



Evaluation of the impact and effectiveness of EU Procurement legislation and policy

Joint Initial Contribution to DG MARKT
Background paper of 26.05.2010

November 2010

Summary of Key Points

This contribution has been produced by a working group involving trade unions, and social and environmental NGOs (see logos on cover and list at end), who have worked together for some time on policy issues related to public procurement.

It is an initial contribution to the evaluation of the impact and effectiveness of EU Procurement legislation and policy currently underway in DG Internal Market Directorate of the European Commission, and reflects experiences of the group across a number of issue and policy areas related to public procurement. Key points emphasised in this document are:

- Major inconsistencies in the EU Commission's policy approach to public procurement, and commitments it has under the Treaties, and other EU legislative and policy areas. The document highlights these inconsistencies, which in certain areas are policies in conflict, and urges the EU Commission to do more to promote positive social and wider sustainable development policy commitments in its procurement legislation and policy.
- The drive to achieve lowest cost in public procurement and the insufficient scope and encouragement to consider other policy objectives – in particular social, decent work and employment objectives - means that public procurement is currently not able to play its full role in addressing societal challenges.
- The review of legislation and policy should strengthen the scope for public procurement to contribute to these objectives. Such a development would be in line with the new Treaty provisions that reinforce social Europe, such as Article 3.3, Article 14 and Protocol 26, the Charter of Fundamental Rights, and the Integration Principle incorporated into Article 11.
- The evaluation process must address this unacceptable imbalance, and emphasise that value for money/best value in public contracting does not mean lowest price, but that wider social, ethical and environmental benefits must be given clear weight in the decision. The European Commission needs to make a thorough assessment of how far procurement legislation and policy has contributed to achieving the wider goals of the EU, notably:
 - 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
 - considering supply chain liability and promoting transparency.

We believe public procurement has under-achieved in all these areas as a tool to make positive progress in these areas, and that this needs to be urgently remedied.

- People across Europe and a growing number of businesses, often due to public pressure, take into account the social and environmental dimensions when buying products or

services and want governments and public authorities to do the same. The EU should do more to encourage contracting authorities to choose products and services on the basis of sustainable development considerations.

- Financially quantifiable costs are seldom reliable, or a sound basis for a procurement award. Public contracts going over budget is a common occurrence across the EU, especially in Public Private Partnership (PPPs) contracts. With PPPs the 'extra' costs may be postponed into the future, but are no less real. There are countless examples of contracts (predominantly outsourced contracts), concluded on lowest price which fail to deliver the quality of service/goods required, and which have to be terminated and re-contracted.

1. Introduction

We welcome the opportunity to contribute to the EU Commission's ongoing evaluation of the impact and effectiveness of EU Procurement legislation and policy. We hope this will be a serious and wide-ranging assessment of this important policy area.

This is an initial response to the DG Markt background paper of 26.05.2010, and we hope to have the opportunity to contribute to this process on an ongoing basis through further written representations on specific issues, meetings with your directorate and by participating in any conferences/seminars or hearings organised during the evaluation process and beyond.

2. The context of the consultation

As a starting point, the DG Markt background paper of 26.05.2010 states that: *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.* Regrettably, the paper does not outline what it considers these objectives to be, which clearly will be a subject of debate in the evaluation process. It would have been helpful to see whether strengthening the social dimension of public procurement, supporting full employment, promoting decent work and labour standards and furthering sustainable development and environmental protection counted among the EU Commission's objectives in this area. We believe that such objectives are, and will remain, crucially relevant to public procurement, but are sadly objectives that EU Procurement legislation and practice to date is still far from realising, and will require a step change at EU and Member State level.

The background paper outlines two justifications as to why the evaluation is being launched:

1. *to identify scope for greater cost-effectiveness...allowing the delivery of public services at lowest cost and*
2. *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.*

Whilst we welcome recognition in point two of the crucial role of EU public procurement policy and legislation in delivering key wider policy objectives of the EU, in our view there is a conflict between these two considerations. In our experience, the drive for lowest cost, combined with insufficient solid scope and encouragement in the legislation to consider other policy objectives, particularly social, decent work and employment objectives, means that low cost too often triumphs in the award of public contracts over vitally important policy objectives to address societal challenges.

