

Network for sustainable development in public procurement (NSPP):
Assessment of the European Commission's proposal for the revision of Public
Procurement Directives, 27 February 2012



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Introduction

1. The Network for sustainable development in public procurement (NSPP) is a group of social, environmental NGOs and trade union organisations united by their **joint aim to achieve progress in sustainable development, including through EU public procurement legislation and policies**. The Network has recently contributed to the European Commission's (EC) evaluation of the public procurement Directives¹, put forward key proposals to strengthen the current EU legal framework², and developed other educational materials. The Network's aims are consistent with provisions in the EU Treaties (see Annex).
2. At present sustainable development is too often forgotten about completely, or it is tagged on as an after thought in order to mitigate the worst effects of unsustainable and unethical economic policies. The Network sees the revision of the public procurement Directives³ as an **opportunity for the EC, the European Parliament and the Council to clearly indicate the (sustainable) way forward for Europe** and to ensure that sustainability considerations are mainstreamed throughout the provisions. Sustainability objectives are not a distraction from the main (economic) aim of public procurement and they do not complicate the process, on the contrary, they provide for better outcomes.⁴ **Short-term thinking is not acceptable – upfront costs on their own are seldom a sound basis for a procurement award**. Further, taking a long-term perspective highlights that unsustainable practices, such as air pollution, precarious work, damaging extraction and/or inefficient use of natural resources have real costs for us as well as people in other parts of the world. The Network underlines that such **horizontal' objectives are of equal value to the functional objectives of what is being purchased**.
3. So, to what extent do the EC proposals for a new Directive on public procurement improve or weaken the sustainability dimension of the EU rules? Below is a first assessment of key points⁵.

Lowest price/lowest cost/MEAT

4. At the heart of the issue is the framework within which contracting authorities (CAs) award tenders. This framework should encourage - even require – CAs to integrate 'horizontal' objectives into the procurement processes.
5. In Article 66(1) the proposal allows a choice between awarding a contracting on the basis of the 'most economically advantageous tender' (MEAT) or the new concept of 'lowest cost'. Lowest cost may be assessed either on lowest price only or using a cost-effectiveness approach, such as life-cycle costing (LCC).
6. The inclusion of life-cycle costing does recognise that costs other than the sticker price should be evaluated, which would be a step forward. However, the equal treatment of 'lowest price' and 'cost-effective' is confusing and unhelpful. 'Lowest price' (i.e. without any LCC

¹ NSPP contribution to the EC evaluation of the public procurement Directives <http://www.epsu.org/a/7046> in English, French, German, Spanish, Swedish and Russian

² NSPP 'key demands' for the revision of the procurement Directives http://www.epsu.org/IMG/pdf/key_demands_Green_Paperfinal_EN.pdf.

³ See the proposal for a Directive of the European Parliament and of the Council on public procurement, COM (2011) 896, 20 December 2011

http://ec.europa.eu/internal_market/publicprocurement/modernising_rules/index_en.htm. Please note that the issues raised in this assessment relate particularly to the proposal for a Directive on public procurement, but many will also apply to the proposal on the Directive for procurement by utilities.

⁴ NSPP 'myths about public procurement' http://www.epsu.org/IMG/pdf/myths_about_sust_procurement_-_version_25_October_2011.pdf

⁵ Besides the members of the Network, also the Forest Stewardship Council has contributed to this evaluation.

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considerations) should be removed as an option as it encourages poor wages and working conditions and low environmental standards, thereby undermining the quality and sustainability of products and services.⁶

7. **It is important that MEAT can be used to evaluate sustainability concerns.** Member States should not be allowed to prevent CAs from using MEAT where they wish. The list of criteria for MEAT in the proposal remains non-exhaustive. However, valuable new additions underline the need to take certain sustainability and quality concerns into account and affirm that such concerns are linked to the subject matter. For example the qualification and experience of staff assigned to and performing a service contract may be taken in to consideration, and CAs may require that they are only be replaced with the consent of the contracting authority, and by replacements ensuring equivalent organisation and quality. **The proposal is a step in the right direction but needs improving: the text must clearly define a comprehensive concept of MEAT so that it gives broad and robust support and encouragement to CAs to integrate horizontal objectives** into procurement, not just the indirect costs, such as after-care, that all responsible CAs should already be including. MEAT criteria should include the full range of social and quality of work considerations, e.g., decent work⁷, collective bargaining, equal pay for equal work, gender equality, fair trade, social cohesion, ethical financing, social integration of disadvantaged persons or members of vulnerable groups amongst the persons assigned to performing the contract.

Life-cycle costing

8. The EC proposals allow CAs to integrate the concept of life-cycle costing (LCC) into both options for awarding the contract: the most economically advantageous tender (MEAT) or the lowest cost (although this is not obligatory). **However, the concept of LCC is too limited in the proposal.** LCC can not only be used to calculate the total costs for the CA, it can also be applied to calculate the costs for society as a whole - including the society where the resources used for products/materials come from. The explanation does say that external environmental costs can be taken into account, provided they can be monetised and verified, **but social externalities are not mentioned. This is far too narrow.**
9. While LCC methodologies used should be robust and transparent, the Directive should be stimulating and endorsing continuing refinement of methodologies in more comprehensive contexts. However, by prescribing criteria for methodologies to be used, the EC proposal is unduly restrictive, e.g. it only allows the use of methodologies that "have been established for repeated or continuous application" or which have been established at Union level (Art 67.3). This will lead to 'lowest common denominator' methodologies and will constrain CAs who wish to use updated data-points or more comprehensive, innovative methodologies.

