

The new EU Directives on public procurement: a step forward for green and social public procurement

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Summary

The new EU directives provide a better framework for social and environmental criteria in public procurement but much more is need if Member States are to put an end to a cost-centred approach.

Public procurement accounts for for one-fifth of the EU's GDP. There have been EU Directives in place since the 1970s, principally aimed at ensuring non-discrimination and transparency for economic operators wishing to bid for public contracts. Since the adoption of the EU directives on public procurement in 2014 there is now a better European framework in place for sustainable public procurement.

The European Federation of Public Services (EPSU), member of the European Trade Union Confederation (ETUC) as well as the Network for Sustainable Development in Public Procurement (NSDPP)¹ welcomed the adoption of the new public procurement Directives as a step towards supporting public authorities to make sustainable choices and spend taxpayer's money wisely.

Importantly, the right for public authorities to provide and organize their services directly was approved and concepts of 'in-house' and 'public-public cooperation' were defined. Public procurement remains only one of many alternative ways of providing public services.

The 2014 Directives affirm that contracting authorities may introduce social and environmental considerations throughout the procurement process as long as these are linked to the subject matter of the contract. Additionally, public authorities can differentiate what they purchase on the basis of the process and production methods that are not visible in the final product. It will be easier for them to rely on labels and certifications as a means to proof compliance with the sustainability criteria they have set. This will allow public authorities to give preference to bidders that offer better working conditions, favour the integration of disabled and disadvantaged workers, and offer sustainably produced goods.

Compliance with environmental, social and labour obligations, including collective agreements, is now enshrined in the principles of this law and tenderers can be excluded in case of non-compliance. It is crucial that this 'mandatory social clause' is fully implemented

¹ The Network for Sustainable Development in Public Procurement (NSDPP)¹

The NSDPP is a European network uniting social and environmental NGOs and trade union organizations that have the joint aim to achieve progress in sustainable development through enabling EU public procurement legislation and policies. <https://sites.google.com/site/sdppnetwork/>

and adhered to, including throughout the supply-chain. The new law makes it easier to identify subcontractors along the supply chain - although it will be up to Members States to establish their joint liability.

We regret however that the European Parliament and Council did not agree to include a reference to ILO Convention 94 in the Directives in spite of substantial cross-party support for this.

The absence of a reference to ILO Convention 94 means that the application of collective agreements and other social clauses such as 'living wages' to posted workers remain contested. In 2015 a further ruling from the CJEU is expected (Oberlandesgericht Koblenz (Germany) — RegioPost GmbH & Co. KG v Stadt Landau²) to clarify further the Rueffert judgment regarding pay clauses in public contracts. The European Trade Union Confederation and others have raised concerns about this case and argue that the new Directives open the way for a more positive and constructive ruling from the Courts.

In implementing the new rules, Members States should improve some of the elements left to their discretion in the new text. For instance, they can prohibit or restrict the "use of price only" criterion, and leave contracting authorities the choice between either assessing other aspects in addition to cost effectiveness, or base their purchasing decisions solely on that criterion. Regrettably, the final text of the Directive still allows the purchase of the cheapest option - despite objections from many groups - subsequently adding confusion to the criteria for assessing tenders. Although life-cycle costing provisions have been improved, social externalities' are still difficult to include in the life-cycle calculation.

Some new elements will need careful monitoring. For example Member States will have option to reserve contracts for health and social services to social enterprises, but the definition of 'social enterprise' is ambiguous and potentially open to abuse.

Having a clearer legal framework for social procurement is a first step but positive measures to support its application are necessary. The European institutions need to take a coherent approach to sustainability in public procurement and to develop a "buy socially responsible and sustainable" strategy with targets and a monitoring and evaluation programme. Furthermore, austerity policies and cuts in public spending need to be reversed if Europe is to tap the benefits that long-term investment in public services and infrastructure can bring.

EPSU will work with national members to ensure the best possible implementation of the social and environmental provisions in the Directives and together with the Network for Sustainable Development in Public Procurement (NSDPP) and others encourage public authorities to think, act, and buy 'sustainable.'

