EU public procurement and social clauses - an overview

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EU PUBLIC PROCUREMENT AND SOCIAL CLAUSES – AN OVERVIEW

Introduction - Social risks at public procured projects
In November 2014 the Dutch building workers’ union FNV Bouw accused the transport ministry’s Department of Waterways and Public Works (Rijkswaterstaat) of a passive attitude towards the exploitation of workers on public procured works despite the evidence of substantial abuses. The trade union stated that the department has a variety of options to check and monitor building companies working on its behalf but fails to do so. As a major road project client, Rijkswaterstaat was in the past repeatedly confronted with violations of the law and exploitation of construction workers on its sites, such as on the road work on the A2 and A4 motorways. Based on a report, commissioned by the trade union to the research foundation SOMO, FNV Bouw concludes that the Dutch Department of Waterways and Public Works, Rijkswaterstaat, has thus far taken very few steps to avert social abuses on its public procured sites. The SOMO report documents how responsible public procurement can play a role in the tendering and awarding of contracts. The research institute spoke to large contractors, like VolkerWessels and Heijmans, and interviewed Rijkswaterstaat as the public client. The conclusion of the interviews is that the workers’ terms of employment are not yet included in tender procedures and contract negotiations. And above, there is evidence that the public customer fails in the monitoring of the subcontractors that are operating on its projects. Experience has shown that the risk of abuse is highest among subcontractors, who try to save on labour costs and often do not comply with labour legislation and provisions covered by collective labour agreements. One of the SOMO-researchers stated that it is very striking that the government, as a major client of these contractors and subcontractors, has no clear policy in place to eliminate the abuses¹.

These conclusions are all the more distressing as the Dutch government ratified international standards, such as the UN Guiding Principles on Business and Human Rights. These standards require the public client to conduct due diligence into the social risks at its public works and to actively take steps to alleviate these risks. Besides, Dutch law provides an opportunity for public clients to impose social conditions on contractors and to encourage and reward a company’s positive social policies.

Is Europe still blocking social clauses and dictating the lowest price?
In recent years we have reported about several comparable large public procured projects all over Europe with similar abuses and a lack of enforcement and control by the public client. One of the stereotypical arguments was and is that the European legislator does not permit the public authorities to formulate social (and environmental) clauses in public procurement procedures and that a tender has to be given to the cheapest bidder; almost automatically leading to low cost subcontracting practices at the detriment of the involved workers. Against the background of the ongoing economic crisis and austerity measures, national, regional and local authorities may find it, with reference to European Union (EU) law, a good alibi to choose for the lowest price. Thus, the quality and sustainability of public services and goods may get compromised and wages, working conditions and collective agreements will come under pressure. In order to assess these arguments we have to go back in time and deal with the EU rules on public procurement.

The regulation of the procedures to be applied for public procurement has played an important role ever since the internal market project started in mid-1980s in the (then) European Economic Community. The European Commission initiated in those years a legislative package composed of Directives for public works, services and concessions. The EU public procurement rules had to create a legal environment guaranteeing at the same time access for all European undertakings to public contracts and efficient public spending. These rules were supposed to have an important impact on the overall economic performance of the European Union. In that first period, the European
Commission presented the drafting of the procurement legislation as merely a ‘technical affaire’ that should not be ‘polluted’ with social or environmental concerns. However, trade unions and environmental groups had serious problems from the start with the one-sided economic reasoning that was adopted in the 1980s by the European legislator. The reasoning was that the most effective way to spend taxpayers’ money in bringing the best benefit to the community was by looking for the cheapest bid. As a result, public procurement has been for quite a while dominated by the narrowed dogma of the lowest price, without taking into account the effect for workers or the environment.