We are disappointed to see that even in the recently finalised (October 2010) EU Commission Guide to socially responsible public procurement, the issue of cost is too often used as an argument against considering a variety of social and ethical approaches to procurement which the guide is supposed to be promoting! We also point out that there is a cost – we would argue a bigger cost – to pay by not including social and environmental considerations, even if this cost may appear to some harder to quantify. People across the EU and certain businesses are already taking into account social and environmental considerations when buying products or services. EU rules should not prevent contracting authorities from choosing between products and services on the basis of sustainable development considerations.¹

We hope that the evaluation process will address this unacceptable imbalance, and emphasise that value for money/best value in public contracting does not mean lowest price, but that wider social, ethical and environmental benefits must be given clear weight in the decision, regardless of how difficult some claim it might be to quantify that benefit in financial terms. Currently the EU Commission and some public authorities set too much store by being able to put a price on these benefits (often as an excuse for not featuring them in the contract process), rather than accepting and actively defending the positive value of these benefits.

The evaluation process must not underestimate the extent to which using procurement can be a positive tool to help encourage jobs and growth as we face the challenges of the current economic crisis and beyond. We would want to see the objectives of EU procurement policy in the future much more focused on supporting and promoting good quality employment, and providing quality services, goods and works in Europe and abroad. This will require flexibility in rules and mandatory requirements to do this effectively, in line with objectives of the 2020 strategy.

The pressures of the crisis may increasingly push public authorities to go for lowest price; therefore the EU Commission must play a leading role in encouraging governments and contracting authorities to use procurement as a lever to promoting employment, skills training, and social inclusion – influencing the market in a positive direction.

The EU Commission needs to accept in the process of the evaluation that financially quantifiable costs are not always reliable, or a good basis for making a procurement award. Public contracts going over budget is a common occurrence across the EU, especially in Public Private Partnership contracts. We have countless examples of contracts (predominantly outsourced contracts), let on lowest price which fail to deliver the quality of service/goods required, and have to be terminated and re-contracted. The EU Commission must put a greater focus on measuring and monitoring the qualitative aspects of contracts. Such situations are rarely raised in the EU institutions or at Member State government level, but this is a common problem causing considerable costs in the damage/loss to citizens of that service/supply/works being poorly provided or not provided at all, as well as added costs through delays and administrative/legal procedures for the contracting authorities.

The Monti report on the future of the Internal Market² acknowledged that there is room for greater use of public procurement as tool to achieve the policy objectives we have mentioned above, but chooses to focus on energy and climate change more specifically.

¹ A recent (9 November 2010) Eurobarometer “International Trade” report shows 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). Report available under: <http://ec.europa.eu/trade/trade-growth-and-jobs/public-opinion>

² http://ec.europa.eu/commission_2010-2014/president/news/press-releases/pdf/20100510_1_en.pdf

We urge the EU Commission 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, considering supply chain liability and promoting transparency. We believe it has under-achieved in all of these areas, and this situation needs to be remedied. The evaluation process must focus on what needs to be done to make it a more effective tool in contributing to these objectives in the future.

Public procurement (and internal market policy more generally), cannot absolve itself of the collective responsibility of the EU institutions to deliver in these areas. Current public procurement legislation and policy remains too narrow and restrictive to fully achieve many key social and environmental sustainable development objectives, and there are glaring inconsistencies between internal market policies influencing public procurement, and wider social and sustainability legislative and policy objectives of the EU, many of which have reference in the EU Treaties (decent work, full employment, social market economy, sustainable development). These inconsistencies need to be addressed. In our opinion, strengthening the possibilities for public procurement to contribute to these objectives should be the central focus of the current review.

3. Procurement Policy to mirror wider EU Policy

This initial response highlights some areas where we see inconsistencies in the EU Commission's policy approach to public procurement in comparison to other EU policy areas, either linked to procurement or where procurement has an impact upon them. In particular, we underline 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. 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 Rights³ the Commission recalls that all EU legal acts "must be in full conformity with the Charter."

