

**NEW EU FRAMEWORK ON
PUBLIC PROCUREMENT**



**ETUC KEY POINTS
FOR THE TRANSPOSITION
OF DIRECTIVE 2014/24/EU**

**NEW EU FRAMEWORK ON
PUBLIC PROCUREMENT**



**ETUC KEY POINTS
FOR THE TRANSPOSITION
OF DIRECTIVE 2014/24/EU**

Introduction and key messages

The new public procurement Directive introduces some positive developments from the trade union perspective – among them a binding social clause. This gives unions a stronger platform for pressing key demands such as respect for collective bargaining agreements, social criteria and greater transparency. We therefore look at the results with some satisfaction. However, much will depend on the way the Directive is transposed into national legislation.

It is now a well-established principle in European law that the purchase of goods, services and the ordering of works by a public authority has to go through a public procurement procedure. EU rules on public procurement are often presented as increasing efficiency in public spending (increase in competition, reduced prices and better services to the user).

But trade unions across Europe tell a different story. Until now, the EU legislator has focused almost exclusively on economic factors, emphasising the need for public authorities to go for the cheapest offer. These practices have proved extremely harmful to the workers, the users and ultimately public budgets. Public procurement is often synonymous of job losses, reduced working hours, unbearable work rhythm and flexibility, unpaid wages and often massive fraud. Ultimately, there is a high price to pay for society at large as the quality of key services is deteriorating. The problem is particularly acute at a time of budgetary constraints where the temptation is great for public authorities to outsource.

The ETUC is very critical of the 2004 public procurement Directive and has long been calling for a thorough review of the EU approach to spending of public money. Public authorities have a responsibility to use public money to promote cohesive social and economic development, good quality employment and quality services, goods and works. The key is not what public authorities are allowed to do or not; it is what they should be doing.

In 2012, the process of revision of the public procurement framework Directive began. The ETUC has been actively involved in the legislative process, pressing for a socially orientated revision. In spite of an unfavourable political situation, the voice of trade unions was clearly heard. The revised Directive contains an obligation to respect the applicable working conditions of the place of work, including collective agreements. Public authorities are enabled to give meaningful weight to additional social considerations when assessing what should be the best offer. The use of the lowest cost criterion has been significantly reduced. A lighter regime is applied to social services but their specificities (universality, affordability etc.) are to be taken into account by the public authorities. Finally, attempts have been made to improve transparency in subcontracting chains.

Of course, every legislative process involves compromises, and there was certainly more that we would have wanted to achieve. There is a lot of potential for improvements in the new Directive and now is time to unlock this potential thanks to carefully designed transposition laws.

This document gives guidance on key points for transposition. Trade unions should strongly resist a literal transposition of the Directive. There are gaps to be filled, and vagueness to be corrected. Above all, a number of provisions leaves the choice open to the national legislator. The ETUC calls for an ambitious approach. As highlighted above, public authorities must feel that there is a clear responsibility upon them to act in a socially responsible manner.

Bernadette Ségol

General Secretary



CONTENTS

PRELIMINARY REMARKS	5
Role of Recitals	5
A minimum standards Directive	5
<hr/>	
1. SCOPE	6
1.1 Contracts partially excluded from the scope of the Directive: social and other specific services	6
Publication and award of contracts for social services	6
Reserved contracts	7
1.2 Contracts fully excluded from the scope of the Directive	8
Non-economic services of general interest, including social security and services furnished by trade unions	8
SGEs not listed in Annex 14	8
<hr/>	
2. SOCIAL CONSIDERATIONS	9
2.1 Mandatory social considerations	9
The principle: Article 18.2	9
Technical specifications	10
General principles for choice of participants and award of contracts	10
Exclusion grounds	10
Abnormally low tenders	10
Subcontracting	10
2.2 Additional social considerations	11
2.3 Public procurement and posting of workers	12
<hr/>	
3. Contract award criteria	15
<hr/>	
4 Subcontracting	16
<hr/>	

PRELIMINARY REMARKS

ROLE OF RECITALS

Recitals are not legally binding and do not have to be transposed into national law. Nonetheless, their influence should not be underestimated. Recitals explain the background to the legislation, as well as its aims and objectives.

Depending on their content, Recitals therefore have to be approached strategically in the transposition process. In a controversial legislative process, such as the one on public procurement, compromises are made in Recitals: the Articles set out in consensual, generally worded principles, whilst concessions are made in wordier Recitals.

A MINIMUM STANDARDS DIRECTIVE

A Directive is binding as to its objective but not the means. The national legislator enjoys a lot of discretion in how to apply the principles of the Directive. An efficient transposition law will be one that devises implementing provisions which are best suited to the national context.

