



## EU public procurement framework – ETUC position

Adopted at the Executive Committee on 6-7 March 2012.

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1. In December 2011, the Commission adopted the revised framework for public procurement comprising a general directive on public procurement, a specific directive applying only to water, energy, transport and postal services, and a directive on the award of concession contracts.
2. The ETUC deplors that the aim to better integrate social and environmental considerations in public procurement has not been met. The Commission has favoured a voluntary approach meaning that it would be optional for public authorities to take social and environmental considerations into account. The Commission has also failed to address the incompatibility between EU law and ILO Convention 94, which is a result of the Rüffert case. The public procurement rules should support the promotion and implementation of the Convention. They must ensure that national labour laws and applicable collective agreements are fully respected. The ETUC calls on those Member States that have yet to ratify the Convention to do so as soon as possible. In order to avoid abuses of working conditions, a system of joint and several liability must be introduced that clearly stipulates that the whole subcontracting chain is jointly held liable regarding pay and working conditions, social security, fundamental rights, health and safety and training.
3. The Commission's proposals do not contain any guarantees to uphold or improve the quality of services. The ETUC cannot accept that the award of public contracts shall continue to be based on the lowest cost criterion. Awarding contracts on the basis of the "most economically advantageous" criterion provides sufficient guarantees that a tender is assessed both on its economic and social merits.
4. The ETUC believes that it is necessary for local authorities to enjoy wide discretion over the organisation and delivery of public services. They must be able to provide public services directly to their citizens. A wide interpretation of in-house arrangements is therefore important.
5. The ETUC welcomes the recognition that social services cannot be treated the same way as other public services and are thus subject only to transparency and non-discrimination principles. However, compliance with labour law and collective agreements must also apply to the procurement regime for social services. Furthermore, social security and trade union services must be excluded since they do not constitute services within the meaning of EU law.
6. The ETUC does not believe that there is a need for a specific directive on concessions. Contrary to the stated objectives, it increases legal uncertainty for public authorities. The scope is vague and the relationship with the two other procurement directives is not clear. It raises concerns about the ability of public authorities to organise key sectors in a social

and sustainable manner.

7. Finally, the ETUC renews its demand for a moratorium on liberalisation in the absence of a full and comprehensive evaluation of the impact of the EU measures to date.

## Annex:

# Explanatory memorandum

## Background

1. In January 2011, the Commission published a Green Paper on the modernisation of EU public procurement policy. The ETUC response emphasised the responsibility of public authorities to use public money to promote cohesive social and economic development, good quality employment and quality services, goods and works<sup>1</sup>. Following the Rüffert case, there is great uncertainty as to what extent contracting entities can stipulate a full equality principle between all workers on the same territory. This makes respecting ILO Convention 94 difficult in those Member States which have ratified it, and leaves the door open to social dumping throughout the EU. The ETUC also underlined that public procurement is a choice, not an obligation and that, in particular, local authorities must enjoy wide discretion over the organisation and delivery of public services.
2. Following the Green Paper, the Commission published in December 2011 a package for the revision of EU rules on public procurement. This package is composed of a proposal for a general Directive replacing Directive 2004/18/EC on public procurement<sup>2</sup>, a Directive on procurement by entities operating in the water, energy, transport and postal services sectors ('the utilities Directive') replacing Directive 2004/17/EC<sup>3</sup>, and a Directive on the award of concession contracts<sup>4</sup>.
3. Although each of these proposals contains specificities linked to their respective scopes, they seek to pursue two objectives: increasing the efficiency of public spending and allowing better use of public procurement in support of common societal goals. In particular, the ETUC welcomes the second objective as the current prevailing approach is almost exclusively based on economic considerations. Nonetheless, the content of the proposals falls short of the social objectives and important improvements are needed to guarantee the respect for labour law and to ensure quality public services.
4. Although the ETUC supports the principles of transparency and non-discrimination, we are not convinced of the need for a specific directive on concessions covering the right to exploit works or services. Contrary to the stated objectives, it increases legal uncertainty for public authorities. The scope of the proposed directive is unclear and the relationship with the general directive on public procurement is not explained. Furthermore, the ETUC is concerned that the directive would interfere with the right of public authorities to organise public services the way they see fit.

