

Brief report of ETUC/EPSU workshop on Public Procurement, 21 May 2015

To the Public Services Network/Network for Sustainable Procurement/EPSU Standing Committee Local Government

Introduction

Mads Samsing, Chair of EPSU Standing Committee for Local and Regional Government opened the workshops and welcomed all participants. He introduced the objectives of the workshop, which were to see how to make the most use of the new Public Procurement Directives in respecting the following:

- ensure respect for employment legislation and collective agreements conditions in public contracts (mandatory social clause)
- encourage a greater take up by public authorities of the new possibilities to include social and environmental criteria in procurement tenders
- take advantage of the clarification in the Directives on the right to 'in-house' / public-public cooperation to question the outsourcing of public services to private operators
- avoid potential problems regarding the specific regime for health social services
- raise awareness / campaign at the different levels, and consider what materials would be useful.

The new Directives adopted in 2014 are a substantial improvement over the previous Directives, which privileged lowest-cost tenders and made it difficult to include social criteria 'upfront'.

Penny Clarke, EPSU, described the work of EPSU in cooperation with ETUC and the Network for Sustainable Development in Public Procurement (NSDPP) to achieve this improvement in the EU legislative framework. 'Social' procurement had been much contested, e.g., it took six years for the European Commission (EC) to publish a first Guide on "Buying Social" ¹ in 2011. EPSU commissioned a study on pay clauses in public procurement showing that pay clauses date back to the second half of the 19th century,² and that there was no reason why for the EU public procurement framework should be less than ambitious on social criteria.

The new framework also now confirms that there is a right for public authorities to provide services directly ("in-house" and "public-public cooperation"). It was important to make the most use and best take up of this new provision, also where Member States chose to implement the 'optional' lighter "lighter regime" for health and social services.

The new public procurement framework 2014: Exchange of views with ETUC, European Commission and Fair Trade Advocacy

Séverine Picard (ETUC) presented the assessment of the ETUC on the new procurement directive, emphasizing too that it was a better framework than before. Correct transposition is crucial however to make sure the "social acquis" of this new directive is not watered down.

¹ <http://ec.europa.eu/social/main.jsp?langId=en&catId=89&newsId=978> EC Guide on « Buying Social »

² <http://www.epsu.org/a/9151>

She presented the ETUC key demands³ for the transposition, in particular in relation to the mandatory social (and environmental) considerations (Article 18.2) and joint and several liability in sub-contracting. The revised framework clearly obliges the respect of employment conditions, including throughout the supply-chain, even if joint liability for sub-contractors is optional. This means that Article 18.2 requires full transposition and applicable obligations are those of the place of work with possibility to add references in technical specifications / selection criteria. In respect to the 'lighter' regime for health and public services, if these provisions are implemented they must be linked to the mandatory social (and environmental) clause. Any claim that the principles of Directive 96/71 on posted workers regulate public procurement in general must also be resisted. The ECJ ruling judgement Ruffert should not have a general effect on all public procurement procedures.

Over and above ensuring respect for the mandatory social (and environmental) considerations, national transposition should seek to add additional social criteria. The transposition laws should take an enabling approach, building on the (non-exhaustive) list of examples in the Directives. National transposition should also seek to ban price-only or cost-only assessment, or at least restrict it to very specific cases. In the recitals there is an encouragement to ban cost-only criteria.

Séverine added that some demands for the Directives, e.g., to ensure a cross-reference to the transfer of undertakings Directive 2001/23/ were not achieved and were to come back to.

Nadia Costacurta, European Commission (DG GROW) explained how the Commission is handling the transposition process. The deadline for Member States implementation of the new framework is the 18 April 2016. The revised framework published in the Official Journal (OJ) contained more than 350 pages. The EC considers the revised framework as a key action to implement the "Single Market" and to re-launch growth and is giving assistance to Member States in the transposition process through the European Commission Expert Group (EGPP) on Public Procurement, which is made up of national government representatives. The EGPP has so far focused on some main points related to transposition regarding to scope, procedures, selection and contract execution. There have been 14 days of meetings since 2014, plus bilateral meetings and numerous questions by Member States. An Online Platform has been created to provide Member States information and to exchange best practices. All Member States have started the transposition, and the UK has already finished.

Ms Costurca mentioned that there are no major problems of transposition at this stage. The EC is now also preparing a questionnaire, with some 40 questions, to collect information on national transposition. Responses will be collected by the second half of 2015. She also informed that the Commission does intend to produce guidance on the aspect of "socially responsible procurement" at the end of 2015.