In particular, the new public procurement Directive lays down clear objectives with regard to social considerations. However, a lot has been left unsaid. A literal transposition of these principles into national law would therefore defeat the effectiveness of the Directive. Considerable thought needs to be given to how to define and guarantee/promote social considerations. Similarly, the new chapter on social services should not be transposed literally.

1. SCOPE

1.1 Contracts partially excluded from the scope of the Directive: social and other specific services

The Directive foresees a lighter regime for the “social and other specific services” which are worth more than EUR 750 000 and are listed in Annex 14. Such services are subject to publication requirements and some awarding principles, but are exempted from the rest of the Directive. Article 77 also offers the possibility to reserve certain services to selected organisations.

Publication and award of contracts for social services

*Article 1.4 and accompanying Recitals 5 to 7
Article 4*

*Articles 74-77 and accompanying Recitals 114, 117, 118
Annex 14*

The new public procurement Directive applies only partially to social and other specific services. This contrasts with purely commercial services, to which the Directive applies in its entirety. The old Directive also made a distinction between two types of services: the A list and the B list, the latter being very similar to Annex 14. Whilst services listed in the A list were subject to the entire public procurement Directive, the services in the B list benefitted from a lighter regime. The actual content of the new “lighter regime” differs from the old Directive. Under the old regime, the award of B list services did not have to be announced via a prior notice. A notice of the result of the award of the contract sufficed¹. In contrast, Article 75 of the new Directive requires that contracting authorities intending to award a contract make their intention known by means of a contract notice or a prior information notice. In addition, contracting authorities shall still make known the results of the procurement procedure.

Further, the old regime required that public authorities lay down in technical specifications the required characteristics of the good or service in question². Art 76

does not contain such obligation but requires Member States to establish criteria for the awarding of contracts. Member States are free to determine the applicable procedural rules as long as principles of transparency and equal treatment of economic operators are respected. Also, public authorities must be enabled to take into account key principles inherent to social services. Finally, Member States may provide that tender shall be awarded on the price-quality ratio, taking into account quality and sustainability criteria for social services.

In general, the ETUC supports the principles of transparency and non-discrimination. However, it should be clear in the transposition laws that the primary objective of Art 74-77 is to give public authorities maximum freedom to organise and finance the provision of social services as they see fit. In that sense, Art 74-76 must imperatively be read in conjunction with Art 1.4 and its accompanying Recitals 5 to 7.

According to these provisions, the public procurement Directive does not oblige Member States to contract out or externalise services that they wish to provide themselves. It is only when an actual decision is made by the public authority to privatise that the EU public procurement rules apply.

As far as social and other specific services are concerned, Article 1.4 expressly states that a number of key principles are not affected by the public procurement Directive. In particular, Member States should organise and finance services of general economic interest (‘SGEIs’) as they see fit. Recital 7 reinforces the freedom of national, regional and local authorities to define the characteristics of the SGEI to be provided, including conditions regarding its quality.

The considerable margin of discretion left to public authorities is nonetheless not absolute. As mentioned above, transparency and non-discrimination, which are classic principles of the EU Treaties, have to be respected. But Art 76 is innovative in the sense that Member States now have a clear responsibility to allow for respect for the fundamental values of social services³.

¹Art 35.4 of Directive 2004/18/EC - ²Art 23 of Directive 2004/18/EC - ³According to Art 76 [emphasis added]:

1. Member States shall put in place national rules for the award of contracts subject to this Chapter in order to ensure contracting authorities comply with the principles of transparency and equal treatment of economic operators. Member States are free to determine the procedural rules applicable **as long as such rules allow contracting authorities to take into account the specificities of the services in question.**

2. **Member States shall ensure that contracting authorities may take into account the need to ensure quality, continuity, accessibility, affordability, availability and comprehensiveness of the services, the specific needs of different categories of users, including disadvantaged and vulnerable groups, the involvement and empowerment of users and innovation.** Member States may also provide that the choice of the service provider shall be made on the basis of the tender presenting the best price-quality ratio, taking into account quality and sustainability criteria for social services.

Finally, Art 76 could have specified more clearly that respect for the applicable working conditions of the place of work is a mandatory awarding criteria (see section 2.1 below). This obligation can be deduced from the multiple references to quality and sustainability of social services and should therefore become more apparent in transposition laws.

Reserved contracts

Article 77, Recital 118

According to Art 77, Member States may enable contracting authorities to reserve participation in procurement procedures for some services in the health, social and cultural services for certain organisations. This would

be the case, for instance, for organisations based on employee ownership or active employee participation, or for cooperatives. Art 77.2 lays down the criteria that the organisations must fulfil to be able to benefit from reserved contracts. These criteria, however, are so weakly worded that they will not allow the distinction between commercial and genuine social enterprises and cooperatives.