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<sup>1</sup> See <http://www.etuc.org/a/9260>

<sup>2</sup> COM (2011) 896 final

<sup>3</sup> COM (2011) 895 final

<sup>4</sup> COM (2011) 897 final

## **Respect for decent wages and working conditions**

5. It is essential that all the parties in a public procurement procedure are bound by national labour law and locally applicable collective agreements. However, the proposed directives contain very weak provisions on social considerations and as a result do not provide sufficient safeguards against unfair competition in working conditions. In addition, in many Member States national and sectoral collective agreements are being attacked by recent labour market reforms establishing the precedence of companies' agreements over national/sectoral ones. This is an additional factor that put workers at risk of having their pay and working conditions undercut by lowest price competition in public procurement.
6. In the Commission's proposals, the possibility to integrate social and environmental considerations into public tendering processes remains entirely optional for the contracting entities. The ETUC rejects this "voluntary" approach and urges the EU institutions to introduce legally binding obligations. Conditions for contract performance must include the respect of all the terms and conditions of employment in the place where the work is carried out. Where the price or cost charged by the tenderer appears to be abnormally low, the prospective tenderer must provide evidence of compliance with such terms and conditions. In the course of the performance of the contract, any violation of the working conditions must automatically lead to the exclusion of the contractor.
7. Concerning the level of protection, the Commission considers that only EU law and core ILO Conventions are to be taken into account. The recitals even mention that only considerations linked to "health, and social integration of disadvantaged person or members of vulnerable groups" are admissible and that such considerations should stay within the limits of the Posting of Workers Directive<sup>5</sup>. Such a minimalist approach leaves the door wide open to social dumping. EU labour law, and in particular the Posting of Workers Directive, does not harmonise labour laws in the Member States but merely lays down minimum standards aimed at ensuring coordination between the various national systems. EU law on its own cannot prevent unfair competition in working conditions.
8. For the ETUC, the principle of equal treatment at the workplace is fundamental. The EU institutions should ensure that the EU public procurement framework respects all the terms and conditions of employment in the place where the work is carried out. Applicable terms and conditions should be understood as the entire national labour law as well as collective agreements. This is a necessary condition to ensure the compatibility between EU law and ILO Convention 94. It stipulates that conditions under public procurement contracts should not be less favourable than those established for the same work in the same area by collective agreement or any similar instrument. 10 EU Member States have ratified the Convention. The EU has an obligation to ensure that all Member States can continue to adhere to the Convention, promote its ratification and implementation, and solve any ambiguities in EU legislation that might stand in the way<sup>6</sup>.
9. Nevertheless, these conditions can be easily circumvented in case of complex and unsupervised chains of subcontracting. In order to promote transparency, contracting authorities must therefore require tenderers to indicate in their tenders any proposed subcontracting (this is only optional in the Commission's proposal). Furthermore, a system of joint and several liability must clearly stipulate that the whole subcontracting

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<sup>5</sup> See for example Recital 41 in the proposal for public procurement.

<sup>6</sup> See ETUC Resolution on "conditions for free movement: more protection of workers and fair competition" <http://www.etuc.org/a/6212>.

chain is jointly held liable as regards pay and working conditions, social protection/security, fundamental rights, health & safety and training.

10. It should also be noted that the proposals offer contracting entities the possibility of requiring social labels to certify environmental, social or other characteristics. The ETUC considers that such labels may provide useful information about the behaviour of contractors (for example their promotion of apprenticeships and investment in training). However, labels cannot on their own provide sufficient guarantees regarding the respect of working conditions and environmental requirements. Furthermore, there is not enough recognition in the proposals regarding applicable standards that can be specified in tenders such as quality standards which have in some cases proved to have a positive impact in terms of wages, working conditions and workload especially when they have been included in collective agreements.

