European Federation
of Building
and Woodworkers

Considerazioni sociali nel quadro degli appalti pubblici

Una scelta politica!

"Un grammo di prevenzione vale un quintale di cure"

Redattore: **Werner Buelen, FETBB**
Autori: **Susanne Wixforth, Arbeiterkammer Wien**
Jan Cremers, Tilburg Law school

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Sommario

Attuazione e applicazione della direttiva UE sugli appalti pubblici di lavori, di forniture e di servizi, con particolare attenzione agli aspetti sociali e per un piano di equità per tutti

1. Premessa

Per molti anni mi sono chiesto perché è così difficile attuare e applicare una regola di comune buonsenso, su cui tutti convengono, che sia “la cosa giusta da fare”. Siamo tutti d'accordo che le autorità pubbliche dovrebbero spendere i nostri soldi in modo oculato e corretto.

I sindacati e le organizzazioni ambientali e del commercio equo chiedono costantemente che i soldi dei cittadini, oltre a pagare per prodotti o servizi di qualità, servano a (1) sostenere lo sviluppo di standard sociali elevati nelle politiche pubbliche, (2) contribuire a un'economia di mercato equa e sociale e (3) promuovere il miglioramento degli standard sociali.

Le direttive europee sugli appalti pubblici (2014/24/UE; 2014/25/UE; 2014/23/UE) hanno chiaramente tenuto conto delle nostre tre rivendicazioni apportando alcuni importanti miglioramenti all'attuale legislazione comunitaria sugli appalti pubblici.

Se teniamo conto che il totale della spesa pubblica nell'UE in beni, lavori e servizi (ma escluse le forniture energetiche) ammontava a 1786,61 miliardi nel 2013, qualcosa di buono certamente si può fare. Purtroppo, la legislazione europea deve essere in primo luogo attuata e in secondo luogo applicata nella pratica. In questa enorme area grigia gli Stati membri e le autorità pubbliche hanno un amplissimo margine per valutare come intendono attuare e applicare gli “standard sociali” di recente adozione. Anche se taluni “standard sociali” sono chiaramente stabiliti, la loro reale applicazione rimane una scelta politica.

Con il presente manuale, la Federazione Europea dei Lavoratori Edili e del Legno si propone di sostenere le sue organizzazioni affiliate nei diversi Stati membri nell'attuazione e applicazione delle nuove direttive sugli appalti pubblici. C'è tempo fino al mese di aprile 2016 per trasporre le nuove regole nella legislazione nazionale.

Il manuale contiene due parti. La prima parte è dedicata a una valutazione dell'attuale legislazione e giurisprudenza europea e indica le direttrici lungo le quali potremo attuare e applicare gli "standard sociali" nell'ambito degli appalti pubblici. La seconda parte è una panoramica diversificata di buone prassi che potrebbero essere eventualmente utilizzate / riprodotte a livello nazionale.

Senza il sostegno attivo degli esperti nominati e delle persone di contatto designate dai rispettivi sindacati nazionali del settore edile, la raccolta di buone prassi atte a evidenziare l'effettivo recepimento degli standard sociali nelle legislazioni nazionali non sarebbe stata possibile.

Il meticoloso lavoro di sistematica raccolta e cernita del grosso delle informazioni ottenute sulle buone prassi per arrivare a un manuale leggibile è opera di Susanne Wixforth e Jan Cremers, ai quali esprimiamo la nostra sincera gratitudine.

Da ultimo, un grande riconoscimento va ai membri del gruppo di coordinamento che hanno apportato la loro esperienza al progetto e lo hanno assiduamente guidato e monitorato.

Il presente manuale è il risultato di un progetto della Federazione Europea dei Lavoratori Edili e del Legno con il sostegno finanziario della Commissione europea.

Werner Buelen

Project manager

2. Introduzione

Gli appalti pubblici sono spesso considerati come una questione puramente legale, dominata dai grandi studi legali e da complesse considerazioni giuridiche. Di conseguenza, il progetto si prefiggeva di fornire ai sindacati una guida pratica al processo di attuazione della nuova direttiva europea sugli appalti pubblici[1]. Si è prestata particolare attenzione alle buone prassi poiché offrono una buona visione panoramica di ciò che è legalmente possibile nell'ambito dei maggiori principi guida della direttiva, ovvero la trasparenza e la non discriminazione. Va detto peraltro che i principi, per quanto legalmente sanciti, non corrispondono alla realtà se mancano la prevenzione, il controllo e l'applicazione. Abbiamo pertanto incluso buone prassi relative a liste nere e liste bianche, come pure altri meccanismi di controllo innovativi, quali importanti strumenti per passare dalle buone intenzioni ai fatti nella realtà dei lavori del settore edile.