Transposition laws need to tighten up these criteria to avoid any private, commercial entity being able to challenge the principle of reserved contracts. When deciding whether or not to transpose Article 77, it should also be kept in mind that reserved contracts are limited in duration and that they cannot be renewed with the same provider.

KEY POINTS FOR TRANSPOSITION:

- 1 Art 74-77 must be read in conjunction with Art 1.4 and 1.5. The last paragraph of Recital 114 also provides helpful interpretation. Any claim that the public procurement Directive creates an incentive to privatise, organise or finance social services in a certain way must be resisted.
- 2 Art 76 cannot be transposed literally. Member States have to put in place national rules for the award of contracts for social services. The Directive talks about enabling contracting authorities to take into account the specificities of the social services. Transposition laws could usefully strengthen this provision by ensuring that public authorities are strongly encouraged, if not compelled, to ensure respect for at least the key principles listed in Art 76.2.
- 3 Art 76.2 offers the possibility to Member States to devise awarding criteria “based on the best price-quality ratio, taking into account quality and sustainability criteria for social services”. This option must be transposed into national law. Awarding a contract for social services mainly on the basis of an economic criterion must be ruled out (see section 3 below).
- 4 The mandatory respect for the applicable working conditions as laid down by law and/ or collective agreements of the place of work must explicitly become an awarding criteria (see section 2.1 below).
- 5 Depending on national circumstances, affiliates should reflect on the desirability of transposing Art 77 into national law (reserved contracts are an option open to Member States; not an obligation). In case of transposition:
 - As far as possible, the criteria listed in Art 77.2 must be tightened so as to avoid purely commercial services interfering in the procedure of reserving contracts for certain social services. In particular, Art 77.2 (a) could be improved by clarifying that at least the majority of profits must be reinvested with a view to achieving the organisation’s objective.
 - It should be clarified that Art 75 and 76 also apply to reserved contracts. This means that reserved contracts are nonetheless subject to some kind of publicity, at the very least a prior information notice. Most importantly, it would help to clarify that the awarding principles listed in Art 76 (quality, continuity, accessibility etc.) also apply in the case of reserved contracts.

1.2 Contracts fully excluded from the scope of the Directive

Contracts with a value below the thresholds set in Article 4 and non-economic services of general interest fall outside the scope of the new public procurement Directive. This should also be the case for SGEIs which are not explicitly mentioned by the Directive.

Contracts which fall outside EU public procurement rules, remain nonetheless subject to Treaty principles (e.g.: non-discrimination, transparency) and EU competition law.

Non-economic services of general interest, including social security and services furnished by trade unions

Article 1.5 and accompanying Recital 6, Annex 16

The last sentence of Recital 6 clarifies that non-economic services of general interest do not fall within the scope of the Directive. The notion of non-economic services of general interest is entirely left to the Member States. It should be kept in mind that Article 2 of Protocol 26 on Services of General Interest⁴ provides that EU rules do not affect in any way the competence of Member States to provide, commission and organise such services.

Article 1.5 of the new public procurement Directive expressly excludes any impact of the EU public procurement rules on the organisation of social security systems. However, this principle could potentially be challenged by Annex 14, which lists “compulsory social security services” as services potentially covered by the lighter regime set out by Articles 74-77. The ETUC position is that social security is not an economic service. As a non-

economic service of general interest, it should therefore be excluded from EU public procurement altogether. This, however, requires some clarification in the transposition laws.

Annex 14 also contains a reference to “trade unions services”. Again, transposition laws should clarify that trade unions services are non-economic services of general interest.

SGEIs not listed in Annex 14

Annex 14, Article 1.4 and accompanying Recitals 5 to 7

Annex 14 cannot be considered as an exhaustive list of SGEIs as the new Directive asserts in several places that the EU public procurement rules do not affect Member States’ freedom to define SGEIs.

But the Directive is silent as to what regime applies to the SGEIs not listed in Annex 14. Given the multiple references to the specificities of SGEIs and to the margin of discretion left to public authorities to organise and finance such services, it is unlikely that they would be subject to the full scope of the Directive. However, to achieve legal certainty transposition laws should clarify that, in the absence of specific provisions, SGEIs not listed in Annex 14 should be considered as not falling within the scope of the EU public procurement Directive.

Article 14 TFEU and Protocol 26 on services of general interest take a functional approach to what constitutes an SGEI. Key characteristics include a high level of quality, safety and affordability, equal treatment and the promotion of universal access and of user rights.