1) The context- benchmarking the delivery of public services against better working conditions

EPSU's starting point for our engagement with public procurement is our demand that the EU should shift towards more sustainable development and to realize a 'social market economy', including quality public services, in line with the Lisbon Treaty.³ Integrating

² Case C-

15/14) <http://curia.europa.eu/juris/document/document.jsf?text=&docid=153061&pageIndex=0&doclang=EN&mode=reg&dir=&occ=first&part=1&cid=42342>. For information on pay clauses see <http://www.epsu.org/a/9152>.

³ 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'. The Treaty also contains the 'integration principle (Article 11) and the Protocol of Services of General Interest (SGI) that calls for "a high level of quality, safety and affordability, equal treatment and the promotion of universal access and of user rights in public services."

sustainability as ‘strategic objective’ into public procurement rules – and bringing procurement into line with the Lisbon Treaty – is part of doing this. A strong regulatory framework, an efficient public sector, and high quality public services are part of the solution to the economic crisis as well as the long-term development of our societies. The Internal Market should contribute to this – as said by the previous Commissioner Michel Barnier in the European Parliament hearings before his appointment, “*I will work to put the internal market at the service of human progress, fight social dumping and protect services of general interest.*”⁴

In EPSU’s response to the EC Communication on the Single Market Act COM (2010) 608⁵ it was argued that Europe – and the EU 2020 strategy- “*should acknowledge the role the public sector and public services play in building sustainable growth and a fair inclusive society.*”⁶ Part of this role includes good governance and indeed the right to good administration is part of the Charter of Fundamental Rights.

Not everything in life can – or should - be bought. Public authorities need to assess why, as much as how, they want to use public procurement to provide public services. There are sound economic, political and social reasons for public authorities – often local authorities - to provide public services directly to the citizens that elect them, or to provide them in other ways than through public procurement. The ‘in-house’ provision of public services in particular - including public-public cooperation - remains a legitimate, sustainable and transparent way of providing public services. Indeed we see many municipalities bringing previously outsourced services back under their control,⁷ not least because of negative experiences of liberalisation.⁸

EPSU has always argued that the EU should make more and better use of the Charter of Fundamental Rights and the provisions on public services that are now firmly enshrined in the Treaty, in particular including the Protocol 26 on services of general interest to ‘benchmark’ how public services are provided. Assessments are also needed for service concessions and public-private partnerships (PPPs).⁹ State Aid rules should not promote public procurement as an ‘easier’ way of complying with EU competition rules and avoiding challenges of ‘over-compensation.’ Cooperation between public authorities and non-profit providers of public services can be a much better option than public procurement procedures that run counter to the long-term relationships that are so important for quality and sustainability.

However, when public procurement is used it should always ensure good pay and working conditions and aim to provide for ‘best value’ in the broad sense of the term. In this sense, public procurement can be a lever to promote good employment, skills and social inclusion – influencing the market in a positive direction. Whether public procurement achieves these goals can only be assessed by evaluating the real outcomes of public procurement, not just the procedural costs of awarding a contract.

2) The 2004 public procurement Directives – a lost opportunity for social criteria

⁴ http://www.europarl.europa.eu/news/expert/infopress_page/008-67167-012-01-03-901-20100112IPR67166-12-01-2010-2010-false/default_en.htm

⁵ http://ec.europa.eu/internal_market/smact/consultations/2011/debate/index_en.htm

⁶ Citation from the ETUC Resolution on public services, June 2010 <http://www.epsu.org/a/6598>.

⁷ See EPSU remunicipalisation report <http://www.epsu.org/a/8688>

⁸ The EC did carry out partial evaluations of the performance of network industries, see for EPSU contributions <http://www.epsu.org/r/232>, but it stopped several years ago.

⁹ For evidence of the failure of PPPs see <http://www.epsu.org/r/237>

It is worth recalling that during the adoption of the previous 2004 Directives, social and environmental aspects were hotly debated. The end result however was unsatisfactory, especially for social procurement. Too much of the wording relating to encouraging and clarifying the scope to use social considerations was confined to the recitals of the Directives and as a result was not reflected in European regulations. The lack of clear wording in the articles themselves gave rise to uncertainty and a 'fearful' approach towards integrating social criteria, including related to employment conditions.