Production characteristics

10. The EC proposal is more explicit than the previous Directives in allowing CAs to refer to a specific process of production or provision of services both in the technical specifications and in the award criteria, provided that they are linked to the subject matter of the contract. It will also be possible to refer to **processes at other stages in the life-cycle. Both these developments are steps forward. However, the extent to which social elements of the**

⁶ Public contracts going over budget is a common occurrence across the EU, especially in Public Private Partnership (PPP) contracts. There are countless examples of contracts concluded on lowest price that fail to deliver the quality of service/goods required, and which have to be terminated and re-contracted.

⁷ 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.

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production process are permissible is still far too restrictive: CAs may only include social criteria as award criteria and not as technical specifications; and only certain social criteria are permitted (i.e., relating to the working conditions of the persons directly participating in the process of production which have immediate consequences on staff members in their working environment). This leaves the permissibility of including other social factors that are linked with the production process unclear. **A clarification of the EC proposal's definition of the scope of the production process/provision of service is therefore required**, as also emphasized by the Parliament.⁸ Social production characteristics relating to all aspects of employment conditions should be permitted as technical specifications, including respect of ILO Conventions, decent wages, price premiums for producers; social impacts of processes on non-employees.⁹ Likewise specific reference to taking account of the social and biodiversity impacts of the management and exploitation of natural resources should be included.

Labels

11. Labels as well as certification schemes¹⁰ can help CAs introduce sustainable development considerations into public procurement. This is recognised in the proposal which allows CAs to specify labels meeting certain criteria providing that equivalents are also accepted.
12. The EC proposals seek to set requirements as regards the governance of labels and certification schemes (Art 41, 1c) and this is essential **in order that they are not business dominated and specific interests (environmental, social) are safeguarded through a decisive role for citizens' organisations representing such interests**. However, instead of a prescriptive approach on which actors should be involved, it would be better to focus on requiring the process to be open to enable a wide-range of actors to input. The wording should therefore be clarified and certification schemes should be more explicitly referred to.
13. The Directives should clearly recognise the wish of public authorities, and their citizens, to have certainty that products and components of works or services are being produced in an environmentally and socially sustainable manner. The EC proposal is restrictive compared to existing policies and practices in several EU Member States. **The use of labels setting out requirements other than those linked to the subject-matter of the contract and labels that relate to only some of the CA's criteria should be clarified**. There should still be scope for such labels to be used by CAs as evidence of compliance with the requirements set in the technical specifications or award criteria. Art 41. 2 only partially clarifies the situation.

Selection stage

14. Recognising the added value of suppliers with a sustainable development 'track record' is not possible under the current Directives and the possibilities to exclude bidders are limited. In the new proposals there are no substantive changes to the selection stage (Art 56); therefore, CAs still do not have the opportunity to properly assess at the selection stage the tenders' commitment to sustainable development.
15. The selection criteria do allow CAs to take into account the technical and professional ability' of tenderers (Art 56. 1). This can include the 'necessary human and technical resources and experience to perform the contract to an appropriate quality standard,' as well as 'skills, efficiency, experience and reliability.' The Directives do not allow any other additional criteria to be added by the contracting authority. The range of selection criteria that can be taken into account should be broadened to include **a wide range of sustainability criteria, such as**

⁸ The European Parliament in its resolution of 25 October 2011 on modernisation of public procurement already points out "[...] the need to clarify the scope for including requirements relating to the production process in the technical specifications for all types of contract [...]"

⁹ For example, impact of unsustainable forestry on indigenous peoples.

¹⁰ Certification schemes also cover assurance schemes that do not translate into a label on products.

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respect for applicable collective agreements, investment in skills and training, and experience with supply-chain management.