### **Quality services**

11. The ETUC has always been critical of the fact that EU public procurement rules essentially rely on economic considerations regardless of the consequences for the quality of services. In particular, judging tenders against the lowest cost criterion cannot guarantee quality and sustainability. Awarding contracts on this basis frequently results in fraud, breaches of regulations and poor quality services. The ETUC therefore urges the EU institutions to abolish the “lowest cost” award criterion. Awarding contracts on the basis of the “most economically advantageous” criterion (MEAT) provides sufficient guarantees that a tender is assessed both on its economic and social merits.
12. Furthermore, the current EU public procurement rules ignore the positive contribution that workers can make to the procurement procedure. The ETUC demands that the EU legislator clarifies in the proposed directives that the award of contracts by public authorities does constitute a transfer within the meaning of the Transfer of Undertakings Directive<sup>7</sup>. ECJ case law should be codified in the directives so that public authorities have a clearer understanding of the applicable rules.
13. The Transfer of Undertakings Directive involves a meaningful information and consultation procedure about a proposed “transfer”. Worker representatives should therefore be informed and consulted about the potential impact of a future tendering process. This dialogue should take place both with the existing and the prospective employers. In this regard, the Commission’s proposals to introduce new procurement techniques are interesting. It would be possible for contracting entities to rely on a two-step procedure, so that dialogue/negotiations with pre-identified tenderers can take place before the awarding of the contract. Worker representatives must be able to take an active role in this exchange.
14. The Transfer of Undertakings Directive also prohibits any change of existing working conditions, including dismissals, which are directly connected to the transfer. It is extremely important that this obligation is enforced in the context of public procurement. Successive tenders are the source of great uncertainty for the workforce and, as a direct result, are prejudicial to the continuity of a service.

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<sup>7</sup> C-173/96 and C-247/96 *Sanchez Hidalgo*, C-343/98 *Collino*, C-172/99 *Oy Liikenne*, C-340/01 *Abler*

15. The Commission's proposals contain new provisions regarding "life-cycle" costs. This should allow contracting entities to take into account all stages of the existence of a work or service, from raw material acquisition until disposal, clearance and finalisation. The costs to be taken into account do not exclusively relate to monetary expenses but also environmental costs (greenhouse gas emissions and climate change). The introduction of life-cycle costing may constitute a further step away from a purely economic approach, but the social dimension needs to be explored further. Precarious work, long working hours, poor health and safety, lack of investment in skills etc also have external costs that need to be taken into account.

### **The role of local authorities**

16. The Treaty of Lisbon recognises public services as an indispensable instrument of social and regional cohesion. The Protocol on Services of General Interest particularly emphasises the essential role and the wide discretion of national, regional and local authorities in providing, commissioning and organising services of general interest as closely as possible to the needs of the users. This is necessary to ensure that public authorities can exercise their responsibilities in ensuring citizens' fundamental rights. The new EU public procurement rules must respect these principles.
17. The two proposed public procurement directives do not include in-house arrangements. This is important as public authorities should be able to provide public services directly to their citizens. The ETUC calls for a wide interpretation of the notion of in-house, so as to clearly cover public-public cooperation and cooperation with non-profit making providers who meet general interest criteria.
18. The Commission's proposals also exclude social services from the general framework and subject them to a lighter regime, imposing only the respect for basic principles of transparency and equal treatment. The proposals list "health and social services, administrative, educational, healthcare and cultural services, compulsory social security services, benefit services, other community, social and personal services, services furnished by trade unions, and religious services" as social and other specific services which would benefit from this lighter regime. The recognition that social services cannot be assimilated into ordinary economic services is welcome. However, the proposed directives bring under procurement rules – albeit lighter ones – services that have nothing to do with the internal market. The references to social security services and trade unions services must be removed.
19. The ETUC agrees that public authorities should have as much margin of manoeuvre as possible to organise social services. This does not mean, however, that social considerations should be ignored. It is therefore of utmost importance to ensure that the respect for working conditions as well as the quality of services also apply to social services.
20. Overall, the very notion of social services is a highly contentious issue. Concepts vary greatly not only according to national traditions but also in various EU policy fields (eg services directive and state aid rules). The ETUC renews its calls for a specific EU instrument on social services.
21. The proposed directive on the award of concession contracts is problematic with regard to the subsidiarity principle and the necessary discretion to be left to public authorities.

The ETUC does not dispute Treaty rules relating to transparency and non-discrimination. However, the directive imposes stricter obligations than the ECJ case law requirements and as such raises strong concerns about future ability of public authorities to organise key sectors in a social and sustainable manner.

22. Furthermore, the ETUC is concerned about the vague scope of the directive as well as its low thresholds. It can be seen as an encouragement to liberalise key sectors which are not always open to competition (eg water, harbour services and social services). Opening up these sectors to free competition would endanger social and ecological standards without necessarily contributing to the quality of those services. The ETUC renews its demand for a moratorium on liberalisation in the absence of a full and comprehensive evaluation of the impact of the EU measures to date.