

## Update on public procurement and concessions

This note is to give an update on the EU initiatives relating to public procurement and concessions, summarised in the table below:

Proposal	New EU Public Procurement Directive(s)	New Concessions Directive	Sustainable Consumption and Production Action Plan (SCP)	Public Procurement Reciprocity Initiative
Content	“How to buy”	“How to buy/sell”	“What to buy”	“From which countries can we buy”
Expected timeline	December 2011 EC proposal (ordinary legislative procedure)	December 2011 EC proposal (parallel with public procurement Directive(s))	December 2011 public consultation and by end 2012 new SCP Action Plan	December 2011 EC proposal (likely a legislative proposal)

All EPSU Standing Committees as well as the EPSU public services Network have an interest in procurement issues. A number of EPSU affiliates are particularly active with the EPSU Secretariat to develop EPSU positions on procurement, e.g., our response to the Green Paper on public procurement (see below). They are:

- ✓ Päivi Ahonen JHL Finland
- ✓ Kathleen Walkershaw GMB UK
- ✓ Margie Jaffe UNISON (now retired) UK
- ✓ Per Brøgger Jensen OAO Denmark
- ✓ Armine Duttine Ver.di Germany
- ✓ Dominique Pognon CGT-fdsp France

EPSU is also part of the Network for sustainable development in public procurement (see [Annex](#) for details of the sustainable procurement Network).

The key objective for EPSU is to ensure that public authorities are not obliged to use public procurement or concessions to deliver public services and that, when they do so, they take account of social/employment/sustainability considerations in their tendering process.

### ***EC Green Paper on the modernisation of EU public procurement rules***

The European Commission published in February 2011 a Green Paper on the revision of the 2004 public procurement Directives [http://ec.europa.eu/internal\\_market/publicprocurement/](http://ec.europa.eu/internal_market/publicprocurement/). EPSU’s public services Network prepared a contribution to the Green Paper at its meeting in April 2011 (see <http://www.epsu.org/a/7559>). In the response EPSU stressed that EU rules should:

- ✓ Be without prejudice to the right of public authorities to provide services 'in-house. By 'in-house' we include public-public cooperation and cooperation with non-profit making providers who meet general interest criteria
- ✓ Not oblige or encourage compulsory competitive tendering, or give rights to economic operators to initiate tendering processes
- ✓ Not promote Public-Private Partnerships (PPPs)
- ✓ Take account of national frameworks that influence the way public procurement takes place in practice;
- ✓ Protect employment conditions and collective agreements
- ✓ Provide a stronger 'enabling' framework for social/ sustainable public procurement

As part of the 'Network for sustainable public procurement' we also submitted a joint response to the consultation. See Network's 'key demands' [http://www.epsu.org/IMG/pdf/key\\_demands\\_Green\\_Paperfinal\\_EN.pdf](http://www.epsu.org/IMG/pdf/key_demands_Green_Paperfinal_EN.pdf) for English and [http://www.epsu.org/IMG/pdf/key\\_demands\\_Green\\_Paperfinal\\_DE.pdf](http://www.epsu.org/IMG/pdf/key_demands_Green_Paperfinal_DE.pdf) for German version.

The European Commission received over 600 contributions to the Green Paper. These are on the EC website together with a synthesis of replies on [http://ec.europa.eu/internal\\_market/consultations/docs/2011/public\\_procurement/synthesis\\_document\\_en.pdf](http://ec.europa.eu/internal_market/consultations/docs/2011/public_procurement/synthesis_document_en.pdf). The EC synthesis notes:

- ✓ there is a consensus for the need for reform, even if the current Directives are relatively new. To note, both BusinessEurope and UEAPME do not support a revision of the current rules and would prefer a focus on better implementation. In particular there is widespread support, especially by local authorities, for simplification of the current rules. Simplification would allow, for example, more widespread use of the flexible 'negotiated procedure', and for tenderers not to have to provide documentation in support of their tender until the award stage.
- ✓ Many respondents favour increasing the thresholds in the current rules, as near threshold tenders are the most expensive in terms of relative costs (20-30%). Other 'popular' issues mentioned include innovation (however this is not defined), clarification of public-public cooperation, and joint public procurement involving more than one public authority. that the consultation shows a clear dividing line between business and local authorities on the one hand, civil society on the other regarding the use of public procurement to support 'horizontal' objectives (e.g. of social, health, employment, equality or fair trade policies).
- ✓ Businesses and many national governments show reluctance to the idea of using public procurement in support of other policy objectives, and oppose most of the ideas to foster for instance green or social procurement. Other stakeholders, notably civil society organisations are strongly in favour of such strategic use. On SMEs (seen as 'social' by the EC) it would seem that there is support for targets and incentives rather than obligatory criteria/binding quotas. There appears to be broader support for specific treatment in procurement rules of social services (e.g., higher thresholds).

### ***EC evaluation of the current procurement Directives***

In June 2011 the European Commission published its evaluation of the current Directives. EPSU, as part of the Sustainable Procurement Network did feed comments into the evaluation (see "Evaluation of the impact and effectiveness of EU Procurement legislation and policy - Joint Initial Contribution to DG MARKT, November 2010 in EN/FR/DE/ES/SV/RU <http://www.epsu.org/a/7046>).

The EC evaluation draws upon existing research and studies at European or national level; notices published in the Official Journal of the European Union via the Tenders Electronic

Daily database (OJEU/TED) and other databases; and specifically commissioned external studies by the EC on cross-border procurement, and cost-effectiveness of procedures. The evaluation covers only procurement covered by the EU Directives (i.e., above threshold), so most public procurement is outside the scope. The evaluation report notes that:

- ✓ 78% of procurement is under the 'most economically advantageous tender' (MEAT), and 22% lowest price
- ✓ the vast majority of procurement is carried out below national level (by local and regional government).
- ✓ There is a low level of cross-border public procurement, due mainly to lack of experience and language barriers (i.e., rather than because of discrimination).

The report also:

- ✓ includes some information on the use of social and environmental criteria in public procurement. It notes that in practice this is mainly used to promote environmental sustainability and social considerations are not widespread. Almost all Member States have National Action Plans to support Green Procurement whereas there are no national action plans for socially responsible public procurement. However a little more than half, 17 of the European Economic Area Member States (EEA MS), refer to social responsibility objectives in procurement in some way.<sup>1</sup> The report also notes that 45% of all contracting authorities or entities do include social considerations within the procurement policies in some way: 26% sometimes include social considerations in their tender documentation, 14% regularly and 9% as often as possible. The most common requirements concern the promotion of decent working conditions, employment opportunities (each with 32% of respondents), measures to promote social inclusion, accessibility for all, and SMEs.
- ✓ suggests that including 'non-economic' – and especially social – considerations in public procurement increases complexity without bringing clear added-value, not least as monitoring of outcomes is weak<sup>2</sup>. This conclusion is unfair because there is very little – if anything – in the evaluation report on the broader costs and benefits of public procurement. Also, the EU has a restrictive interpretation of how and where social considerations can be included, i.e., only in the contract performance requirements, which prevents effective implementation. The EU PR proclaims "EU public procurement framework has saved around 20 billions euros<sup>3</sup> but even from an 'economic' perspective, the 20 billions is questionable because it includes only the costs up to the award of contracts and litigation costs, not costs that occur when contracts have to be modified/terminated. There are many negative experiences of public procurement contracts going wrong, often precisely because they have not included sustainability considerations.
- ✓ notes diversity in national situations, which the EC interprets to mean that the administrative capacity and competence on public procurement in a number of Member States needs to be strengthened.

The Annex to the evaluation report contains information the history of the procurement Directives and their implementation. It also has a specific chapter (number 9) on utilities procurement which accounts for around 1/5 of total public procurement reported by Member States. This includes an assessment of liberalisation policies in these sectors.

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<sup>1</sup> Austria, Belgium, the Czech Republic, Germany, Denmark, Finland, France, Italy, Lithuania, Luxembourg, the Netherlands, Norway, Poland, Slovakia, Spain, Sweden and the UK.