16. As under the current legislation, some exclusion criteria are mandatory and some only optional. Those most relevant to sustainability remain only optional. The exclusion provisions should be broadened and certain of them should be made mandatory. Furthermore, the new proposed procurement passport (Art 59 and Annex XIII) should be expanded to include information that would allow CAs to operate their powers to exclude tenders.
17. The exclusion of tenders for breach of substantive requirements under previous contracts is a new inclusion in the proposal (Art 55(3)(d)). It is unfortunately an optional exclusion and has been unnecessarily narrowed to relate to only previous contracts of a similar nature with the same contracting authority. There are also possibilities to exclude tenders who violate social, employment or environmental law, but only if it is Union law or certain international agreements listed in Annex XI, such as the ILO core conventions. **Breach of national laws and applicable collective agreements are not referred to at all. This is an appalling omission.**¹¹ Further clarity is also required about the level of environmental and labour protection expected from tenders in states that are not signatories to all of these international agreements.
18. Although CAs may exclude tenders in theory, in practice the proposal would make it very difficult for them to do so. Even if the exclusion criteria apply, tenders will still have the possibility to be considered nonetheless ('self-cleaning'). The self-cleaning provisions may be designed to create incentives for tenders with a poor track record to work on their compliance but in practice it is likely that CAs accept more self-cleaning evidence than they reject with the result that the exclusion will not have a practical dissuasive effect on businesses who may not be taking their social and environmental obligations seriously. This is because the onus is on the contracting authority to explain that the way the tenderer has resolved previous breaches (examples given are paying compensation, cooperating with the authorities and taking active measures to prevent further offences) is not sufficient to override the exclusion.
19. **The Directives should clearly state that selection criteria, especially sustainability requirements, must apply all along the supply-chain.**¹² As mentioned by UEAPME in their position paper on better regulation "The objectives are clear: to create a Union which offers high standards of social, environmental and consumer protection. So, if legislation is necessary in this field it should apply to everybody."¹³ **Article 71 on subcontracting is weak**, even if a step forward from the 2004 Directives. Although a CA *may ask* or be *required by MS* to ask the tenderer to indicate the share of the contract it intends to subcontract. There are no obligations or responsibility to adhere to employment protections, working conditions or environmental protection standards. It is clear that the motivation behind the information request is to get an idea of level of contracts being subcontracted to support SMEs.
20. **The provisions on "abnormally low tenders" (Art 69) also need strengthening** in order to tackle violations of social and labour laws and/or collective agreements and breaches of environmental legislation. The new proposals do require operators to explain price and costing in certain situations (50% lower than average price) but when it comes to "other reasons" they are not required to request explanations. It is positive that CAs must reject the tender where

¹¹ The 2004 Directive referred to employment protection and working conditions in force at the place where the work service or supply is to be performed (Art. 55)

¹² In an earlier draft of the proposal the text of Article 71 reflected this, saying "*Where a contracting authority has established that a tender is abnormally low because the tender does not comply with obligations established by European Union legislation in the field of social and labour law or environmental law, including throughout the supply chain, it shall reject that tender.*"

¹³ See http://www.ueapme.com/IMG/pdf/111221_pp_report_micros.pdf

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they establish that it is abnormally low because it does not comply with specified obligations relating to social and labour or environmental law (Art 69 4 para 2).

Governance

We welcome provisions in the Directives (A. 84-88) to support contracting authorities monitor and evaluate public procurement processes, and in particular outcomes. The draft Directive proposes, inter alia, establishing a single independent oversight body on the national level to which all contracting authorities shall be subject and which will be in charge of monitoring, implementation and control of public procurement. It shall also publish an annual report including an overview of sustainability policies and measures with explicit reference to environment protection, social inclusion and innovation (A.84.2(b)). However, we think that these provisions should not only be mandatory but could also be more proactive in promoting sustainable development, for example by:

- ✓ setting both a series of indicators based on targets and objectives for contracting authorities as well as by guidelines in order to facilitate impact assessments of effectiveness of the sustainability measures applied.
- ✓ requiring national oversight bodies to closely cooperate with, assist and draw attention to technical support structures ("knowledge centers"), providing legal and economic advice, guidance, assistance and training.
- ✓ gathering best practices of sustainable development in the oversight body's annual report and share them with relevant stakeholders in order to contribute to the creation of a specific expertise on sustainable procurement policies in the EU.
- ✓ organising regular exchanges with social partners, civil society organisations and other stakeholders on the progress made towards sustainability to encourage a positive dialogue on evidence-based examples of sustainable policies and practices.

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Annex

Treaty provisions in support of sustainable public procurement

These include:

- ✓ Article 3.3 Treaty on the European Union, on a social market economy
- ✓ Article 11 Treaty on the Functioning of the European Union, known as the “integration principle”, which requires that environmental protection requirements must be integrated into EU policies and activities with a view to sustainable development. The reference to sustainable development interweaves economic, environmental and social components. The EU Council, when endorsing a new EU Biodiversity Strategy in December 2011, explicitly called to “integrate and mainstream targets on biodiversity in the development and implementation of all relevant EU and national sectoral policies”. This concept is picked up in point 19 of the European Parliament’s 2011 report on the modernisation of public procurement which: *“Underlines the need to strengthen the sustainability dimension of public procurement by allowing it to be integrated at each stage of the procurement process (i.e. ability test, technical specifications, contract performance clauses)”*.¹⁴
- ✓ Article 9, which 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.”*¹⁵
- ✓ Article 14 which acknowledges that Services of General Economic Interest (SGEI) are an intrinsic part of Europe's social model and Protocol 26 which states clearly the responsibilities of Member States in the delivery of such services.
- ✓ The European Charter of Fundamental Rights. 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.”¹⁶

¹⁴ See <http://www.europarl.europa.eu/committees/en/IMCO/subject-files.html?id=20110712CDT23842>

¹⁵ Background paper prepared by the Belgian Presidency 2010
http://www.socialsecurity.fgov.be/eu/docs/agenda/26-27_10_10_sia_en.pdf

¹⁶ COM (2010) 573 final