Una caratteristica specifica del settore edile è la complessa struttura di cantieri temporanei e mobili, con complicate catene di subappalti cui si aggiunge un'elevata incidenza di infortuni sul lavoro e di frode sociale, uno stato di cose che deve e può essere migliorato mediante la legislazione sugli appalti pubblici. Particolare è anche il fatto che il ruolo del legislatore è triplice: come legislatore, come cliente e come partner in negoziazioni tripartite che possono definire il quadro delle condizioni di lavoro.

Ne consegue che gli appalti pubblici costituiscono un importantissimo campo di azione in materia di considerazioni sociali, sanitarie e previdenziali. Per di più, la crisi economica e finanziaria impone nuove mansioni ai contraenti pubblici:

in primo luogo, devono impegnarsi a indicare la via in tema di occupazione, salute e sicurezza. Le opere pubbliche edilizie e infrastrutturali rappresentano una delle voci più rilevanti della spesa pubblica. I contratti pubblici che ricadono nell'ambito delle direttive europee rappresentano 422 miliardi all'anno, pari al 2,6 % del PIL dell'UE (dati 2013). Con la crisi finanziaria ed economica in atto, gli appalti pubblici sono la principale forza trainante per il settore edile. Di conseguenza, i sindacati si aspettano che le autorità preposte attribuiscano gli appalti al contraente che propone l'offerta economicamente più vantaggiosa piuttosto che al contraente meno caro.

In secondo luogo, in un'epoca di enorme disoccupazione giovanile, con tassi che arrivano al 50%, ci si attende dalle amminstrazioni aggiudicatrici che offrano delle opportunità ai giovani includendo l'apprendistato tra i criteri di attribuzione del bando.

In terzo luogo, il settore edile si è rivelato particolarmente vulnerabile a pratiche di dumping sociale e concorrenza sleale. È così che i contratti collettivi e le responsabilità legali e civili del contraente principale vengono annacquati nelle catene di subappalto.

La nuova direttiva sugli appalti pubblici lascia maggiore spazio di manovra per la realizzazione di questi compiti politici da parte dei committenti pubblici. Ma spesso i governi nazionali preferiscono scegliere la strada più facile e optare per un adeguamento minimo della legislazione nazionale nel recepire la direttiva. I sindacati devono opporsi con forza a queste tendenze e affrettarsi a formulare norme di qualità da applicare nelle procedure per gli appalti pubblici in materia di occupazione, salute e sicurezza e stipularle al più presto in forma di legislazione vincolante.

I sindacati promuovono la **trasparenza** (regole chiare e controllabili) e l'**applicabilità** e sono pertanto riluttanti rispetto alla responsabilità sociale d'impresa, gli accordi quadro o altre forme di accordi non vincolanti. I principi proposti dai sindacati durante il processo di attuazione nazionale dovrebbero essere:

[1] Direttiva 2014/24/UE del Parlamento europeo e del Consiglio del 26 febbraio 2014 sugli appalti pubblici e che abroga la direttiva 2004/18/CE e la direttiva 2014/23/UE e 2014/25/UE)

- la considerazione degli aspetti sociali al momento di attuare e applicare le direttive europee è un obbligo politico e non solo una questione di ordine legale;
- l'applicazione degli standard sociali nei bandi pubblici deve essere esemplare, garantire che i soldi pubblici siano spesi bene e imporre l'effettiva applicazione di elevati standard sociali, educativi, sanitari e di sicurezza sul luogo di lavoro;
- la stipulazione dell'obbligo di rispettare gli aspetti sociali è nell'interesse non solo dei sindacati ma anche delle imprese che tali obblighi rispettano. La legislazione sugli appalti pubblici è dunque uno strumento per la creazione di un piano di equità per tutti al fine di evitare distorsioni della concorrenza;
- la lotta al dumping sociale è anche un obiettivo politico volto a ridurre i costi post-contrattuali sostenuti dalla società nel suo complesso. Il committente pubblico dovrebbe assumere un ruolo guida riguardo a:
  - la conformità con e il rispetto dei contratti collettivi;
  - l'istituzione di un solido sistema di relazioni industriali a tutti i livelli; e
  - l'uso dell'appalto pubblico quale leva atta a garantire che al giovane lavoratore sia data l'opportunità di una formazione di qualità.