KEY POINTS FOR TRANSPOSITION:

- 6 Any claim that the public procurement Directive contains an obligation or an encouragement to private services must be resisted.
- 7 The national understanding of SGEI and non-economic SGI should be handled with great care. Non-economic services of general interest will fall outside the scope of the public procurement Directive. Depending on national circumstances, it might be highly desirable to define certain services as non-economic services of general interest.
- 8 Social security services and trade unions services must be unambiguously defined by national law as non-economic services of general interest.
- 9 Transposition laws should clarify that SGEIs which are not listed in Annex 14 fall outside the scope of EU public procurement rules.

⁴ <http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:12008M/PRO/26&from=EN>

2. SOCIAL CONSIDERATIONS

2. SOCIAL CONSIDERATIONS

The ETUC attaches a lot of importance to the special responsibility of a public authority to spend public money in a responsible manner. The new public procurement Directive opens several opportunities for public authorities to spend public money in a socially responsible fashion. The respect for applicable working conditions of the place of work should be an absolute redline for trade unions. Further, transposition laws should find ways to strongly encourage public authorities to use sustainable public procurement.

2.1 Mandatory social considerations

The principle: Article 18.2

Article 18.2 and accompanying Recitals 37 to 40

A key objective of Art 18.2 is to ensure compliance with the working conditions that are applicable at the place of work, be they contained in law and/ or collective agreements. Leaving aside the specific case of posting of workers, labour law of the place of work should normally already apply. The practice, however, is less clear for respect for collective agreements. If implemented properly, the new Directive should guarantee the continuous application of collective agreements of the place of work in case of change of employer following a public procurement procedure (e.g.: outsourcing or change of contractor).

Art 18.2 also seeks to secure respect for core ILO Conventions, including convention C87 on Freedom of Association and protection of the right to organise, C98 on the right to organise and collective bargaining. It should be noted that Art 18.2 also refers to obligations in the field of environmental law.

Art 26 of old Directive 2004/18 only opened a possibility for contracting authorities to lay down special conditions concerning in particular “social considerations”, without further precisions. Art 18.2 therefore represents a major change compared to the old regime and as such should generate significant amendments in national law. In particular, new Art 18.2 contains new 2 key elements: First, its mandatory character. Art 18.2 clearly constitutes an obligation. Art 18.2 can be considered as a general principle, which is later substantiated in specific

articles. Nonetheless, this provision has to be transposed into national laws (‘Member States shall take appropriate measures’). Arguably, appropriate measures should include general legal provisions but also appropriate enforcement measures to ensure the actual application of Art 18.2. Recital 39 gives helpful indications in this regard⁵.

It should be noted that the obligation to ensure that economic operators comply with applicable working conditions is on the Member States, not on public authorities. This was a political choice by the European legislator who did not wish to impose excessive burdens upon local authorities. Member States are therefore made accountable for the respect for applicable working conditions.

Secondly, equal treatment. The applicable obligations in the fields of social and labour law are those of the workplace. Full attention should be paid to Recitals 37 and 38 which clarify that the applicable obligations are those of the place where the works are executed or the services provided. Services should be considered to be provided at the place at which the characteristic performances are executed. When services are provided at a distance (e.g.: call centres), services should be considered to be provided at the place where the services are executed.

The applicable obligations are to be found in law and collective agreement of the workplace. By using generic terms, in particular with regard to collective agreements, Art 18.2 respects the diversity of national traditions in this field. However, Art 18.2 also mentions respect for Union law. And Recital 37 explicitly raises the question of posted workers. The use of posted workers in a public procurement context creates some consequences for the type of collective agreements that can be imposed upon the company (see section 2.3 public procurement and posting of workers). But a public contract which does not involve the use of posted workers has to be performed in compliance with the entire labour law and collective agreements of the workplace, without any interference from Union law. Regardless of the nationality of the economic operator, there is no room to argue in favour of a country of origin principle, unless of course this would result in the application of terms and conditions of employment which are more favourable to workers (Recital 37 clarifies this point).

⁵“(39) The relevant obligations could be mirrored in contract clauses. It should also be possible to include clauses ensuring compliance with collective agreements in compliance with Union law in public contracts. Non-compliance with the relevant obligations could be considered to be grave misconduct on the part of the economic operator concerned, liable to exclusion of that economic operator from the procedure for the award of a public contract.”

Art 18.2 applies “in the performance of contracts”. This should be understood in a general way and not a specific reference to Art 70 on conditions for the performance of contracts. The mandatory social consideration applies nearly throughout the public procurement stages with the exception of technical specifications.

