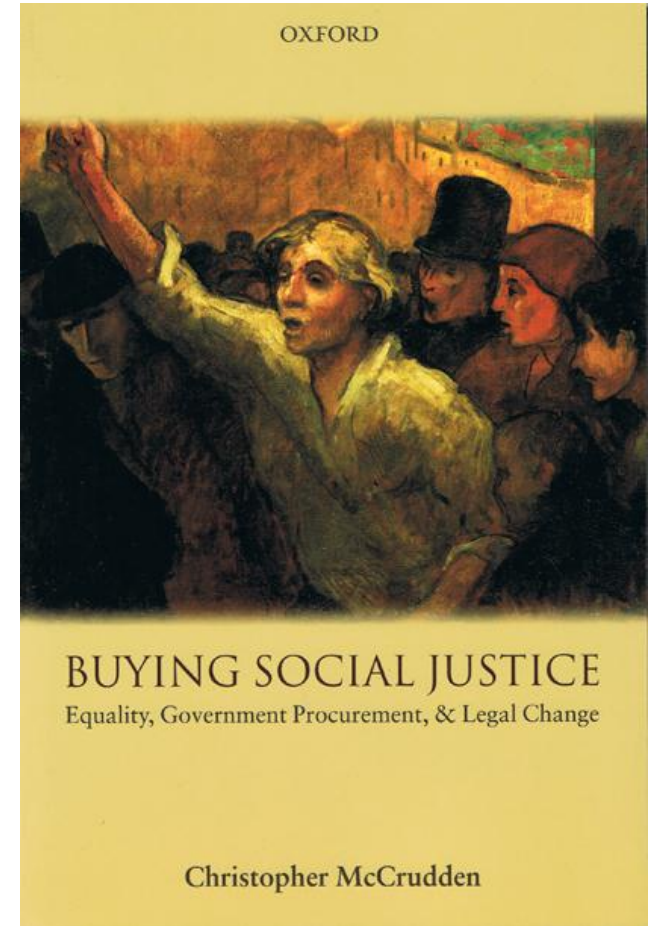
First pay clauses dates back to the
second half of the 19th century

National regulation:

- ⇒ **UK:** (1891/1909/1946)
- ⇒ **France:** (1899)
- ⇒ **USA:** (1931/1936)

Local and Regional Regulations:

- ⇒ **Germany, Netherlands, Belgium etc.**



History of pay clauses in public procurement



ILO Convention 94 on Labour Clauses in Public Contracts (1949)

“**Contracts** ... shall include clauses ensuring to the workers concerned **wages** ..., **hours of work and other conditions of labour which are not less favourable** than those established for work of the same character in the trade or industry concerned in the district where the work is carried on ...

(a) by **collective agreement** ...; or

(b) by arbitration award; or

(c) by **national laws or regulations**” **(Article 2)**

ILO Convention 94 on Labour Clauses in Public Contracts (1949)



Ratification: 62 states (15 in Europe, **10 in the EU**)

Countries	Year of ratification	Countries	Year of ratification
Austria	1951	Denmark	1955
Finland	1951	Cyprus	1960
France	1951	Turkey	1961
Belgium	1952	Spain	1971
Italy	1952	Norway	1996
Netherlands	1952	Armenia	2005
Bulgaria	1955	Bosnia & Herzegovina	2010
		Macedonia FYROM	2010

Only Denouncement: UK in 1982

Use of pay clauses in European public procurement

Pay clauses are
frequently used

(Most) collective
agreements are **not**
universally applicable

Pay clauses are
not much used

Most collective
agreements are
universally applicable

ILO 94
ratified

Denmark, Norway

Austria, Belgium,
Finland, France; Italy,
Netherlands, Spain

ILO 94
not ratified

Germany, Sweden,
Switzerland, UK.