The disappointing outcome was in spite of clear positions from trade unions and civil society,¹⁰ and also from the European Parliament. The European Parliament resolution from Tappin, 1998 point 12 of points out: *"Notes the Commission's intention to interpret the basic principles for the consideration of social aspects in public procurement contracts in an interpretative communication; nevertheless calls urgently for binding legislation at European level to ensure compliance with social legislation by all suppliers, including subcontractors, in the context of procurement procedures in order to prevent unhealthy competition with regard to the price of labour or other terms and conditions of employment; calls on the Commission, in future directives on public procurement, also to include provisions permitting social clauses to be included in contracts, in order to enable purchasers to develop positive action in employment and to promote social objectives."*

Following the adoption in 2004, EPSU and a coalition of groups tried to make the most of text. The coalition produced in 2005 a guide called *"Making the most of public money: a practical guide to implementing and contracting under the revised (2004) EU public procurement directives"*¹¹ to support members.

The EC also produced in 2004 its first 'Buying Green' guide¹² but it was not until six years later that the EC published a Guide on Socially Responsible Public Procurement (SRPP) thanks to the pressures from the trade union movement. Social procurement remained contested ground: The EC chose not to publish the 40 contributions from stakeholders and 13 from governments that it received in response to a consultation it organised on the draft SRPP Guide, only indicating that they represented a wide range of opinions that needed to be taken into account.¹³ The final result, published in December 2010 left more questions open than it resolved and the opening example used in the Guide is telling. If a public authority wants to build a school and ensure that the construction workers have good working conditions this cannot be done 'upfront'. It is nonsense – and the antithesis of simplification - to forbid public contractors from expressing their objectives clearly. So the European Commission chose not to clarify how criteria relating to all three pillars of sustainability – social, environmental, and economic – can be integrated into public procurement policies, in accordance with the Lisbon Treaty and the Integration Principle established by Article 9 TFEU. Article 9 TFEU).

The EC put forward a restrictive interpretation on what is allowed limiting social considerations to "contract performance" issues, without the possibility for contracting authorities to use the social considerations into technical specifications or to distinguish between offers at the moment that contracts are awarded. The issue of cost was used as an argument against considering a variety of social and ethical approaches to procurement which the Guide was supposed to be promoting. There was little attempt to argue that higher cost can arise when social and environmental considerations are not taken into account, even if this cost may appear harder to quantify, at least at the time when the contract is awarded. Neither effort was made to evaluate the entry costs into public procurement.

¹⁰ See for example Spring Alliance Manifesto see http://www.springalliance.eu/images/sa_manen.pdf

¹¹ See <http://www.epsu.org/a/744>

¹² http://ec.europa.eu/environment/gpp/pdf/buying_green_handbook_en.pdf

¹³ Reported during a meeting organised by EPSU and CEMR in the framework of the EU social dialogue committee for local and regional government. See PR from the meeting <http://www.epsu.org/a/5848>

Nonetheless, during this period the EU social partners in the textiles, cleaning, catering and private security industry produced guides to encourage social procurement in their sectors. National social partners developed monitoring tools - for example the Italian social partners in contract catering regularly documented the number and volume of contracts and whether these were awarded to economically most advantageous offer or to lowest price¹⁴. Social partners in local and regional government also addressed social considerations in procurement and in 2010 by adopting a joint statement on the SRPP Guide¹⁵. Other networks were also active, Eurocities and ICLEI for example, but progress was limited and there was also uncertainty about sharing good practices should they be challenged. The EU also indicated support for certain issues, for example including equal pay in public contracts¹⁶ although this did not seem to make any difference on the ground. However, underneath the legal discussions, support for sustainable public procurement remained strong, as indicated in a Eurobarometer survey in 2010.¹⁷

3) EPSU and NSDPP contribution to the evaluation of the 2004 public procurement Directives

When the EC launched in 2010 an evaluation of the 2004 public procurement Directives, this provided an opportunity to 'revisit' the discussions on social procurement. In its paper of 26.05.2010 the EC stated 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."* In particular, the EC outlined two justifications as to why the evaluation was launched:

- to identify scope for greater cost-effectiveness(...)allowing the delivery of public services at lowest cost and
- 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.