Technical specifications

Article 42 and accompanying Recitals 74 ad 76

Technical specifications are a key stage in the public procurement procedure as they lay down the required characteristics of the work or service. Nonetheless, the new Directive makes no reference to Art 18.2 at this particular stage. A public authority can still secure compliance with the applicable working conditions by laying down conditions for the performance of the contracts. However, since Art 18.2 is clearly mandatory and its respect is to be checked on several occasions in the following stages of the procedure, it would make sense for transposition laws to also include a reference to mandatory social considerations already at the technical specifications stage.

General principles for choice of participants and award of contracts

Art 56

According to Art 56, contracting authorities may decide not to award a contract to a tenderer submitting the most economically advantageous tender where the tender does not comply with Art 18.2. The use of the word ‘may’ rather than ‘shall’ is in apparent contradiction to the spirit of Art 18.2, which clearly is mandatory. Transposition laws could helpfully clarify that public authorities have no choice in this matter: a tenderer not respecting the applicable labour law or collective agreement of the place of work cannot be awarded the contract.

Exclusion grounds

Art 57 and accompanying Recitals 85, 100-102

Art 59

According to Art 57, the public authority has the possibility to exclude an economic operator from participating in a public procurement procedure when it can demonstrate by any appropriate means a violation of Art 18.2 either before or during the procedure. This exclusion can occur at any time during the procedure.

Art 57 is an option offered to public authorities, but

Member States can in their transposition laws make sure that public authorities are actually required to proceed to an exclusion in case of violation of Art 18.2. In doing so, they would significantly strengthen the impact of Art 57.

Art 59 introduces the principle of a European Single Procurement Document (ESPD), consisting of an updated self-declaration by the economic operator as preliminary evidence. This self-declaration would confirm in particular that the economic operator is not in violation of Art 18.2. Careful attention should be paid to this provision in the transposition phase so as to minimise the risks of abuse. It is crucial that sufficient verification by the public authority or a reliable third party does take place.

Abnormally low tenders

Art 69 and accompanying Recitals 40 and 103

In case of abnormally low tenders, public authorities are required to request explanations from the economic operator. However, public authorities are not obliged to request explanations specifically linked to respect for Art 18.2. This is a loophole, which has to be addressed in the transposition laws. In case of abnormally low tenders, public authorities must systematically request explanations in relation to respect for Article 18.2.

That said, Art 69 does stipulate that where it is established that the tender is abnormally low because of violation of the obligations referred to in Art 18.2, the tender has to be rejected.

Art 69.5 deals with cooperation between Member States by means of exchange of information. As far as working conditions are concerned, this provision should only be considered relevant in the context of posting (see section 2.3 public procurement and posting of workers).

Subcontracting

Art 71.1 refers to the observance of Art 18.2 in case of subcontracting. The formulation used in this paragraph is very vague and cannot be transposed literally (see section 4 below).

KEY POINTS FOR TRANSPOSITION:

- 10 Art 18.2 should not be considered only as a general principle but as a concrete obligation upon Member States, which are required to take appropriate measures. Art 18.2 therefore requires actual transposition.
- 11 Transposition laws must make it clear that applicable working conditions include labour law and collective agreement applicable at the place of work. In particular, in case of change of employer following a public procurement procedure (outsourcing or change of employer), the collective agreement(s) in place before the tendering process must continue to apply.
- 12 Transposition of Art 42 on technical specifications should add a reference to mandatory respect for working conditions of the place of work.
- 13 Cross-references to Art 18.2 in Articles 56 (general principles), 57 (exclusion grounds), 69 (abnormally low tenders), and 71 (subcontracting) should be strengthened. Public authorities should be required to verify compliance with the applicable working conditions.
- 14 The use of the European Single Procurement Document (ESPD) must not undermine the useful effect of Art 18.2. Public authorities and/ or a reliable third party should be given the means to ensure that sufficient verification does take place.

2.2 Additional social considerations

Articles 42, 43, 67, 70 and accompanying Recitals 92-95, 97, 104

The new Directive makes direct or indirect references to social considerations in various stages of the public procurement procedure:

- Art 42 on technical specifications makes it easier for public authorities to require “social” characteristics, provided however that those factors are linked to the subject matter of the contract and that they are proportionate to its value and objectives.
- Art 43 on labels enables contracting authorities to require a specific social label in the technical specifications, the award criteria or the contract performance conditions.
- According to Art 67 on contract award criteria, contracts can be awarded on the basis of a best price-quality ratio, which involves social aspects criteria. Such criteria comprise for instance quality, social characteristics and organisation, qualification and experience of staff.
- According to Art 70, contracting authorities can include social considerations in their conditions for performance of the contract, even if such considerations had not been spelt out in technical specifications or contract award criteria.

