

Public Procurement and the Lisbon Treaty
background note on integrating social criteria into public procurement

European Federation of Public Services Unions

<http://www.epsu.org>

The European Federation of Public Service Unions (EPSU) comprises 8 million public service workers from over 250 trade unions; EPSU organizes workers in the energy, water and waste sectors, health and social services and local and national administration, in all European countries. EPSU is a member of the ETUC and the regional organization of Public Services International (PSI). EPSU considers public procurement should contribute to the realisation of a 'social market economy' in line with the Lisbon Treaty¹ and in order to ensure sustainable progress for society as a whole.

Summary points

1. Member States have a long history with integrating social criteria into procurement. This is being undermined by the absence of a positive EU framework for social procurement. Public authorities *can* integrate social considerations, but there is no active encouragement.
2. On the other hand, since 2004 the EU has supported green procurement through the use of targets and other measures.
3. The EU Treaty now calls for a 'social market economy.' This means that 'social' procurement can catch up. 'Best value' does not mean cheapest. Quality of work goes hand in hand with quality of goods and services. The Lisbon Treaty strengthens the framework for social procurement and local decision making.
4. Key social (or societal) considerations for public procurement include:
 - ✓ *Gender equality:* The European Commission in its Communication "*Tackling the pay gap between women and men*" calls on "*national authorities to make every effort to reduce the pay gap for their own staff and encourage their service providers to adopt equal pay policies in the performance of public contracts*".
 - ✓ *Social cohesion:* the EU social inclusion programme calls on public authorities to create the 'framework' to integrate vulnerable groups into the labour market. The draft agreement by the cross-sectoral social partners on "*Inclusive labour markets*" also points to the need for policy incentives.
 - ✓ *Equitable wages:* 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 common framework for improving the quality of employment.
 - ✓ *Collective agreements:* The current decline in the number of workers covered by collective agreements needs to be reversed. Means and ends go together. Public procurement should contribute to a strategy to improve the coverage of collective agreements, and Member States should be encouraged to ratify ILO

¹ 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'

Convention 94 on labour clauses in public contracts. This implies resolving the contradiction between the ECJ judgment in the Rüffert case.

- ✓ *Transparency*: Public contracts should be subject to the highest standards of public control. Their content should not be kept secret on the grounds of “commercial sensitivity”.
- 5. The EU should support actively Member States to integrate social criteria into public procurement, including by strengthening the procurement directives, taking as a starting point the EU and ILO criteria developed in relation to quality/decent work.
- 6. Procurement is one way – not the only way - of providing a public service. The EU is not neutral as regard the choice of service delivery. This is illustrated in the latest European Commission Communication on Public-Private Partnerships. Here the relatively low number of PPPs is interpreted as evidence of regulatory and other obstacles to their development, rather than an indication of local and national choices, or their limitations.
- 7. The EU should support Member States improve the quality of public services, focusing on desired objectives and outcomes rather than processes.
- 8. The Protocol of Services of General Interest attached to the Lisbon Treaty 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.*” All EU initiatives should be ‘benchmarked’ against the new Treaty rules.
- 9. Trade unions and social partners, in line with the Commission’s impact assessment guidelines should be informed and consulted on the development of procurement policy, including through the EC’s advisory committee on public procurement.

Introduction

When the current EU directives were adopted in 2004 the then Internal Market Commissioner Frits Bolkestein argued that the directives would “*open up all the benefits of the Single Market to guarantee the competitiveness of companies, best value for money for taxpayers and improved quality of public services*”². This hearing comes at a timely moment. We would welcome a broad review of the EU rules on public procurement, encompassing social and environmental concerns and not only economic interests.

Trade unions have always argued that ‘best value’ does not mean cheapest. Social progress is best driven in a variety of mutually reinforcing ways, including by giving incentives to companies to respect workers’ rights, labour standards and collective agreements, to provide training for employees and to promote equality of opportunities.³ The public sector has broad responsibilities in society; and quality of work goes hand in hand with quality of goods and services.

Under the current directives public authorities *can* integrate social considerations. However, too much of the wording relating to encouraging and clarifying the scope to use social considerations is confined to the recitals of the directives, and as a result may not be properly implemented into national regulations. Clear wording in the Articles themselves would give certainty and positive encouragement to maximise scope.