EPSU welcomed the recognition in the second point of the role of EU public procurement policy and legislation in delivering key wider policy objectives but noted the conflict between these two considerations: the drive for lowest cost combined with insufficient solid scope and encouragement 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 important policy objectives aimed at improving social outcomes. The Monti report on the future of the Internal Market¹⁸ acknowledged that there is room for greater use of public procurement as tool to achieve the policy objectives we have mentioned above, but chose to focus on energy and climate change more specifically.

EPSU and the NSDPP network contributed to the EC evaluation¹⁹, stressing the many benefits of using public procurement to support the transition to sustainable development. We argued that the 'lowest price' option should be removed in principle in order to encourage public authorities to think, act, and buy 'sustainable' goods and services. Quality of work, fair trade, environmental protection are not the enemy of the Single Market. Giving

¹⁴ See http://www.ebnt.it/gestione_osservatorio/OSSERVATORIOlist_sc.asp?cartkey=8
[http://www.ebnt.it/gestione_osservatorio/Documenti/8_2009_4_17_f\)Ebnt%20I%20trimestre%202009.xls](http://www.ebnt.it/gestione_osservatorio/Documenti/8_2009_4_17_f)Ebnt%20I%20trimestre%202009.xls)

¹⁵ EPSU/CEMR statement http://www.epsu.org/IMG/pdf/SRPP_Joint_Statement_Final_Annex.pdf

¹⁶ See page 12 of Council resolution on salary inequalities
<http://register.consilium.europa.eu/pdf/en/10/st16/st16881.en10.pdf>

¹⁷ 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>

¹⁸ http://ec.europa.eu/commission_2010-2014/president/news/press-releases/pdf/20100510_1_en.pdf

¹⁹ see <http://www.epsu.org/a/7046>

incentives to companies – both large and small- to respect workers' rights, labour standards and collective agreements, to provide training for employees and to promote equality of opportunities makes sense, also for companies.

We urged the EC 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, and considering supply chain liability as well as promoting transparency. We believed that it has under-achieved in all of these areas, and this situation needed to be remedied. We argued that the evaluation process should focus on what needs to be done to make public procurement a more effective tool in contributing to these objectives in the future.

The EC still gave the impression that including 'non-economic' – and especially social - considerations in public procurement increased complexity without bringing clear added-value, not least as monitoring of outcomes is weak²⁰. We found this unfair and misleading. Unfair, because the EC report did not also say that this is largely due to the ambiguities in the Directives and lack of positive measures in the last years to support public authorities develop sustainable development (more so in social rather than green procurement); and misleading, because there was very little – if anything - in the evaluation report on the broader costs and benefits of public procurement in general.

The EC seemed to consider that public procurement is perfect in terms of outcomes – except when it includes sustainability criteria. The EC PR accompanying the evaluation report proclaimed "*EU public procurement framework has saved around 20 billions euros*" even though no analysis was made of the social and environmental impacts of this cost-saving (for example 'lost' wages due to social dumping). Indeed, even from an economic perspective, the 20 billions is an incomplete estimate because it includes only the costs up to the award of contracts – not the 'post' contract costs; e.g. costs that occur when contracts have to be modified/terminated. The EC said that it has only limited information on the number of contracts that have to be modified. From our own experience however we have good proof of public procurement contracts gone wrong, precisely because they do not include sustainability considerations²¹. Interestingly, although the EC quantified the cost of an average public contract, it could not say in 2010 whether these costs had gone down since the 2004 Directives had been adopted.

In any case, financially quantifiable costs are not necessarily a 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 and 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.

In particular, we underlined 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. And 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

²⁰See page 81 of Evaluation Report

²¹ The construction, cleaning and care sector provide many examples. The Danish trade union organisations, for example, 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. [Read more at > FOA \(DK\)](#) . See also PSIRU paper on appalling conditions in private care homes in the UK <http://www.epsu.org/a/7578>

Communication on the strategy for the effective implementation of the Charter of Fundamental Rights²² the Commission recalls that all EU legal acts “*must be in full conformity with the Charter.*”

The Lisbon Treaty also 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 2010 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.”²³

In the NSDPP²⁴ we drew attention to the following areas where public procurement could make a real contribution to improving social conditions:

Social Europe – getting it back by procuring socially responsible

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.