<sup>2</sup>See page 81 of Evaluation Report

<sup>3</sup><http://europa.eu/rapid/pressReleasesAction.do?reference=IP/11/785&format=HTML&aged=0&language=en&guiLanguage=en>

The various EC evaluation documents are available on [http://ec.europa.eu/internal\\_market/publicprocurement/modernising\\_rules/evaluation/index\\_en.htm](http://ec.europa.eu/internal_market/publicprocurement/modernising_rules/evaluation/index_en.htm)

The EC also published in September 2011 a study commissioned by EC DG Internal Market to ADELPHI reviewing Member State experience with initiatives to use public procurement to support the realisation of other policy objectives. Like the evaluation, this study concludes that 'social' procurement is less developed than 'green' procurement and that monitoring of the impact of policies is weak. (See [http://ec.europa.eu/internal\\_market/publicprocurement/docs/modernising\\_rules/strategic-use-public-procurement-europe\\_en.pdf](http://ec.europa.eu/internal_market/publicprocurement/docs/modernising_rules/strategic-use-public-procurement-europe_en.pdf)). We are still waiting for a cost-benefit analysis for socially-responsible public procurement, commissioned by DG EMPL to the University of Munich to be published.

The EC organised in June 2011 a high level conference on public procurement at which the . EPSU General Secretary spoke. (See programme [http://ec.europa.eu/internal\\_market/publicprocurement/modernising\\_rules/conferences/index\\_en.htm](http://ec.europa.eu/internal_market/publicprocurement/modernising_rules/conferences/index_en.htm)). At the Conference Commissioner Barnier stressed the role of public procurement in the framework the EU2020 growth strategy and noted some of the questions that the Commission is considering.

The Network for sustainable development in public procurement was also invited in June 2011 to discuss the 'key demands' of the Network with the Cabinet of Commissioner Barnier.

### ***European Parliament report on the modernisation of public procurement***

Heide Rühle MEP has been the rapporteur for the IMCO Committee report, which will be voted in plenary 25/6 October 2011. See <http://www.europarl.europa.eu/activities/committees/homeCom.do?body=IMCO>.

The rapporteur has said that the main objectives of the EP report are to get more legal certainty, clarity and simplification; with the right balance being struck between clarification and simplification. There are a number of the points that we support in the draft report but miss clear working on key areas (e.g., reference to 'in-house', SGI Protocol, PPPs). See also <http://www.europarl.europa.eu/oeil/file.jsp?id=5901642>.

We are still waiting to hear who will be the rapporteur for the EC legislative proposal.

### ***EC staff working paper on 'in-house' and public-public procurement (SEC(2011)1169)***

In October 2011 the EC published a staff working paper on public-public cooperation, which aims to clarify the circumstances when contracting authorities can chose to perform their public interest tasks using their own resources and in cooperation with other contracting authorities without coming under EU public procurement law.

### ***EPSU/CEMR joint statement on social procurement***

In May EPSU/CEMR agreed in the framework on the social dialogue for local and regional government a statement "*The EC Guide on Socially Responsible Public Procurement (SRPP) - defining principles, requirements and standards of Socially Responsible Public Procurement (SRPP) for local and regional government*", available in EN/FR <http://www.epsu.org/r/73>.

The EC is organising in November 2011 a series of national workshop to support implementation of the SRPP Guide.

### **EPSU research on pay and other social clauses in public procurement**

EPSU has commissioned a short research paper on this, with a focus on regulation and practices in five European countries: *Denmark, Germany, Norway, Switzerland and the UK*. This will include legal regulation on pay clauses, including ILO Convention 94; use of pay clauses in practice; and demands of unions for further development of pay clauses.