3. Valutazione giuridica della nuova direttiva UE sugli appalti pubblici

(Direttiva 2014/24/UE del Parlamento europeo e del Consiglio del febbraio 2014 sugli appalti pubblici e che abroga la direttiva 2004/18/CE)

I beni, servizi e opere oggetto di appalti pubblici costituiscono una parte notevole del prodotto interno lordo in Europa. La quota media corrisponde a circa un quinto (19,7% nel 2010) del PIL comunitario, con variazioni che vanno dal 10,5% del PIL a Cipro al 30,6% nei Paesi Bassi.[2] Le autorità che assegnano appalti pubblici in Europa sono oltre 250.000. Gran parte dei relativi beni, servizi e opere rimangono entro i confini dell'UE[3]. Nel caso di appalti che non ricadono sotto i regolamenti comunitari, sta alle stesse amministrazioni aggiudicatrici giudicare se l'appalto può rivestire un qualche interesse per i soggetti economici degli Stati membri. In caso contrario, il diritto comunitario non sarà applicabile. Ma comunque, in generale, ogni grande opera e progetto dovrà fare i conti con il nuovo regime che entrerà in vigore ad aprile 2016. Nel quadro delle nuove regole per gli appalti le possibilità di affrontare le questioni sociali dovrebbero essere ampliate. Le amministrazioni aggiudicatrici potranno tenere conto, tra gli altri criteri, anche degli aspetti sociali per decidere quale sia l'offerta più promettente mentre il prezzo non è più il principale fattore determinante. La 'vecchia' direttiva (2004/18/CE) aveva già introdotto la nozione di offerta economicamente più vantaggiosa in alternativa al prezzo più basso. Tuttavia l'integrazione delle considerazioni sociali era limitata principalmente allo stadio di esecuzione del contratto. Nella nuova direttiva, il concetto MEAT (most economically advantageous tender - offerta economicamente più vantaggiosa) è elaborato in modo più approfondito e permette l'inclusione di criteri di qualità nelle specifiche, nelle condizioni contrattuali e nella procedura di aggiudicazione.

L'inclusione di clausole sociali nei contratti pubblici può richiedere che, come condizione per l'aggiudicazione, i rispettivi acquirenti e fornitori proteggano le fasce vulnerabili, sostengano le persone svantaggiate, sviluppino l'economia sociale, tutelino l'ambiente e promuovano altri obiettivi sociali e vantaggi per le comunità nel corso di un progetto. Ma questa politica è destinata a fallire senza un progetto decente alle spalle. Di conseguenza, occorre seguire da vicino la trasposizione e valutare e monitorare le misure di attuazione prima dell'aggiudicazione e anche ad aggiudicazione avvenuta. Occorrerà preparare delle iniziative. Nel frattempo gli Stati membri hanno avviato i preparativi per la trasposizione e alcune delle iniziative sono promettenti. Ma ci sono già i primi indizi che taluni Stati membri intendono optare per una trasposizione meccanica e senza alcuna ambizione. La causa di questo è sovente la resistenza dei committenti pubblici, che preferiscono procedure più semplici: optando per il modello del prezzo più basso vi sono meno probabilità di ricorsi in sede giuridica, come invece può avvenire nel caso dell'offerta economicamente più vantaggiosa.

Questo può però portare alla non applicazione delle clausole sociali, lasciando spazio al prezzo più basso quale criterio principale di aggiudicazione. Andrebbero così perduti i potenziali incentivi a stimolare l'adozione di appalti 'verdi' e 'sociali', nonostante siano state teoricamente rimosse le barriere legali per l'adozione di criteri sociali e criteri atti a promuovere la sostenibilità negli appalti pubblici. La relazione dal Portogallo[4], per esempio, indica che il governo è assai restio a includere significative considerazioni sociali nella procedura di appalto, adottando semplicemente la raccomandazione che "laddove possibile, le specifiche tecniche devono essere definite in modo che le caratteristiche dei beni da acquisire o delle opere da realizzare includano la possibilità che possano

[2] Schulten T., K. Alsos, P. Burgess, K. Pedersen (2012) *Pay and other social clauses in European public procurement*, WSI/HBS, Düsseldorf.