Public procurement should 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. However, the effect of the ECJ cases, Laval, Rueffert and Luxembourg in particular, created uncertainty in areas of public contracting. 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 94²⁵ (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 should support collective agreements in general and not undermine them. Pay clauses have a long history, dating back to the second half of the 19th century (UK Fair Wage Resolution (1891/1909/1946), France: National Decree (1899), USA: National Acts (1931/1936). A positive reference to the ILO’s labour clauses (public contracts) Convention 94 would be very helpful as the Convention, “...requires the insertion of clauses into public contracts to (a) ensure that workers are entitled to wages, hours of work and other labour conditions at least as good as those normally observed for the kind of work in question in the area where the contract is executed, and (b) also ensure that higher local standards, if any, are applied.” The Convention therefore helps to counter arguments that only ‘universally’ applicable agreements are compatible with the EU’s internal market. This is not only important for EU/EEA countries but also other countries, as the EU plays an important role within the ILO. It also brings its ‘internal market’ logic into trade relations.²⁶

²² COM (2010) 573 final

²³ Background paper prepared by the Belgian Presidency 2010
http://www.socialsecurity.fgov.be/eu/docs/agenda/26-27_10_10_sia_en.pdf

²⁴ NSDPP input into evaluation of the 2004 Directives (EN/FR/DE/SV/ES/RU)
<https://sites.google.com/site/sdppnetwork/documents>

²⁵ 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)

²⁶ To support our arguments, EPSU published a study Study on pay and other social clauses in European public procurement, Thorsten Schulten, Kristin Alsos, Pete Burgess, Klaus Pedersen, December 2012

Social cohesion

The EU social inclusion programme calls on public authorities to create the ‘framework’ to integrate vulnerable groups into the labour market. The agreement²⁷ 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. This is particularly important during the economic crisis, where as unemployment increases, the scope for employment opportunities for vulnerable groups decreases even more dramatically.

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 socially, environmentally, and economically. The Lisbon Treaty affirms the role of sustainable development at the heart of EU objectives, including through its external relations.²⁸ 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.

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

(EN/RU) <http://www.epsu.org/a/9152>

²⁷ http://www.etuc.org/IMG/pdf_20100325155413125.pdf

²⁸ 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.

extinction of flora and fauna. Procurement and trade policies must build in mandatory requirements to prevent such destructive practices.

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” Policy²⁹.

The EC in November 2010³⁰ 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 EC should not narrow or restrict 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.

“Best value” - not lowest price

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.³¹ In other words, cost cutting at the expense of workers and reducing the quality of the service provided – clearly a false economy.

Decent work

The EU has a policy³² 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. If workers in developing countries are exploited and in 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. All employment should be fairly remunerated.³³ Supply chain liabilities must be strengthened and responsibilities of sub-contractors tightened, monitored and enforced with penalties.

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

²⁹http://europa.eu/legislation_summaries/development/general_development_framework/r12534_en.htm

³⁰<http://ec.europa.eu/trade/trade-growth-and-jobs/>

³¹[see for more details FOA \(DK\)](#)

³²<http://ec.europa.eu/social/main.jsp?catId=323&langId=en>

³³ 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.

and regulatory arrangements, and properly trained and skilled personnel in adequate numbers to provide a quality and effective service.³⁴

Social Dialogue

At EU level there are cross-sectoral and sectoral social dialogue committees. However, consultation with these structures and promotion of their involvement and role in procurement policy is not evident at all.

At national level trade unions should be able to give input from the earliest stage of the procurement process, i.e. long before any consideration is given to whether to outsource the contract. Trade unions and social partners can 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

Gender equality

The EC in its Communication³⁵ *“Tackling the pay gap between women and men”* called 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 EC 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.

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.

Public contract 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

³⁴ 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. In 2013 we organised for example with the Belgian trade unions and several federations a ‘day of action’ on 28 May (see <http://www.epsu.org/a/9539>) in support of our social demands.