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 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."⁴

Key areas of inconsistency:

³ COM (2010) 573 final

⁴ Background paper prepared by the Belgian Presidency 2010

http://www.socialsecurity.fgov.be/eu/docs/agenda/26-27_10_10_sia_en.pdf

i) Social Europe – getting a balance

Trade unions and social NGO's are critical of the lack of a social dimension to the Internal Market.⁵ An evaluation and potential review of the public procurement Directives provides an opportunity to correct this imbalance. The aim of the review should be to reorient public procurement policy towards achieving a 'social market economy', in line with the new provisions of the Lisbon Treaty⁶ and in order to ensure sustainable progress for society, both within and outside Europe. Over several decades the EU has developed a considerable body of social and employment policy and legislation which defines our *Social Europe*, yet, regrettably, there has never been a sense of true balance between the social and economic/internal market dimensions of the EU. 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. This is alienating people and making the EU increasingly unpopular as a project. The EU Commission needs to act to address the imbalance.

The Lisbon Treaty includes a stated objective of a Social Market Economy, and includes a legal base for the Charter of Fundamental Rights. Yet public procurement policy does little to 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.

The effect of the ECJ cases, *Laval*, *Rueffert* and *Luxembourg* in particular, have created intolerable uncertainty in areas of public contracting and have further undermined the principles mentioned above, creating policies in opposition. 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 94⁷ (Labour Clauses in Public Contracts Convention) which stipulates that all tenders apply no less favourable conditions of employment than are in force at the local level. The EU Commission must develop its procurement policy around reinforcing and promoting the adoption of ILO Convention 94, not undermining it.

Commissioner Barnier promised to "*put the internal market at the service of human progress, fight social dumping...protect services of general interest*", which will mean collective concrete action in the EU Commission to reverse the negative impact of these judgments.

In the recently published Single Market Act proposals, Commissioner Barnier has further developed these issues. The EU Commission must now seriously address the issues covered in proposals 29 and 30 in particular, and come forward with legally binding solutions that will ensure real progress is made in the crucial areas of embedding legal weight to the adherence to fundamental rights, and to revising the Posting of Workers legislation so that it is able to offer the protections, rights and equal treatment to workers for which it was envisaged.

⁵ For example, the ETUC resolution (March 2010) "*A new social impetus for the Internal Market Strategy*" points out that trade union calls for a more 'social dimension' to the internal market have not been met with an adequate response, and that 'catch up' action is needed to advance Europe's social objectives.

⁶ The Lisbon Treaty stipulates that the EU should be 'based on a highly competitive Social Market Economy' (Art. 3.3). By adopting this treaty, the EU has demonstrated its programmatic commitment to the Social Market economy as its 'desirable European social model'

⁷ 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)

We need clear recognition that social considerations advance the broadly-shared general interest objectives, and that these should always prevail over market freedoms and rules. Failure to include social and ethical considerations will encourage a race-to-the-bottom and promote social dumping, which in turn will increase the number of working poor and those working under precarious conditions. This flies in the face of the EU Decent Work agenda. The mid- and long-term direct and indirect costs of this for societies in Europe and across the world should not be underestimated, and must be avoided.

ii) Gender equality

The European Commission in its Communication⁸ "*Tackling the pay gap between women and men*" calls 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 European Commission 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 across Member States in this area, and for more mandatory requirements to be set at EU level.

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. Procurement 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.

iii) Social cohesion

The EU social inclusion programme calls on public authorities to create the 'framework' to integrate vulnerable groups into the labour market. The recent agreement⁹ by the cross-sectoral social partners on "*Inclusive labour markets*" also points to the need for policy incentives to encourage concrete actions. The public procurement legislation needs to be much more flexible to promote employment opportunities for those excluded from the labour market.

Though some welcome positive progress was made with Reserved Contracts for sheltered employment factories and businesses for people with disabilities in the 2004 revision of the Directives, it should now be made mandatory for contracting authorities to have at least one contract at any time with supported employment workplaces for people with disabilities as is contained in the UK Guidance on Article 19 (Regulation 7 UK).

Provisions in the Directives should be made more flexible and extended to help support long term and young unemployed into skills training and work, and promote diversity of race, disability, gender, age, sexual orientation, and religious belief in workplaces through public contracts. This is particularly important during the economic crisis, where as unemployment increases, the scope for employment opportunities for vulnerable groups decreases even more dramatically.