A distinction must be imperatively drawn between the mandatory social consideration laid down in Art 18.2 and subsequent cross-references, and the above additional social considerations. The mandatory social consideration lays down the working conditions that have to be respected throughout the stages of the public procurement procedure. Additional social considerations are other criteria that enable public authorities to favour sustainable public procurement. In doing so, the public authorities benefit from great flexibility, even if the Directive imposes some clear restrictions.

In concrete terms, respect for a collective agreement that was in force at the workplace before a public procurement procedure is triggered, must not be considered as a sustainability criteria that a public authority may wish to promote in technical specifications or contract award criteria. It is a mandatory condition that has to be enforced throughout the procedure.

Additional social criteria are more difficult to circumscribe from a European perspective and they have to be defined by local authorities themselves. According to Recital 92, “contracting authorities should be encouraged to choose award criteria that allow them to obtain high-quality works, supplies and services that are optimally suited to their needs”. Recital 92 also clarifies that the various examples to be found in the Directive constitute a non-exhaustive list.

Recital 93 cites for instance “social integration of disadvantaged persons or members of vulnerable groups”.

Recital 98 talks about “the implementation of measures for the promotion of equality of women and men at work, increased participation of women in the labour market, reconciliation of work and private life, compliance with fundamental ILO Conventions, recruitment of disadvantaged persons”. Recital 99 mentions employment of long-term job-seekers, implementation of training measures for unemployed or young persons, accessibility for disabled persons.

Another important criterion is the quality of staff, including their organisation, qualification and experience, where the quality of staff can have a significant impact on the level of performance of the contract (Art 67.2 (b) and Rec 94).

However, the discretion of public authorities to define useful social criteria is not absolute. A contract award decision cannot be based on non-cost criteria only. Further, the criteria must be linked to the subject matter of the contract, i.e. that they relate to the work, supply or service to be provided. Recital 97 specifies further this restriction⁶.

In concrete terms, it seems that a contracting authority may not demand that a company respects a given social criterion if it is not the subject of the contract, but it could award extra points for such companies in the best price-quality ratio assessment.

KEY POINTS FOR TRANSPOSITION:

- 15 Additional social criteria must not be confused with the mandatory social consideration laid down in Art 18.2 and subsequent cross-references. In particular, respect for collective agreements cannot be considered as a criterion to be weighted as part of a best price-quality ratio; it is a stand-alone obligation.
- 16 Transposition laws should take an enabling approach towards social criteria, encouraging public authorities to have recourse to them at all stages of a public procurement procedure.
- 17 The examples of social criteria contained in the Directive must not be considered as an exhaustive list.

⁶Recital 97 last paragraph reads: “the condition of a link with the subject-matter of the contract excludes criteria and conditions relating to general corporate policy, which cannot be considered as a factor characterising the specific process of production or provision of the purchased works, supplies or services. Contracting authorities should hence not be allowed to require tenderers to have a certain corporate social or environmental responsibility policy in place”

2.3 Public procurement and posting of workers

The new Directive unambiguously establishes the principle of equal treatment at the workplace for domestic situations. The situation is less clear when the contractor uses posted workers. In the *Rüffert* judgment⁷, the European Court of Justice (ECJ) narrowly interpreted Directive 96/71/EC on the posting of workers, thereby making it more difficult for some public authorities to impose respect for collective agreements at the workplace upon foreign employers.

In the *Rüffert* case, the public authority had requested a commitment from tenderers to pay employees at least the remuneration prescribed by the local collective agreement. Once awarded to a German company, the contract was then subcontracted to a Polish firm using posted workers.

The ECJ interpreted the posted workers Directive narrowly, stating that a given level of wages fixed by collective agreement can only be imposed for the performance of a public contract in one of two mutually exclusive situations:

- The collective agreement is universally applicable.
- The collective agreement is generally applicable. For this, the public authority needs to demonstrate that the collective agreement in question also applies to the private sector. This scenario is only admissible where the host Member States has no system for declaring a collective agreement universally applicable.

A public authority imposing a rate of pay set in a collective agreement which is not fixed by one of these two methods would breach the posted workers Directive and the Treaty.

⁷C-346/06

One of the reasons why this judgment is heavily criticised is that requiring that generally applicable collective agreements apply both for private and public contracts is a condition almost impossible to fulfil for local collective agreements.