This position has been shared by a wide range of trade unions and NGOs for many years,⁴ and was clearly reflected in the resolution of the European Parliament (Tappin, 1998) which: “12. *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.*”

The current rules reflect the half successful efforts by a broad-based coalition⁵ to include social and green considerations in the directives. EPSU, together with a range of other organisations, did produce back in 2005 a guide called “*Making the most of public money: a practical guide to implementing and contracting under the revised EU public procurement directives*”⁶ to distill some of these doubts at least. The EU social partners in the textiles, cleaning, catering and private security industry have also produced guides to encourage social procurement in their sectors. Social partners have also developed monitoring tools - for example the Italian social partners in contract catering document per trimester the number and volume of contracts and whether contracts were awarded to economically most

²<http://europa.eu/rapid/pressReleasesAction.do?reference=IP/00/461&format=HTML&aged=1&language=EN&guiLanguage=en>; 21/09/2007

³ And indeed ‘cheapest’ is often at the expense of 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. [Read more at > FOA \(DK\)](#)

⁴ See for example Spring Alliance Manifesto see http://www.springalliance.eu/images/sa_manen.pdf

⁵ The main initiators behind the coalition were EPSU (<http://www.epsu.org/>) for the trade unions and the European Environmental Bureau (EEB) (<http://www.eeb.org/>) for environmental NGOs. Active organisations included for example Solidar (<http://www.solidar.org/>), European Disability Forum (EDF) (<http://www.edf-feph.org/>) the Social Platform (<http://www.socialplatform.org/>), the Climate Action Network Europe (<http://www.climnet.org/>), the Clean Clothes Campaign (CCC) (<http://www.cleanclothes.org/>).

⁶ See <http://www.epsu.org/a/744>

advantageous offer or to lowest price⁷. Social partners in local and regional government have also addressed social considerations in procurement.

We are still waiting however for the European Commission to publish a long-promised Guide on socially responsible public procurement that might provide more definitive guidance.⁸ To note, the Commission received 40 contributions from stakeholders and 13 from governments to the consultation on the draft Guides. These have not been made public but the Commission has indicated that they represent a wide range of opinions that need to be taken into account.⁹ This in itself points to uncertainty in the starting point.

Public procurement in the context of quality public services

EU rules determine *how* public authorities buy goods and services. Public authorities themselves decide whether or not to buy a particular good or service. EPSU underlines: that governments (at all levels) are responsible for funding, organisation, and regulation of public services, according to common principles (public control, universality/equal treatment, transparency, impartiality, participation of users and social partners, proximity..).

Public authorities should have wide discretion in deciding how services are delivered; i.e., by the authority itself 'in-house', including through a legal entity which it owns or controls and through intercommunal service arrangements. EU legislation in public passenger transport (Regulation EC/1370/2007) offers a wider "in-house" test that could be generalised.¹⁰

A recent study carried out for the European Parliament confirms that this discretion is reinforced by the Lisbon Treaty, "The new structure of the Treaties clearly strengthens self-administration on a local and regional level. This new concept already may have shown effect in the ECJ's recent judgment "Stadtreinigung Hamburg", where a new type of exemption for intercommunal/inter-state cooperations has been developed. This new model is linked with a change of focus from formal aspects of the entities' organisation to material aspects of the common fulfilment of public tasks."¹¹

The link between the quality of public services and the quality of work is very pronounced: For example, continuity of care demands stable and long-term employment relationships. Public authorities – and citizens – need to be able to monitor and evaluate the different ways to provide public services in a transparent and democratic way.

EPSU and the local authority organisation CEMR have noted that, "*Balanced information regarding the "pros" and "cons" of different ways of delivering public services is lacking, and indeed biased against public sector delivery. Public authorities need to be in a better position to monitor and evaluate the different ways of providing local services and to assess the different risks involved, for example regarding the difficulties of defining quality criteria in public contracts, and indeed problems that arise from fragmented procurement processes.*"¹²

⁷ 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)

⁸ See EPSU and others contributions see <http://www.epsu.org/a/4424>. Our members are very active too, see for example UK UNISON <http://www.unison.org.uk/acrobat/17808.pdf>

⁹ 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>

¹⁰ In the judgment Commission v Germany C-480/06 of 09 June 2009 the European Court of Justice confirmed again that the inter-municipal cooperation does not fall under the application of EU rules on public procurement. The Court reminded its findings from Coditel Brabant case that a public authority has the right to perform the public interest tasks using its own resources and without tendering and that it may do so in cooperation with other public authorities.