The project team consists of:

- ✓ Germany, Switzerland and coordination: Thorsten Schulten (WSI) <http://www.boeckler.de/1260.html>;
- ✓ Denmark: Klaus Pedersen (FAOS) <http://www.soc.ku.dk/ansatte/beskrivelse/?id=59651> and <http://faos.ku.dk/english>
- ✓ Norway: Kristin Alsos (FAFO) <http://www.fafo.no/pers/bio/kal.htm> and <http://www.fafo.no/indexenglish.htm>
- ✓ UK: Pete Burgess Freelance Researcher (formerly at IDS and University of East London) <http://peteburgess.org/>

We hope that the research will be useful in supporting our employment demands relating to procurement, i.e. that public authorities should be entitled to require that tenderers apply relevant collective agreements or other relevant employment conditions which are valid and applicable, in the jurisdiction where the service will be performed; and that the EU rules refer explicitly to ILO Convention 94 (1949) concerning labour clauses in public contracts.

First results of the research were presented to the Network for sustainable public procurement at a meeting organised on 10 October 2011. The research will be completed by end of 2011.

### **Concessions**

EPSU and the European Parliament (in the 2010 EP report from Heidi Ruehle on 'new developments on public procurement') have expressed doubts about the benefit of a EU Directive on concessions, not least as the revision of the procurement Directives should be dealt with first. In the EPSU response to the EC consultation in March 2011 (see <http://www.epsu.org/a/6884>) we argued that before assessing shortcomings in the current legal framework, the Commission should evaluate national situations and demonstrate how a directive on concessions would improve, for example, water quality, waste collection, security of investment and employment. We also questioned the opening phrase of the consultation document, that states "*An initiative on concessions would aim to facilitate the use of concessions and ensure best value for money for both users and contracting authorities, by providing all interested parties with legal security and guaranteeing transparency and equal treatment for economic operator.*" This reflects the framework set for the consultation, i.e., biased towards assessing concessions against one perspective only, that of competition. It also shows that the EC aims to 'facilitate' the use of concessions, not only ensure transparency.

Most concessions are PPPs and there is a lot of experience with the problems these can cause for employment and working conditions, and also with the extra costs they can give rise to for tax payers. This is because costs of PPPs may not feature immediately in government public spending figures, and this can make them more attractive than they really are. The EC published in October 2011 proposals regarding EU cohesion funds after 2013, in which it says that funding may be suspended if Member States flout budget rules or breach the EU's Stability and Growth Pact. This may also increase pressure on governments to use PPPs. (See [http://ec.europa.eu/regional\\_policy/what/future/proposals\\_2014\\_2020\\_en.cfm](http://ec.europa.eu/regional_policy/what/future/proposals_2014_2020_en.cfm))

In September EPSU wrote to the EC to express concerns over a (leaked) draft Directive concessions and impact assessment. As a result we were invited to join a ETUC meeting with Commissioner Barnier on 29 September, at which a number of points were clarified (for EPSU and ETUC letters see <http://www.epsu.org/a/8055>). EPSU and ETUC also met with

the EC officials working on the Directive to continue discussions. In both meetings the EC argued that it only want to ensure a transparent tendering process for concessions, not to encourage Member States to make use of them.

To note, we will publish shortly a briefing paper recalling the main arguments against using PPPs.

***Third-country access to EU public procurement markets***

In August 2011 EPSU sent a short response to the EC on the consultation on third-country access to EU public procurement markets. In the response we argue that any EC initiative should pay attention not only to the imbalance in openness of public procurement markets between the EU and its main trading partners, but also to social and environmental considerations, including universal access to quality public services. Public procurement rules within and outside the EU should respect local and regional self-government and the broad discretion that public authorities have to provide public services according to local circumstances and democratically agreed preferences. For consultation on “access of third countries to the EU's public procurement market” (for details of consultation see [http://ec.europa.eu/internal\\_market/publicprocurement/modernising\\_rules/consultations/index\\_en.htm](http://ec.europa.eu/internal_market/publicprocurement/modernising_rules/consultations/index_en.htm)) and for EPSU response <http://www.epsu.org/r/71>

## Annex

**Network for Sustainable Development in Public Procurement**

Introduction &amp; membership list (version 8 August 2011)

- Description of the network
- Membership list

**1. Description of the network*****Who are we?***

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.