[3] 207.000 EUR per tutti i contratti di servizio, tutti i concorsi per progetti, i contratti per servizi sovvenzionati, tutti i contratti di fornitura delle amministrazioni aggiudicatrici non centrali e 5.186.000 EUR per tutti i contratti per lavori, concessione di lavori, contratti di lavoro sovvenzionati delle amministrazioni governative centrali

[4] Relazione di Bruno Monteiro – Instituto de Sociologia - Universidade do Porto

essere utilizzate da persone con handicap o da qualsiasi altra persona". La relazione conclude giudicando le procedure in modo assai negativo, specialmente in tema di diritti sociali e di condizioni di lavoro. L'attenzione ai criteri economici comporta il fatto che durante l'esecuzione del contratto l'operatore economico farà pressione sui subcontraenti per il rispetto dei costi pianificati. Spesso questo avviene a spese delle condizioni sociali (dormitori sovraffollati, assenza di mense, ecc.), degli equipaggiamenti di sicurezza e dei servizi sanitari. Sovente i lavoratori stessi devono acquistare i propri equipaggiamenti di sicurezza e pagare per la sistemazione. Premiare l'offerta più bassa spesso significa trasferire i costi sempre più in basso nella catena di subappalto. In più, le pratiche di subappalti acutizzano il problema data la loro invisibilità e aleatorietà.

È pertanto indispensabile che i sindacati, nel quadro della procedura di trasformazione delle nuove direttive UE sugli appalti pubblici, chiariscano ai rispettivi governi che un'aggiudicazione fatta in base al prezzo più basso piuttosto che una più ampia valutazione dei benefici durante l'esecuzione del contratto e di quelli a lungo termine alla fine risulta più onerosa per il bilancio pubblico. Premiare l'offerta più bassa non solo pregiudica la qualità del lavoro e i prezzi, ma spesso aumenta la probabilità di fallimento dell'offerente o dei suoi subcontraenti, con gli elevati costi collaterali che ne conseguono. I sindacati danesi, per esempio, hanno recentemente preso in esame il 15-20% di economie ottenute dall'esternalizzazione di servizi sanitari locali, scoprendo che la differenza deriva dall'impiego di personale con livello di formazione inferiore e di lavoratori part-time cui non vengono pagati gli straordinari. Alla fine, visto che il taglio dei costi è a spese dei lavoratori e la qualità del servizio ne risente, il risparmio è puramente nozionale.

Come dimostra la relazione dell'Irlanda[5], anche le regole degli appalti pubblici irlandesi, in termini di conformità agli standard del lavoro impongono ben pochi obblighi sia agli offerenti sia alle autorità preposte all'aggiudicazione. Questa è un'area in cui linee guida ministeriali, meccanismi di 'legislazione morbida' (circolari, raccomandazioni, ecc.) e discrezione amministrativa giocano un ruolo importante. Non sembrano esistere dati sistematici sull'uso e, soprattutto, l'applicazione delle clausole modello. Le clausole di conformità sono contrattuali (piuttosto che statutarie) per natura; ne consegue che le eventuali penali in caso di violazione devono essere previste contrattualmente (e soggette ai principi generali della legislazione contrattuale, inclusa l'interpretazione e, se necessario, il giudizio dei tribunali). Anche in questo caso vi è una scarsità di informazioni sull'esistenza e/o applicazione di tali clausole di penalità.

Questo è confermato dalle statistiche del NERA (Ispettorato irlandese del lavoro) che evidenziano un significativo e continuativo problema di conformità nei cantieri delle opere pubbliche. Per esempio, nella prima metà del 2010, il NERA ha eseguito 191 ispezioni nel settore edile riscontrando un tasso di conformità alla legislazione sul lavoro solo del 43 per cento.[6] L'impressione è che le autorità preposte tendano a considerarle come esercizi teorici, senza sforzarsi realmente di farle applicare.[7] A quanto pare il problema, benché generalizzato, è particolarmente acuto nel settore edile.