In the judgment, the Court focused exclusively on the posted workers Directive, insisting on a “market entry” doctrine. Imposing a certain level of wages could “impose on services providers established in another Member State where minimum rates of pay are lower an additional economic burden that may prohibit, impede or render less attractive the provision of their services in the host Member State” (para 37 of the Ruffert judgment). On the other hand, the Court did not give any consideration to the notion of sustainable procurement. As the new public procurement Directive has introduced a significant number of social considerations to reinforce sustainability, the risk of conflict with the posted workers Directive is increasing.

It should also be noted that following the *Laval* and *Commission vs Luxembourg* judgments⁸, imposing upon foreign service providers terms and conditions of employment which exceed those expressly listed in Art 3.1 of Directive 96/71/EC is likely to be in breach of that Directive. Questions must therefore be raised as to the compatibility of additional social considerations allowed by the new framework on public procurement with the posted workers Directive.

In case of conflict between two instruments of the same nature, in this case two directives, the *lex specialis* principle normally applies. According to this principle, the law governing a specific subject matter overrides a law which only governs general matters. It also frequently happens that the most recent law is given priority over the oldest one. In case of conflict relating to the use of posted

workers in a tendering process, the public procurement Directive should theoretically take precedence over the posted workers Directive. However, Recital 37 of the public procurement Directive hints that the posted workers Directive cannot be side-lined⁹. This Recital seems to imply that a public authority cannot impose respect for a local collective agreement which does not fulfil the conditions laid down in the Ruffert judgment, even if it means that equal treatment at the workplace cannot be achieved.

The absence of any consideration related to public procurement in the Ruffert judgment is disturbing. It should be noted, however, that the EU public procurement framework in force at the time of the facts of Ruffert did not contain notable social considerations. The choice made by the legislator at the time was for almost exclusively economic considerations.

The new public procurement Directive takes a different approach. Not only does it contain a mandatory social clause (Art 18.2), public authorities are also enabled to adopt a more sustainable stance (additional social considerations, clear preference for a quality/price assessment as an award criterion rather than lowest cost only). If the ECJ interpretation of Directive 96/71/EC logic was to be applied strictly, a whole chunk of the new public procurement legislation could potentially be set aside in certain Member States. This would raise even further questions as to the ECJ legitimacy as a co-legislator. When the new public procurement Directive enters into force, one has to wonder whether another Ruffert case would still be possible.

However, in advance of a possible challenge to the ECJ case law on posting when public procurement is at stake, one has to be vigilant when posted workers are used in the performance of a public contract. Because

⁸ *Laval* C-341/05 and *COM vs Luxembourg* C-319/01

⁹ Recital 37 reads (emphasis added):

“With a view to an appropriate integration of environmental, social and labour requirements into public procurement procedures it is of particular importance that Member States and contracting authorities take relevant measures to ensure compliance with obligations in the fields of environmental, social and labour law that apply at the place where the works are executed or the services provided and result from laws, regulations, decrees and decisions, at both national and Union level, as well as from collective agreements, provided that such rules, and their application, comply with Union law. Equally, obligations stemming from international agreements ratified by all Member States and listed in Annex X should apply during contract performance. However, this should in no way prevent the application of terms and conditions of employment which are more favourable to workers.

The relevant measures should be applied in conformity with the basic principles of Union law, in particular with a view to ensuring equal treatment. Such relevant measures should be applied in accordance with Directive 96/71/EC of the European Parliament and of the Council and in a way that ensures equal treatment and does not discriminate directly or indirectly against economic operators and workers from other Member States.

of the complexities of the legal situation, some public authorities may have become reluctant to use social considerations in general. This is an exaggerated reaction, which must be resisted. The Ruffert case law is limited to transnational provision of services and the related use of posted workers. It has no role in regulating domestic situations.

Also, the very use of posted workers has to be scrutinised carefully. The new Directive on the enforcement of Directive 96/71/EC¹⁰ clarifies the circumstances in which posting can be used. Companies without a genuine place of establishment in the country of origin (letterbox companies), and companies using posted workers on a permanent basis cannot pretend to rely on the provisions of Directive 96/71/EC.

It should be recalled that Recitals serve as an interpretation guidance and do not have to be transposed into national law. It would therefore be wise to avoid a codification of Recital 37 of the public procurement Directive into national law. This would give more flexibility to judges, including European ones, to adapt the Ruffert case law to the new public procurement framework. A zealous transposition of Recital 37 may also give disproportionate importance to the issue of posting, whilst the majority of public procurement procedures take place within a purely domestic context.