In discussion, Kathleen Walker Shaw (GMB), and Per Brøgger Jensen (FOA) emphasized that the correct implementation of Article 18.2 - with the accompanying recital - is also important in relation to the current trade negotiations. Valentina Caima (Social Platform) raised questions regarding the social considerations in relation to social services. Elena Crasta (TUC) emphasized the legal obligation to transpose Article 18.2 and that social procurement

³ <http://www.etuc.org/publications/new-eu-framework-public-procurement-etuc-key-points-transposition-directive-201424eu#.VYKzRf7xvIU>

should not be linked to CSR, which is another matter. EPSU wondered if, to guarantee implementation, Article 18.2 would be well placed in the technical specifications or selection criteria (that all bidders have to meet before they can take part in the tender process). ETUC emphasized the need for the involvement of social partners in the implementation process and pleaded for more transparency.

In reply, Ms Costacurta said that it not possible to be transparent on the work od the EGPP but that consideration could be given to making some of the information public. The EGPP will produce some short documents and a synthesis of the replies to the questionnaire, and these may be published. On the technical specifications she replied that technical specifications can take account of accessibility criteria for people with disabilities, but it was difficult to see how a link with Article 18.2 could be made.

Elba Estrada (Fair Trade Advocacy Brussels) also reported about the work of the Fair Trade groups to influence the new revised public procurement framework. She highlighted the extended concept of life-cycle and life-cycle costing, as well as areas mentioned by ETUC on respect for environmental, social and labour law. This also has an implication for assessing abnormally low tenders. Experience shows that enforcement of mandatory social and environmental provisions is harder during the early stages of the production, so it is positive that fair trade labels may be now included in call for tenders, either in the award criteria or in the contract performance conditions. There is also now the possibility to ask for specific labels as means of proof. She mentioned a review of Dutch policy for socially responsible procurement and that the Andalusian Parliament in Spain recently recognized the new opportunities offered in the procurement Directives. The EU and its Member States should encourage social procurement and responsible corporate conduct within the 17 Sustainable Development Goals (SDGs) now being drawn up by the United Nations (UN).

Per Brøgger Jensen raised the issue to how link tax evasion/avoidance with the selection criteria. There was a window of opportunity to promote CSR by making it impossible for companies that avoid tax to bid for public contracts. It was pointed out that the Scottish public consultation on the new public procurement framework included a question on tax avoidance, linking this to the need to have good management of taxpayers money.

Working Groups on implementation and good and bad practices

All participants participated to the workshops (see participant list enclosed). It was reported in discussion that:

- In **Spain** a preliminary bill was introduced on public procurement and administrative reforms. The trade unions urged for more transparency, workers rights, job protection, no increase in temporary agency work, more quality control and enforceable collective agreements. They call for social aspects to be included in tenders and not to opt for the cheapest bid.
- In **France** the only public service not affected by public procurement is the police and the judiciary arm. Training is given to local authority employees on how to respect social criteria and the respect for collective bargaining, and preference can be given to in-house bids. A working group on transposition was established where trade unions try to influence the process.
- In **Denmark** the national Parliament is moving forward on the transposition of the law. The Danish union movement pressed for a reference to ILO C94 but they were not

successful. The union movement raised the issue of tax evasion and avoidance as a selection criteria in Denmark.

- In **Sweden** measure have been introduced to ensure that companies carrying out a public procurement contract do not go bankrupt.
- In the **United Kingdom**, the revised framework has already been implemented in England without an obligation to oblige bidders to respect social criteria. Unions campaigned on these issues. TUC and UNISON are producing guidance with information on the in-house principle, on mutuals and on reserved contracts. It was said that that joint messages with the employers organization in local government (CEMR) on the transposition / implementation of the Directives would be helpful in efforts to raise standards. In Scotland there is a different approach, with a public consultation raising questions on tax avoidance and evasion, social care contracts, and more positive focus on 18.2.
- In **Norway** a tripartite committee was set up to determine how and where collective agreements can be included into public contracts. Nothing similar however has happened as regards concessions / PPPs.
- In **Finland** the implementation is to be finalized this summer. It seems that lowest-cost contracts will certainly be discouraged but it is more difficult to discourage the current government in not implementation the application of environmental criteria.

City of Nantes (and Member of Eurocities) best-practice example

André Sobczak (City of Nantes Metropole, member of Eurocities) explained how the City of Nantes is politically trying to put socially responsible procurement high on its agenda and tries to mobilize other cities to do likewise. Socially responsible procurement is integrated into wider political objectives by convincing and accompanying enterprises (including municipal enterprises) to take a long-term and systematic approach to including social criteria into their bids. This work started five years ago. A joint platform with the trade unions was established, as well as a platform for social corporate responsibility which includes academia and local fair trade advocacy. For example, the City of Nantes encourages enterprises to have childcare arrangements for their staff. Politically it is important to convince private actors that it is about long-term sustainability and planning and as well as using economic arguments. The City of Nantes is present in the governmental working group on the implementation of the new framework and at local level it takes the initiative to try to apply this new framework. Social criteria for local businesses were drawn up, taking account the supply chain, production processes, questions with regard to staff and collective agreements. He underlined that it is important to act within the legislative framework, but also to explore with local actors to see what is possible outside this framework in trying to give incentives for socially responsible procurement. The city of Nantes is developing strong exclusion criteria.