The 2004 revision and the ECJ rulings
Trade union demands, formulated since the start of the Single Market project in the mid-1980s, have been partially met during the revision of the procurement rules in 2004. That review of the EU public procurement directives allowed the integration of social and environmental criteria into public contracts; also to be applied by third country services providers, provided that such criteria were in tune with the fundamental principles of EU law as enshrined in the Treaties. However, almost in parallel with the 2004 revisions of the procurement rules European Court of Justice (ECJ) rulings watered down the applicable social legislation and the possibilities to control contract compliance by the Member States, notably the competence for Member States to formulate mandatory labour standards and provisions to be respected by all undertakings and for all those that are pursuing paid work within the territory. In addition, parts of the national regulatory frame (of labour standards and working conditions), based on labour legislation and collective bargaining, were unilaterally ruled out by the ECJ. The ECJ judgments (notably in the Luxembourg and Rüffert cases) create a situation whereby domestic service providers have to comply with mandatory rules that are imperative provisions of national law, whilst foreign service providers do not have to respect these obligations. The European Trade Union Confederation (ETUC) concluded in 2008 that the Rüffert judgement ignored Public Procurement Directive 2004 which explicitly allowed for social clauses. The judgement did not recognise the rights of Member
States (MS) and public authorities to use public procurement instruments to counter unfair competition on wages and working conditions of workers by cross-border service providers, as these would not be compatible with the Posting Directive. Nor did it recognise the rights of trade unions to demand equal wages and working conditions and the observance of collectively agreed standards applying to the place of work for migrant workers regardless of nationality beyond the minimum standards recognised by the Posting Directive.

Along the same line of thoughts as the ECJ rulings, the European Commission came up with a selective and partial applicability of ILO Conventions. In a footnote to its 2011 guide ‘Buying Social: a guide to taking account of social considerations’ the European Commission limited the applicability of ILO Conventions for work pursued with posted workers in the public procurement area to eight core ILO Conventions that have been ratified by all 27 EU Member States. As a consequence, for instance ILO Convention 94, formulated and concluded as early as 1949 and ratified by several Member States (but not all MS), and of high relevance for fair public procurement procedures, was brought outside the scope. These and other public positions of the EU institutions made it possible for procurement authorities to wrongly argue that EU directives prevent them from using social clauses.

The EU public procurement rules are to be applied by the member states. However, there is of course also an external trade dimension (see also the Doka/Pedrina contribution). The EU as an international trade actor has obligations to promote decent work, equality, respect for fundamental rights, freedoms and labour standards and environmental protection and energy efficiency in third countries. These are not principles that are left behind when economic activities are pursued at global level. Therefore, the trade unions have argued in the past that more needs to be done at EU level to improve social and environmental standards in cross-border supply chains, and has to be

addressed simultaneously in foreign trade policy. The EU legislation in the area of public procurement should pay more attention to the persistent imbalance in openness of public procurement markets between the EU and its main trading partners. In order to create a level playing field, EU public procurement legislation should not create opportunities for third country bidders to circumvent basic standards. In this respect, ratified ILO conventions and Human Rights have to be respected by all players, Member States and third countries alike.

In the slipstream of the 2004 revision, and heartened by the neglect paid by the legislator, the trade unions and a large group of NGOs continued their plea for an EU policy that makes social responsible procurement a tool for national, local and regional government actors to maintain and enhance the quality of services, contribute to preventing social dumping and to ensure that wages and working conditions are in accordance with standards laid down in legislation and/or in collective agreements. Thereby, contracting authorities should use procurement as a lever to promote social and societal concerns such as employment, skills training, equality and social inclusion influencing the market in a positive direction.³

### The recent revision

Not least because the member states were confronted with serious problems in their own constituencies, the narrow vision advocated by the majority of the Barroso-led European Commission and the ECJ was more and more discredited. In reaction to rulings like the Rüffert case political space was created for an opening up of the rigid system. As a result, voices to use public procurement as a policy instrument to acquire supplies and services with a higher societal value, including the social and environmental effects, were becoming louder. The European Commission made in recent years new legislative proposals that led to a revised and modernised framework for public procurement policy in the whole of the EU. One of the aims was to enable constituencies to work with public contracts that can be put to better use in support of

³. The Network for Sustainable Development in Public Procurement (NSDPP) was installed as a European network uniting social and environmental NGOs and trade union organisations with the joint aim to achieve progress in sustainable development through enabling EU public procurement legislation and policies. See https://sites.google.com/site/sdppnetwork/
other policies. The necessary legislation on public sector procurement, utilities sector procurement and the procurement of works and service concessions by contracting bodies in the public and utilities sectors was concluded in December 2013 and finalised with the publication in early 2014.4