³⁵ <http://eur-lex.europa.eu/Notice.do?mode=dbl&lng1=en,fr&lang=&lng2=bg,cs,da,de,el,en,es,et,fi,fr,hu,it,lt,lv,mt,nl,pl,pt,ro,sk,s,sv.&val=483833:cs&page=&hwords=null>

transparently. The European Court of Justice clarified, however, that the requirement of transparency does not mean the contracting authority must adopt criteria which are “quantitative or related solely to prices.”³⁶ 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 to compare the tenders and are clearly relevant for identifying the most advantageous tender.”³⁷ 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.³⁸

4) Assessment of the new Directives (2014)

The new public procurement Directives adopted by the European Parliament and Council in July 2014 go some way towards improving the framework for sustainable public procurement and in particular some of the unhelpful ambiguities about social criteria have been tackled.

Key elements of the public procurement Directives include:

- The right for public authorities to provide services directly is confirmed and concepts of ‘in-house’ and ‘public-public cooperation’ clarified
- All parties and operators of public procurement contracts are obliged to meet national employment and labour laws and collective agreements (see ETUC guidance³⁹ on this aspect).
- MEAT (Most Economically Advantageous Tender) is the main basis for contract criteria and no longer cost or price.
- Life-cycle concept is included (but not clear if it can cover social elements)
- It will be easier for contracting authorities to include social and environmental factors throughout the procurement process, i.e. can now include in award criteria (in line with positive ECJ rulings)
- There is more transparency in supply-chain – including obligation to provide details of sub-contractors, which should make it easier to ensure compliance⁴⁰
- Stronger possibilities to exclude suppliers with poor track record
- Substantial modifications of contracts will have to be retendered

On the other hand:

- There is no real improvement on transparency for citizens, ‘commercial confidentiality’ and lack of freedom of information requirements on private companies remain an obstacle to getting ‘best value’
- There is no reference to ILO labour clauses (public contracts) Convention 94 and so certain collective agreements / social clauses will still be contested.
- Social criteria not mentioned in the section on technical specifications (i.e., minimum requirements for all tenderers)

³⁶ Case No. T-59/05 *Evropaiki Dinamiki – Proigmena Sistimata Tilepikinonion Pliroforikis AE v European Commission* [2008] All ER (d) (Sep), at paragraphs 58-59.

³⁷ *Ibid.* at 47-48, 58-59.

³⁸ See Case No. C-479/99 *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.

³⁹ Key points for the transposition of the new EU framework on public procurement

<http://www.etuc.org/issue/public-procurement>

⁴⁰ See e.g., EIRO article on Cyprus where only two of the 26 public works inspected in 2011 were found to be in compliance with labour legislation. Violations concerned both contractors and subcontractors.

<http://www.eurofound.europa.eu/areas/labourmarket/tackling/cases/cy016.htm>

- Member States will have option to reserve contracts for certain services (including health and social services) to certain types of social enterprises, but the definition of 'social enterprise' is ambiguous and potentially damaging
- Measures to promote the measuring and monitoring the qualitative aspects of contracts remains limited.
- Joint liability for subcontractors and direct payment to sub-contractors by the authority are optional to member states

The EC is working on the transposition of the Directives with the Expert Group on public procurement, composed of Member States,⁴¹ that should be completed by April 2016. During the first stage the EC indicated that it was clarifying questions from Member States and that they will then deal with "horizontal issues". At the national level EPSU's members, and more often the national confederations, are involved in this process to a varying degree. The EC has seemed hesitant to advance discussions in the Expert Group on social considerations but has indicated that it will make sure that Member States are aware of the new possibilities in the Directives. It has not said whether it will update the SRPP Guide or develop further materials to support Member States.

EPSU will now turn its attention to the implementation of the new Directives. Many EPSU members produce guides and other material to support more trade union capacity and influence on public procurement.⁴² Additionally, EPSU is a member of a EC stakeholder group⁴³ on public procurement and here both green and social procurement were discussed in 2014.

⁴¹ see <http://ec.europa.eu/transparency/regexpert/index.cfm?do=groupDetail.groupDetail&groupID=2679> for agendas and minutes but not the names of Government representatives

⁴² See for example UNISON's 'procuring employment rights', also on the EPSU website <http://www.epsu.org/a/8777>

⁴³ The terms of reference of the group, list of members and agendas /minutes of meetings can be found at http://ec.europa.eu/internal_market/publicprocurement/expert_group/index_en.htm