Conclusions

Mads Samsing, (HK Kommunal) and Christine Jakob (EPSU Policy Officer Local Government) summarized the presentations of the day with following conclusions:

- Collecting good examples of local authorities which apply and work towards implementing social and environmental criteria is important
- EPSU can work together with the employers and/or other stakeholders (e.g. Eurocities) to promote socially responsible procurement by providing guidance, training and assistance to municipalities

- EPSU members should work / campaign at national level with the trade union confederations to influence the implementation of the new “social acquis” (Art. 18.2.) in the new public procurement framework: EPSU should further explore with ETUC arguments that support a reference to 18.2 in the technical specifications or selection criteria.
- We should avoid mixing the concept of corporate social responsibility (CSR) with social criteria such as working conditions and the respect for collective bargaining arrangements; social criteria has always to be linked to the public contract in question, not the company.
- The main social criteria in procurement that we want to include concern respect for quality working conditions, respect for collective agreements. Companies that do not respect these and other conditions should not be given public contracts.
- Tax evasion and avoidance should also be part of socially responsible procurement criteria
- Affiliates should inform us on the transposition phase of their country and we will take stock of the actions of our affiliates in September/October 2015
- A more thorough discussion should take place on the specific regime for health and social services (and some other services). The EPSU Working Group Social Services might be the right place to discuss this.

List of Participants

1.	MKRTCHYAN Arman	M	RBUPOWSE	Armenia
2.	KATTNIG Thomas	M	GDG-KMSfB	Austria
3.	UNGER Günter	M	GDG-KMSfB	Austria
4.	CALLAERTS Kurt	M	ACV-CSC Transcom	Belgium
5.	VANDENBULCKE Christoph	M	ACV-Openbare Diensten	Belgium
6.	ELU Alexander	M	Eurodiaconia	Belgium
7.	WALKER SHAW Kathleen	F	GMB Brussels Office	Belgium
8.	CIOCI Grazia	F	Health Care Without Harm Europe	Belgium
9.	CAIMI Valentina	F	Social Platform	Belgium
10.	FRIEDRICH Alexander	M	SOLIDAR	Belgium
11.	CRASTA Elena	F	TUC Brussels office	Belgium
12.	KAPTAN Ahmet	M	Cyprus Turkish Civil Servants TU (KTAMS)	Northern Cyprus
13.	OYTAM Mehmet	M	Cyprus Turkish Civil Servants TU (KTAMS)	Northern Cyprus
14.	BRØGGER JENSEN Per	M	FOA	Denmark
15.	SAMSING Mads	M	HK/Kommunal	Denmark
16.	LANGBAKKE POULSEN Bjorn	M	OAO	Denmark
17.	HAMALAINEN Mika	M	JHL	Finland
18.	FALBA André	M	FPSPSS-FO	France
19.	FORGEAU Patrick	M	Eurocities (City of Nantes)	France
20.	BUSET Ingrid	F	Fagforbundet NUMGE	Norway
21.	HEIMLI Roger Haga	M	Fagforbundet NUMGE	Norway
22.	GASULL Joan	M	FSC-CCOO	Spain
23.	GALLEGO Jesús	M	FSP-UGT	Spain
24.	HANSSON Maria	F	Kommunal	Sweden
25.	JONSSON Anders	M	Kommunal	Sweden
26.	OSTBERG SVANELIND Maria (only afternoon)	F	SSR	Sweden
27.	HAGBERG Anneli	F	Vision	Sweden
28.	NIELSEN Dan	M	Vision	Sweden
29.	SANTHAKUMAR Arthy	M	British Medical Association	UK
30.	ROCHE Allison	F	UNISON	UK
31.	FARMER Fiona	F	UNITE THE UNION	UK
Speakers				
	PICARD Séverine		ETUC Legal Adviser	Belgium
	COSTACURTA Nadia		DG GROW, European Commission	Belgium
	ESTRADA Elba		Fair Trade Advocacy Office	Belgium

SOBCZAK André		Eurocities (City of Nantes)	France
Secretariat			
CLARKE Penny	F	EPSU	
JAKOB Christine	F	EPSU	
KRIJGER Anneke	F	EPSU	
Apologies			
NIJS Gustave	M	ACOD CGSP–FGTB ABVV	Belgium
BONDIN Kendrick	M	General Workers' Union GWU	Malta
HILMERSSON Per	M	Brussels Office of the Swedish Trade Unions	Belgium