¹¹ See <http://www.europarl.europa.eu/activities/committees/studies.do?language=EN>

¹² CEMR and EPSU conclusions adopted on 24 June 2008 on the report "Supporting the reform process in local and regional government: Joint evaluation of the experience in different forms of service provision." <http://www.epsu.org/a/4160>

There are many good reasons why public authorities might chose not to put public services on the market.

The European Commission is not neutral as regard the choice of service delivery, as illustrated in the latest Communication on Public-Private Partnerships. Here the relatively low number of PPPs is interpreted as evidence of regulatory and other obstacles to their development¹³ rather than an indication of their ineffectiveness.¹⁴ Indeed, the intangible nature of services argues against a 'cut and paste' of old policies of liberalisation and increasing 'market access.'

A recent study¹⁵ - based on the 'old' procurement directives but still of relevance - noted a deterioration in the procurement process for less standardised goods and for services in particular. This deterioration was most pronounced for complex requirements and for small public authorities.

We recommend that the European Union develops a public service protocol checklist against which existing or future changes to public services can be assessed using the terms of the protocol on Services of General Interest, annexed to the Lisbon Protocol, namely; "*a high level of quality, safety and affordability, equal treatment and the promotion of universal access and of user rights.*"¹⁶ This should apply to all policy including procurement, trade negotiations and the European Neighbourhood policy.¹⁷ We have also called over the years – along with many other organisations – for a variety of instruments to support Member States to develop quality public services, accessible to all.

EPSU expects all upcoming initiatives on State Aid, institutionalised public-private partnerships (PPPs), and concessions and public procurement to take into account the new Treaty rules.¹⁸ We also expect trade unions – and social partners, in line with the Commission's impact assessment guidelines - be informed and consulted on the development of procurement policy. In spite of many requests trade unions are still not represented in the EC's advisory committee on public procurement.¹⁹

¹³ See the recent EC Communication on PPPs <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2009:0615:FIN:EN:PDF>

"To release fully the potential of PPPs as a tool for facilitating economic recovery and building sustainability, competitiveness and high quality public services for the future as well as maintaining high level of environmental standards, the Commission intends to build **an effective and enabling co-operation framework** between public and private sector. Drawing on a dialogue with all relevant stakeholders through a dedicated PPP group to be set up by the Commission, a **series of actions** will complement Member States' actions to remedy the obstacles to the development of PPPs and to promote their use."

¹⁴ For critiques of PPPs and suggestions for alternatives see <http://www.epsu.org/a/4217>

¹⁵ Evaluation of the public procurement directives Markt/2004/10/D by Europe Economic, 15 September 2006

¹⁶ See recommendation in EPSU position paper <http://www.epsu.org/a/5934>

¹⁷ See critique of EU Canada trade agreement drawn up by EPSU and Canadian public sector trade unions <http://www.epsu.org/a/6088>

¹⁸ See also "Trade union memorandum to the Spanish Presidency of the European Union" http://www.epsu.org/IMG/pdf/ETUC_Spanish_Presidency_Memo_Dec_2009_FINAL.pdf

¹⁹ "The committee's task shall be to assist the Commission, either at the Commission's request or on its own initiative, in assessing the economic, technical, legal and social aspects of public procurement... The committee shall be composed of independent experts whose business and industrial experience and whose competence regarding public procurement at Community level are widely recognized. The members of the committee shall be appointed by the Commission, after consulting the sectors of business and industry concerned. " See <http://eur-lex.europa.eu/LexUriServ/site/en/consleg/1987/D/01987D0305-19871117-en.pdf>

Achieving social progress through public procurement

Since 2004 the EU has made progress in 'greening the economy' and supporting sustainable production and consumption through the use of targets in green procurement.²⁰ Similar progress needs to be made in the social area. Some examples:

- ✓ *Gender equality*: The European Commission's in its Communication "*Tackling the pay gap between women and men*"²¹ points out that, "*public authorities have a significant part to play in national economies..... They are therefore in a position to encourage their service providers to adopt socially responsible behaviour. To this end, Directives 2004/17/EC17 and 2004/18/EC18 stipulate that "contracting entities may lay down special conditions relating to the performance of a contract... [which] may, in particular, concern social and environmental considerations"*. The Communication states that the Commission will "*call upon the 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.*" A new Equalities bill was published in the UK in April 2009 that makes it clear that public bodies can use procurement to drive equality.
- ✓ *Social cohesion*: Another policy area that could benefit from more direct links with public procurement is the EU social inclusion programme, which aims to integrate vulnerable groups (for example people with disabilities, migrants and ethnic minorities, the young and older persons) into the labour market. Concrete targets could be developed, in line with the draft agreement by the cross-sectoral social partners on "*Inclusive labour markets*," which recognises that public authorities and other actors have responsibilities in terms of ensuring that there is a framework which encourages and promotes inclusive labour markets.
- ✓ *Equitable wages*: The Commission's Opinion on equitable wages COM(93)388 was a follow-up to the 1989 Community Charter of the Fundamental Social Rights of Workers, which states that all employment shall be fairly remunerated. In our view "equitable" means also equal pay for equal work. Competition in the internal market, including public procurement, should not result in social dumping, on the contrary, it should be a driver for the improvement of social standards and conditions. The Commission identified 10 'dimensions' of job quality²² back in 2001 and, together with the ILO's "decent work" concept (which add social protection) these dimensions could provide a common framework for improving the quality of employment.
- ✓ *Collective agreements*: the EU should promote collective bargaining at national level as a means of securing good terms and conditions for workers. It is not possible to separate means and ends. The current decline in the number of workers covered by agreements needs to be reversed. Public procurement could contribute to a EU strategy to improve the coverage of collective agreements, and Member States should be encouraged to ratify ILO Convention 94 on labour clauses in public contracts.²³ This implies resolving the contradiction between the ECJ judgment in the Ruffert case,²⁴ which ruled that a

²⁰ For example, the Commission proposes a political target of 50 % Green public procurement (GPP) to be reached by the Member States by the year 2010 (Commission Communication of 16 July 2008 on public procurement for a better environment). The target is linked to a process for setting common voluntary Green public procurement criteria.

²¹ COM (2007) 424 final 18.7.2007

²² See Communication 2001COM(2001) 313 final. As a follow-up to this a list of indicators was approved by the Council and communicated to the Laeken European Council in December 2001 (Indicators of Quality in Work, Report by the Employment Committee to the Council, 14263/01, 23.11.2001). The 10 dimensions (and accompanying indicators) relate to Intrinsic job quality (includes pay level indicators); Skills, training; Gender equality; Health and safety; Flexibility and security; Access to labour market; Work organisation and work-life balance; Social dialogue and worker involvement (and including collective bargaining); Non discrimination; Overall work performance

²³ Convention 94 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).

²⁴ Ruffert; 19 June 2008, C-319/06

requirement to comply with collective agreements as part of public procurement obligations violates the EU Directive on the posting of workers, and the ILO convention.²⁵

- ✓ *Transparency*: transparency is also a social objective issue. Public contracts depend on public funding (i.e., tax payers money). As such they should be subject to the highest standards of public control. Full transparency needs to be ensured at every stage.²⁶ It is not acceptable that the content of public contracts can be kept secret on the grounds of “commercial sensitivity”. The public bodies awarding contracts must be obliged to make the text of contracts public in order to allow citizens to scrutinize the conditions under which they are awarded, the investments made, and the conditions the contracts will be carried out. This includes quality criteria and employment issues including collective agreements.

In conclusion, Member States’ public procurement did not always have the economic focus and the competition and market access objectives of the EU directives. It is time for EU’s procurement rules to shift their emphasis towards social Europe. This would support the aim stated by Michel Barnier in the EP hearings, “*I will work to put the internal market at the service of human progress, fight social dumping and protect services of general interest.*”²⁷

²⁵ Furthermore, the European Commission has brought a case against Germany (C-271-08) challenging the practice of local authorities to award contracts for pension services on the basis of the selection as laid down in collective agreements, which it considers is a violation of the public procurement directives.
<http://www.epsu.org/a/6075>

²⁶ This is also important to ensure non-discrimination, as well as to prevent corruption (see OECD working paper ‘Integrity in public procurement’ GOV/PGC (2007)16)

²⁷ http://www.europarl.europa.eu/news/expert/infopress_page/008-67167-012-01-03-901-20100112IPR67166-12-01-2010-2010-false/default_en.htm