⁸ COM(207)424

⁹ http://www.etuc.org/IMG/pdf_20100325155413125.pdf

iv) Decent work

The EU has a policy¹⁰ 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. Where is the European Commission equitable pay principle in public procurement? If workers in developing countries are exploited and in dire working 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. The EU cannot expose itself to the criticism that it only supports sustainable economic growth as a policy principle for within Europe, and not externally.¹¹ Member States should be encouraged to ratify ILO Convention 94 on labour clauses in public contracts, and other ILO standards and conventions promoting working and trade union rights and freedoms, and the EU should include these demands in trade negotiations and procurement contracts.

Procurement also needs to take into account the specific characteristics of particular services, such as social, care and welfare 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.¹² Social dumping and unfair wage competition can have a devastating effect on these sensitive services.

v) “Best value” (not lowest price)

Too often lowest price reigns, and the interpretation of *most advantageous tender for the contracting authority* is far too narrowly interpreted. In 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 also 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.¹³ In other words, cost cutting at the expense of workers and reducing the quality of the service provided – clearly a false economy.

vi) 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 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, that is, which is sustainable

¹⁰ <http://ec.europa.eu/social/main.jsp?catId=323&langId=en>

¹¹ The Commission's Opinion on equitable wages stated that all employment shall be fairly remunerated. Together with the 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.

¹² Evidence from the field of labour market placement and professional training services in Germany, for example, shows that public authorities awarding on the basis of low bids offered to win public tenders, entailed a general downwards spiral where considerably lower wages were paid, the number of precarious and fixed-term contracts strongly increased, and wage schedules (for new contracts or personnel entering the labour market) were downgraded.

¹³ [see for more details FOA \(DK\)](#)

socially, environmentally, and economically. The current general Procurement Directive provides for technical specifications relating to production processes¹⁴ and the European Court of Justice has interpreted these provisions as allowing technical specifications intended to promote more sustainable production processes. This interpretation is further supported by the Integration Principle. This Principle states that the objectives of *sustainable development* should be integrated into all the laws and policies of the EU and its Member States. The Lisbon Treaty affirms the role of sustainable development at the heart of EU objectives, including through its external relations.¹⁵

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. Recital 5 to the current Procurement Directive expressly refers the Integration Principle and emphasizes that the Directive is intended to allow contracting authorities to use public procurement as a tool for implementing sustainable development objectives.¹⁶

Moreover, the recitals further state: “*Nothing in this Directive should prevent the imposition or enforcement of measures necessary to protect public policy, public morality, public security, health, human and animal life, or the preservation of plant life, in particular with a view to sustainable development, provided that these measures are in conformity with the Treaty*”.¹⁷

Thus, the Directive is clearly intended to define the content and scope of procurement policies to include procurement objectives to promote sustainable development. Indeed, this is how the European Court of Justice has interpreted the current Procurement Directives, as illustrated by the *Wienstrom* case.¹⁸

The European Commission produced a guide¹⁹ to green procurement in 2004, which has since been followed-up with specific targets and other positive EU proposals. After an unacceptable delay, a guide to social procurement was finally produced in October 2010, though much more modest in its proposals, and lacking any targets. In both of these guides, the Commission seeks to limit the scope and content of procurement criteria relating to the sustainability of production processes. Instead, the Commission continues to insist that procurement criteria should be limited to the physical qualities and characteristics of the products only.

The review of the Procurement Directives must aim to clarify how criteria relating to all three pillars of sustainability – social, environmental, and economic – can be integrated into public procurement

¹⁴ Directive 2004/18/EC, Article 23 and Annex VI.

¹⁵ Article 3, paragraph 2 states that the EU shall “establish an internal market” and further states, in the same paragraph, that the EU shall pursue the sustainable development of Europe in terms of all three pillars (economic, environmental, and social). Paragraph 5 of Article 3 goes on to state that, in its relations with the wider world, the EU shall contribute to “the sustainable development of the Earth, solidarity and mutual respect among peoples, free and fair trade, eradication of poverty and the protection of human rights.” Also, in Article 11 of the Treaty on the Functioning of the European Union, the Lisbon Treaty maintains the provisions of Article 6 of the Treaty of the European Community (TEC), promoting the implementation of the principle of sustainable development in the definition of all other policies and activities.