***How did the network become established?***

The group began to work together during the development of the last revision of the EU Public Procurement Directives in 2000. The current priority is now the revision of the EU Public Procurement Directive, to be formally launched by the EC towards the end of 2011.

***What does the network do?***

The group exchanges information, legal advice and ideas on how we can influence EU legislative and policy developments to promote sustainable development in public procurement, and we work together in developing joint actions to try to further these goals. This has included joint responses to EU Commission/European Parliament consultation processes, joint letters to Commissioners and MEPs. We have also co-operated with MEPs in organising hearings or specialist legal sessions on this area of public procurement.

***Can we use information from the network?***

The network is keen for our ideas on sustainable policy development to be circulated as widely as possible. We therefore welcome dissemination of our joint positions to a wider audience, as well as our arguments being used further in debate/discussions on this theme.

***How often does the group meet?***

There is no set structure or calendar to how regularly the network meets. We meet in response to the level of activity relating to the EU public procurement agenda. Clearly during consultation/revision periods regarding the Directives we meet more regularly, based on a consensus on dates agreed at the end of each meeting.

***Can we join the network?***

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. The network decides whether to endorse applications to join the group.

Contact co-ordinators:

Veerle Dossche - [veerle@fern.org](mailto:veerle@fern.org);

Penny Clarke - [pclarke@epsu.org](mailto:pclarke@epsu.org);

Sergi Corbalán - [corbalan@fairtrade-advocacy.org](mailto:corbalan@fairtrade-advocacy.org)

Kathleen Walker Shaw – [kathleenwalkershaw@gmbbrussels.be](mailto:kathleenwalkershaw@gmbbrussels.be)

## 2. Membership list

### 1. MEMBERS

1.a) Organisations that want to be publically seen as members of the network (and add their logo to public positions by the network). They are actively involved in the drafting of public positions and drafting and implementation of joint advocacy activities.

Organisation	Contact person	Email
Eur. Fed. of Public service unions - EPSU	Penny CLARKE Matthias Maucher	<a href="mailto:pclarke@epsu.org">pclarke@epsu.org</a> ; <a href="mailto:mmaucher@epsu.org">mmaucher@epsu.org</a> ;
Britain's general union – GMB (UK)	Kathleen WALKER SHAW	<a href="mailto:kathleenwalkershaw@gmbbrussels.be">kathleenwalkershaw@gmbbrussels.be</a> ;
European Federation of Building and Woodworkers - EFBH	Werner BUELEN	<a href="mailto:WERNER@efbh.be">WERNER@efbh.be</a> ;
Fair Trade Advocacy Office - FTAO	Sergi CORBALAN Luca TOSONI	<a href="mailto:corbalan@fairtrade-advocacy.org">corbalan@fairtrade-advocacy.org</a> ; <a href="mailto:advocacy@fairtrade-advocacy.org">advocacy@fairtrade-advocacy.org</a> ;
Solidar	Adeline Otto	<a href="mailto:Adeline.otto@solidar.org">Adeline.otto@solidar.org</a> ;
Eur. Federation of Food, Agric., Tourism Trade Unions (EFFAT)	Kerstin HOWALD	<a href="mailto:k.howald@effat.org">k.howald@effat.org</a> ;
TUC - UK	Elena Crasta Tim Page (TUC – UK)	<a href="mailto:ecrasta@tuc.etuc.org">ecrasta@tuc.etuc.org</a> ; <a href="mailto:TPage@tuc.org.uk">TPage@tuc.org.uk</a> ;
UNI Europa	Laila Castaldo	<a href="mailto:laila.castaldo@uniglobalunion.org">laila.castaldo@uniglobalunion.org</a> ;
FERN	Veerle DOSSCHE	<a href="mailto:veerle@fern.org">veerle@fern.org</a> ;
SETEM & Network Wear	Ramon Vives	<a href="mailto:rvives@setem.org">rvives@setem.org</a> ;
European Network for Social Integration Enterprises ENSIE	Patrizia Bussi Aurelie Duprés	<a href="mailto:patrizia.bussi@ensie.org">patrizia.bussi@ensie.org</a> ; <a href="mailto:aurelie.dupres@ensie.org">aurelie.dupres@ensie.org</a> ;
UNISON (UK)	???	
British Medical Association (UK)	Stephanie Ashmore	<a href="mailto:sashmore@bma.org.uk">sashmore@bma.org.uk</a> ;
European Trade Union Confederation - ETUC		
Health Care Without Harm Europe	Anja Leetz Susie Kinghan	<a href="mailto:anja.leetz@hcwh.org">anja.leetz@hcwh.org</a> ; <a href="mailto:communications-eu@hcwh.org">communications-eu@hcwh.org</a> ;
ver.di / United Services Union (DE)	Armin Duttine	<a href="mailto:armin.duttine@verdi.de">armin.duttine@verdi.de</a> ;