KEY POINTS FOR TRANSPOSITION:

- 18** A codification of Recital 37 into national law should be avoided. It should be recalled that Recitals serve as an interpretation guidance and do not have to be transposed into national law.
- 19** The limitations of ECJ case law on posting apply only in transnational situations. Any claim that the principles of Directive 96/71 regulate general social considerations in public procurement must be resisted.
- 20** The use of posted workers must be scrutinised. The following situations constitute a breach of the posted workers Directive: letterbox companies, the absence of a link between the posted worker and his/her alleged country of origin, the use of posted workers on a permanent basis. In such cases, Directive 96/71/EC should not apply.

¹⁰ Directive 2014/67/EC on the enforcement of Directive 96/71/EC

3. CONTRACT AWARD CRITERIA

In the new Directive, the term best price-quality ratio replaces the term MEAT (most economically advantageous tender). The notion of most economically advantageous tender is used in the new Directive as an overriding notion referring to what the contracting authority considers as the best solution among those offered.

The multiple references to social considerations show that the new Directive marks a preference towards awarding criteria based on a best price-quality ratio. This should be welcome. A public procurement procedure based on cost alone exercises downwards pressure upon working conditions and the quality of the service. However, the award of a contract on the basis of a cost or price-only assessment is not totally ruled out. There is therefore room for transposition laws to reduce to a minimum the use of an exclusively economic assessment.

According to Art 67, price or cost is a mandatory element that has to be assessed by contracting authorities. On top of that, contracting authorities may include a best price-quality ratio, which involves additional qualitative criteria such as those listed in Art 67.2¹¹.

In short, contracting authorities can decide to award a contract on the basis of:

- Price only; or
- Cost only based on a cost effectiveness approach. This involves the use of life cycle cost calculation; or
- Price or cost effectiveness combined with qualitative criteria, including social criteria. In such cases, the contracting authority shall specify the relative weighting which it gives to each of the criteria.

The Directive allows Member States to establish that contracting authorities may not use price only or cost only as the sole award criteria, or restrict their use to certain circumstances. According to Recital 90, this would "encourage a greater quality orientation of public procurement". The most should be made of this opportunity in the transposition laws. Failing that, the current situation where quality procurement and cheapest option carry the same weight will continue.

KEY POINTS FOR TRANSPOSITION:

21 Transposition laws should explicitly ban the use of price-only and cost-only assessment, or at the very least restrict it to specific cases such as highly standardised products which do not leave room for quality assessment.

22 The respect for labour law and collective agreements of the place of work cannot be considered as a criterion to be weighted as part of a best price-quality ratio; it is a stand-alone obligation.

¹¹

- quality, including technical merit, aesthetic and functional characteristics, accessibility, design for users, social, environmental and innovative characteristics and trading and its conditions;
- organisation, qualification and experience of staff assigned to performing the contract, where the quality of the staff assigned can have a significant impact on the level of performance of the contract; or
- after-sales service and technical assistance, delivery conditions such as delivery date, delivery process and delivery period or period of completion.

4. SUBCONTRACTING

Art 71 and related Recital 105

Art 71.1 makes it clear that the obligations stemming from Art 18.2 also apply to subcontractors. The responsibility of the competent national authorities is engaged to that effect. However, the Directive is quite vague as to what kind of measures are to be taken by the competent authorities. Transposition laws have to fill this gap. Art 71.6 lists two indications as to what appropriate measures may consist of:

- When a system of joint liability between subcontractors and the main contractor exists under national law, the enforcement of applicable obligations under Art 18.2 applies as part of it. Unfortunately, the Directive does not create an obligation to introduce such a mechanism but merely opens the possibility for the Member States to do so. A system of joint and several liability throughout the subcontracting chain is one of the most effective ways to ensure compliance with the applicable working conditions.

- Art 71.6 also clarifies that the exclusion grounds provided for in Art 57 apply to subcontractors. This is another reason to ensure that Member States make sure in transposition laws that public authorities are actually required to proceed to an exclusion in case of violation of Art 18.2.

However, exclusion of subcontractors has to take place in accordance with Art 59, 60 and 61. Again, it is particularly important that transposition laws ensure that self-declarations by the economic operator are properly monitored.

KEY POINTS FOR TRANSPOSITION:

- 23** If not already the case, Member States should introduce a system of joint and several liability throughout the subcontracting chain.
- 24** Transposition laws should ensure an adequate transposition of Art 57, requiring public authorities to systemically verify compliance with applicable working conditions.
- 25** The use of the European Single Procurement Document (ESPD) must not undermine the useful effect of Art 18.2. Public authorities and/ or a reliable third party should be given the means to ensure that sufficient verification does take place.



Boulevard du Roi Albert II, 5
1210 Brussels
Tel + 32 2 224 04 11
E-mail : etuc@etuc.org

www.etuc.org