¹⁶ Under Article 6 of the Treaty [establishing the European Community], environmental protection requirements are to be integrated into the definition and implementation of the Community policies and activities referred to in Article 3 of that Treaty, in particular with a view to promoting sustainable development. *This Directive therefore clarifies how the contracting authorities may contribute to the protection of the environment and the promotion of sustainable development, whilst ensuring the possibility of obtaining the best value for money for their contract*

¹⁷ Directive 2004/18/EC, Recital 6.

¹⁸ [Case C-448/01, EVN AG v Austria \[2003\] ECR I-14527.](#)

¹⁹ http://ec.europa.eu/environment/gpp/pdf/buying_green_handbook_en.pdf

policies, in accordance with the Lisbon Treaty and the Integration Principle. The Directives should contain clearer and more positive provisions to promote the social and environmental dimensions effectively, and to clearly allow more scope for such considerations to be taken in to account in the award stage of the contract. Quality and accessibility must be a guiding focus in awarding contracts. This includes the quality of products and the production methods and processes in terms of their sustainability. Both social and environmental considerations are key here. There should not be a narrow focus on the physical qualities and characteristics of products only. By promoting a narrow approach, the EU risks suffocating innovation and positive developments in product sustainability and corporate social responsibility. This is in blatant contradiction of policy commitments to CSR²⁰, promoting innovation, research and technological development, and will have a severe detrimental impact on developing social responsibility in the public and private sector across the globe, as well as on prospects in the EU for research, development and innovation.

EU and national targets should be set in public procurement for increasing the number of contracts awarded on the basis of ‘economically most advantageous contracts’ rather than lowest price, taking in a wide range of social and sustainability considerations. This should be supported by European Commission guidance, monitoring, and peer review.

vii) 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” Policy²¹. It is time to move from words to action. Furthermore, externally sourced public procurement contracts and trade agreements negotiated with developing countries too often perversely have negative, rather than positive effects on the social and economic development of these countries. Development aid from Europe can often pale into insignificance in comparison to the damage or loss caused to developing countries by aggressively liberalising procurement and trade policy.

Driven by lowest price, such decisions encourage the continual driving down of wages and labour standards and over-exploitation of land, resources and workers in developing countries and restrict positive and sustainable growth and benefits. Decent work and sustainable production have to be the focus. There is a need for consistency between the EU’s internal and external policies.

The European Commission issued on 9 November 2010²² its new trade agenda, including 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 European Commission should not narrow or restrict the 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.

²⁰ http://ec.europa.eu/enterprise/policies/sustainable-business/corporate-social-responsibility/index_en.htm

²¹ http://europa.eu/legislation_summaries/development/general_development_framework/r12534_en.htm

²² <http://ec.europa.eu/trade/trade-growth-and-jobs/>

viii) Environment, Climate and Emissions

There is a big gap between stated commitment and practice in this area. In trade and procurement procedures for materials/natural resources/energy – much of the focus 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. Where does this fit in with EU Climate and environmental policies? Procurement and trade policies must build in mandatory requirements to prevent such destructive practices.

ix) Social Dialogue

The EU acts as a secretariat for a number of social dialogue committees, and the Maastricht procedures established a cross sectoral social dialogue process to allow a legislative approach based on social partner agreement in the social field. However, consultation with trade unions and promotion of their involvement and role in procurement policy is not evident at all. Neither is there a reference to the role and importance of trade unions and their social partners in trade policy when negotiating EU agreements.

The EU Commission must be more inclusive in emphasising the role and importance of trade union input from the earliest stage of the procurement process, i.e. long before any consideration is given to whether to outsource the contract, in future procurement policy and legislative documents. Trade unions 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. We would like to see trade union involvement in EU Commission expert groups or task groups in this area developed.