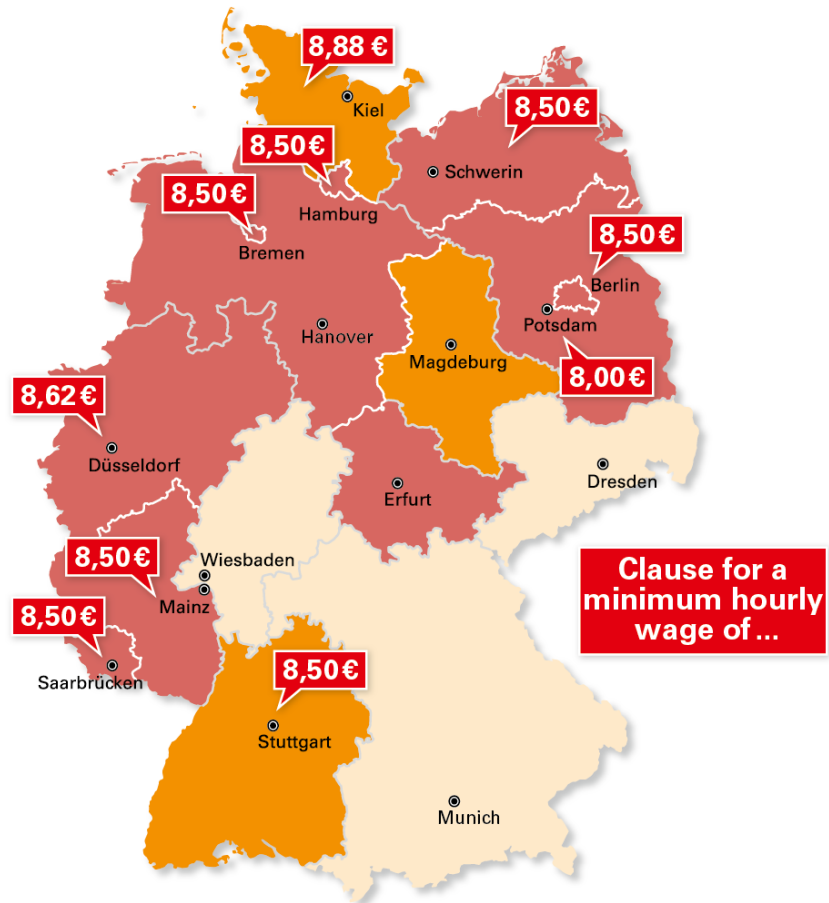
Portugal

Comeback of pay clauses!

Pay clauses in German public procurement law

Public procurement law in German Federal States

- with pay clauses,
- with plans to introduce pay clauses,
- with no pay clauses



Effective October 2012; Source: WSI Collective Agreement Archive 2012
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After the “**Rueffert-Shock**”:

Pay clauses are back on the agenda

10 Federal States have currently pay clauses in their regional public procurement law

3 States announced to introduce a pay clause

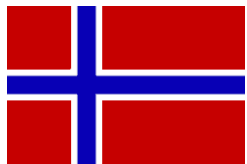
Use of pay clauses in public procurement



National level (local level voluntarily): Reference to national **collective agreements** (*not* universally applicable)



Federal state level: Reference to universally applicable **collective agreements** (except for public transport) and procurement related **minimum wages**



National/regional level: Reference to national **collective agreements** (*not* necessarily universally applicable)



National/regional level: Reference to prevailing **collective agreements** (*not* necessarily universally applicable)



Local level: References to „**Living Wages**“ (voluntarily)

Conclusion

- ➔ **Several European countries** make use of pay clauses in public procurement
- ➔ Pay clauses are of **particular relevance** in countries, where (most) collective agreements are ***not* universally applicable**
- ➔ After the **Rüffert Judgement** of the ECJ the use of pay clauses is **uncertain** regarding its conformity with EU law
- ➔ There is a particular uncertainty regarding the **ILO Convention 94** and a need for **legal clarification**

Conclusion

European Parliament (2011)

“... calls for an **explicit statement in the directives** that they do not prevent any country from complying with **ILO Convention C94**; calls on the Commission to encourage all Member States to comply with that Convention.”



Resolution on Modernisation of Public Procurement
25 October 2011

Conclusion

Council of the European Union (2012)

“It should also be possible to include clauses ensuring compliance with collective agreements in public contracts”

“Award criteria or contract performance conditions concerning social aspects ... should be applied in accordance with Directive 96/71/EC ... in the framework of the provision of services, as interpreted by the European Court of justice.”

**Proposal for a Directive of the European Parliament and of the Council on public procurement - Presidency compromise text/Consolidated version 19
October 2012**

Conclusion

- ⇒ **Council of Europe confirm the Rüffert judgement**
- ⇒ **Council/Commission failed to address ILO Convention 94**
 - ⇒ the draft directive on **public procurement** (December 2011)
 - ⇒ the draft directive on **the enforcement of Directive 96/71/EC** (March 2012)
- ⇒ In order to give pay clauses a future, there is a need for a clear reference to **ILO Convention 94** and a **political revocation of the Rüffert judgement**