Price is no longer allowed to be the sole determining factor5. The Network for Sustainable Development in Public Procurement (NSDPP) welcomed the revision of the public procurement Directives, approved by the European Parliament, as the new rules will allow social aspects to be considered amongst other criteria for determining which bid is the most economically advantageous to accept. Contracting public authorities in Europe have the opportunity to make truly sustainable choices and spend taxpayers’ money wisely6. NSDPP participants interpret the revised rules as an affirmation of the authorities’ competence to introduce social and environmental considerations throughout the procurement process as long as these are linked to the subject matter of the contract. The NSDPP says: ‘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 prove compliance with the sustainability criteria they have set’. Members of the NSDPP were especially pleased with this aspect as it will allow public authorities to give preference to bidders who offer better working conditions to their workers and offer sustainably produced goods. Another important and controversial internal market issue was also settled as the right for public authorities to provide services directly was approved and concepts of ‘in-house’ and ‘public-public cooperation’ were defined. Public authorities thus have the possibility to limit competition for specific health, social and cultural contracts.

The rules state that all member states shall take appropriate measures to ensure that in the performance of public contract economic operators comply with applicable obligations in the field of social and labour law established by Union law, collective agreements or by international social and labour law. The revision offers scope for individual EU member states to set mandatory grounds for excluding suppliers from competitions for contracts, including where a bidder breaches labour legislation (next to taxation). According to NSDPP participants, compliance with environmental, social and labour obligations, including collective agreements, is thus enshrined in the principles of the procurement legislation and tenderers can be excluded in case of non-compliance.

**Political will of the member states decisive**

On the trade union side, it has been pointed out that the opening up of the procurement rules consigns the duty to develop and materialise a sound and decent public procurement policy that includes societal objectives back to the member states and to the procuring public authorities. The new Directives have to be implemented into national law in 2 years; the deadline for transposition in national law will expire on 17 April 2016. Member states have the responsibility to implement the EU Directives in such a way that full account can be taken of the introduction of environmental and social clauses. 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 the cheapest price option. Moreover, they have the possibility to effectively blacklist companies and prevent them from bidding for public contracts.

The European Trade Union Confederation (ETUC) has published a list of key points for the transposition into national law. In the introduction, the ETUC general secretary Bernadette Ségol stresses that there is work to do for the trade union movement and the NGOs. First of all trade unions should strongly resist a literal transposition of the Directives and call for an ambitious approach. A literal transposition into national law would probably defeat the effectiveness of the new
rules. According to the ETUC, there are gaps to be filled, and vagueness to be corrected. Besides, a number of provisions leave the choice open to the national legislator; the rules remain complex and much is left for member states to decide, such as the possibility for member states to reserve contracts for health, social and cultural services.\(^7\)

The shift from the almost ‘mandatory’ procurement for the lowest price to an optional use of social clauses in the award procedure also poses a challenge for the trade unions and the NGOs that have lobbied for the broadening up of the public procurement rules; now it is their turn to keep the finger on the pulse. Local, regional and national governments no longer have the possibility to hide behind the lowest bid dogma. This begs for both active involvement in the preparation of the national legislative implementation and for local action during the practical application (see the Clarke contribution in this issue of CLR-News).

Transposition has to be thoroughly followed and practical measures have to be assessed and monitored from pre-procurement till post-procurement. The inclusion of social clauses in public contracts for instance can require public purchasers and suppliers to protect the vulnerable, support the disadvantaged, develop the social economy, protect the environment and promote other social goals and community benefits during the course of a project as a condition of the contractual award. But without a decent design, this policy will fail. Initiatives have to be well prepared. In the meantime member states have started the preparations of the transposition and some initiatives are worth mentioning. To give just one example, the Irish government started a pilot (in a Social Clauses Project Group) led by the Office of Government Procurement to proactively look at public contracts where social clauses could be deployed to contribute to employment or training opportunities for the long term unemployed. The aims are to identify policy priorities to be addressed through the insertion of social clauses and to come to adequate guidance in relation to suitable project types.\(^8\)

But there are also first signals of member states that opt for a plain and unambitious transposition. This could result, for instance, in non-application of social clauses, thus leaving space for the lowest price to stay upright as the basic award criterion. The potential incentives to contribute to stimulating green and social procurement would get lost though the legal obstacles to adopting social criteria and criteria to promote sustainability in public procurement procedures have in theory been removed.