x) Simplification v socially sustainable

The Monti Report touches on public procurement and raises the issue whether a review should lead to greater integration of horizontal policy objectives into procurement. If those objectives focused on the social, employment, decent work, labour standards, fair trade, environmental and sustainability policy objectives of the EU, then we would clearly support this development. The document also refers to the need to *simplify* and *sharpen* public procurement rules. Those of us who have followed this policy area for some time note that this was, in fact, the motive behind the last revision in 2004, where a number of Directives were combined and consolidated. In the 2004 revision we feel that the EU Commission failed to go as far as it should have in clarifying and strengthening the social/employment and sustainability policy dimensions of the Directives. We urge the Commission to accept that simplification must not be synonymous with *deregulation*. The focus in the evaluation should not be centred on removing what businesses often over exaggerate as *administrative burdens* and *SME unfriendliness* of legislation, but should aim to get a real balance between, the economic, social and environmental dimensions of sustainable procurement.

xi) Public (in house) procurement v liberalisation/privatisation

EU procurement policy pushes privatisation and liberalisation of procurement over respecting the right of authorities to provide services and works in-house. Yet the Treaties are clear that public authorities should have choice of delivery, reinforced in the Lisbon Treaty public service sections. The EU has no mandate to promote PPP's yet is doing so²³ wilfully despite overwhelming evidence of excessive costs and poor quality service and structure/goods. Mr. Monti's document refers to this as *friction*, but thinks he can solve it with *clarification* of in house.

The case for the value of promoting in-house provision of works and services needs to be positively restated at EU and Member State level. We must learn from the lessons of this major economic and financial crisis that wholesale liberalisation is not the answer for promoting stable, sustainable economic growth and prosperity. It stores up terrible consequences for the future, and too often it is the innocent, low paid and vulnerable who pay the price for the casino capitalism madness that has been allowed to cripple national finances across the globe, and is now devastating public services as Governments enforce misguided austerity programmes, rather than trying to stimulate the economy.

xii) Supply chain liability

EU Commission contracts hold the main contractor responsible for sub-contractors actions/work, but do not set this as standard for legislative policy in public procurement legislation. This needs to be established, supply chain liabilities must be strengthened and responsibilities of sub-contractors tightened, monitored and enforced with penalties.

xiii) 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.

The EU Commission says it supports transparency, but needs to ensure that public contracts should be subject to the highest standards of public control. Their content 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 has clarified, however, that the requirement of transparency does not mean the contracting authority must adopt criteria which are "quantitative or related solely to prices."²⁴ 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

²³ See the recent EC Communication on PPPs

<http://eurlex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2009:0615:FIN:EN:PDF> which states that the Commission "will complement Member States' actions to remedy the obstacles to the development of PPPs and to promote their use." For critiques of PPPs and suggestions for alternatives see <http://www.epsu.org/a/4217>

²⁴ Case No. T-59/05 *Evropaiki Dinamiki – Proigmena Sistimata Tilepikinonion Pliroforikis AE v European Commission* [2008] All ER (d) (Sep), at paragraphs 58-59.

to compare the tenders and are clearly relevant for identifying the most advantageous tender.”²⁵
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.²⁶

Signatory Organisations:

ClientEarth – www.clientearth.org Contact: Janet Pritchard

EFBWW – European Federation of building and woodworkers www.efbww.org Contact: Werner Buelens

EFFAT – European Federation of Food Agriculture and Tourism www.effat.org Contact: Kerstin Howald k.howald@effat.org

EPSU – European Public Service Unions www.epsu.org Contact – Penny Clarke pclarke@epsu.org

FERN – www.fern.org

GMB – British Trade Union (Multi-sector) www.gmb.org.uk Contact: Kathleen Walker Shaw kathleenwalkershaw@gmbbrussels.be

SOLIDAR – www.solidar.org

UNISON – British Public Sector Trade Union www.unison.org.uk Contact: Margie Jaffe

EFTA - European Fair Trade Association }

FLO - Fairtrade Labelling Organizations International}

WFTO - World Fair Trade Organization}

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²⁵ *Ibid.* at 47-48, 58-59.

²⁶ See Case No. C-470/99 *Universale-Bau and others v. EBS* [2002] ECR I-11617 (and cases cited therein); see also Case No. C-331/04 *ATI EAC Srl e Viaggi di Maio Snc and Others v ACTV Venezia SpA and Others* [2005] ECR I-10109; Case No. C-532/06 *Lianakis case v Municipality of Alexandroupolis* [2008] ECR I-251.