Réseau intercontinental de promotion de l'économie sociale et solidaire – Territoires de l'Europe – RIPESS	Pascale Dilille Gilles Dacheux	<a href="mailto:pascale.delille@univ-bpclermont.fr">pascale.delille@univ-bpclermont.fr</a> ; <a href="mailto:dacheux@ope.lu">dacheux@ope.lu</a> ;
Eur. Mine, chemical and energy workers fed. (EMCEF)	???	

1.b) Advisory organisations that, for neutrality reasons, prefer not to be publically seen as members of the network (logos do not appear on public position papers, names of organisations do not appear on “list of members!”<sup>4</sup>). They are actively involved in the drafting of public positions and, if they wish, drafting and implementation of joint advocacy activities.

Organisation	Contact person	Email
Client Earth	Janet Pritchard	<a href="mailto:jpritchard@clientearth.org">jpritchard@clientearth.org</a> ;
	Catherine Weller	<a href="mailto:cweller@clientearth.org">cweller@clientearth.org</a> ;

## 2. PARTNER ORGANISATIONS

Organisations supportive of the overall goals of the network but that, for one or other reason, have not yet publically shown their “membership” to the network by showing their logo in public positions. By involving these organizations in information exchange, it is expected that they will eventually decide to upgrade to a “leading organisation”.

Organisation	Contact person	Email
Inter-Réseau Européen des Initiatives Éthiques et Solidaires - IRIS	Joël Obrecht	<a href="mailto:contact@iris-network.eu">contact@iris-network.eu</a> ;
Eurodiaconia	Laura Jones	<a href="mailto:laura.jones@eurodiaconia.org">laura.jones@eurodiaconia.org</a> ;
European Confederation of Workers' Cooperatives, Social Cooperatives and Social and Participative Enterprises (CECOP)	Bruno Roelants	<a href="mailto:bruno.roelants@cicopa.coop">bruno.roelants@cicopa.coop</a> ;
Vlaams Overleg Duurzame Ontwikkeling (VODO) - Be	Gert VANDERMOSTEN	<a href="mailto:Gert@vodo.be">Gert@vodo.be</a> ;
Clean Clothes Campaign	Frieda De Koninck Carole Crabbé	<a href="mailto:frieda.dekoninck@wsm.be">frieda.dekoninck@wsm.be</a> ; <a href="mailto:carole@vetementspropres.be">carole@vetementspropres.be</a> ;
WEED ( <u>Weltwirtschaft, Ökologie &amp; Entwicklung</u> )	Veselina Vasileva	<a href="mailto:veselina.vasileva@weed-online.org">veselina.vasileva@weed-online.org</a> ;
Forest Stewardship Council (FSC)	John Hontelez	<a href="mailto:j.hontelez@fsc.org">j.hontelez@fsc.org</a> ;
FEANTSA - European Federation of National Organisations Working with the Homeless	Karolina Krzystek	<a href="mailto:karolina.krzystek@feantsa.org">karolina.krzystek@feantsa.org</a> ;
ICLEI	Mark Hidson	<a href="mailto:mark.hidson@iclei.org">mark.hidson@iclei.org</a> ;

4 This note is only for internal purposes (mainly for e-mailing) and is not shared with externals as such.