In primo luogo, chi ci informa ritiene che in fase di aggiudicazione le autorità proposte sono interessate quasi esclusivamente al prezzo e non verificano affatto in che modo l'offerente intende rispettare gli obblighi imposti dalla legislazione del lavoro. Negli ultimi anni, a seguito del clima economico esacerbato, il problema si è aggravato.

[5] Relazione del Prof. Michael Doherty, Maynooth University Department of Law, Maynooth University, Co. Kildare, Irlanda.

[6] I dati non riguardano solo i cantieri pubblici, ma secondo il rappresentante del NERA, la maggior parte delle ispezioni è stata condotta in quei cantieri. http://www.employmentrights.ie/en/media/NERA%20Quarterly%20Update%20-%20June%202010.pdf.

[7] In effetti, le linee guide pubblicate sul sito web per gli appalti pubblici nazionali non fanno riferimento alcuno alla conformità alla legislazione del lavoro: http://www.procurement.ie/sites/default/files/Public-Procurement-Checklist.pdf

In secondo luogo, dato che le clausole modello della legislazione del lavoro sono di natura contrattuale, le amministrazioni aggiudicanti sembrano essere più riluttanti a invocare clausole di sospensione di pagamento per timore di ritrovarsi coinvolte in costose procedure legali.

In terzo luogo, vi sono numerosi problemi di carattere generale al momento di imporre l'applicazione: le autorità preposte fanno un forte affidamento sul ricevimento di informazioni relative a sospetti di non conformità. Di conseguenza i sindacati, dove sono presenti, giocano un ruolo importante nel garantire l'adozione di misure di applicazione. Il fatto è che la densità sindacale in Irlanda, come in molti altri Stati membri, è diminuita negli ultimi anni e in molti settori i sindacati hanno una presenza limitata (quando ce l'hanno). Il declino della capacità dei sindacati di assolvere il loro tradizionale ruolo 'di polizia' esercita ulteriore pressione sulle risorse delle autorità preposte all'applicazione, per le quali perseguire un caso nei confronti di un fornitore di servizi estero, in particolare se presente nella loro giurisdizione solo per un periodo limitato, è logisticamente difficile e oneroso. Anche quando un caso può essere perseguito, fare applicare un'ordinanza contro un'impresa costituita all'estero resta problematico.

Sembrerebbe dunque che, benché la prassi per gli appalti pubblici in Irlanda preveda l'inclusione della legislazione del lavoro nelle clausole di conformità dei contratti pubblici, si possa dubitare dell'efficacia di tali clausole nell'imporre gli standard lavorativi.

Dunque la questione è se con le nuove regole si possa garantire l'incorporazione della clausole sociali nei contratti pubblici e l'ottimizzazione del beneficio e del valore sociale attraverso le procedure d'appalto. Secondo la CES la direttiva presenta diversi aspetti positivi:

- Crea una piattaforma più solida per avanzare le rivendicazioni più importanti quali il rispetto dei contratti collettivi, le condizioni di lavoro e salariali, il rispetto degli strumenti di salute e sicurezza, la formazione dei lavoratori, le opportunità di apprendistato e altri criteri sociali.
- Allarga la possibilità di introdurre criteri di sostenibilità e altri aspetti socio-politici.
- Può mettere fine alla determinazione dell'offerta più bassa dato che il ricorso obbligatorio al criterio del minimo costo è stato notevolmente ridimensionato.
- Apre una finestra di opportunità per una futura politica degli appalti che contribuisca all'impiego del denaro pubblico per promuovere la coesione sociale e lo sviluppo economico, posti di lavoro e servizi, beni e lavori di qualità.[8]
- È un tentativo di migliorare la trasparenza nelle catene di subappalto.
- È un mezzo per lottare contro il dumping sociale.

La direttiva elenca degli obiettivi in relazione alle considerazioni sociali, ma molto dipende dalla trasposizione nelle legislazioni nazionali. Occorre riflettere a fondo non solo a come definire e garantire/promuovere le considerazioni sociali[9], ma anche a come arrivare a un migliore controllo dell'applicazione e del rispetto dei minimi salariali.

[8] L'Allegato 14 riporta un elenco di "servizi sociali e altri servizi specifici" di valore superiore ai 750 000 euro. La direttiva prevede un "regime alleggerito" per questi servizi,

[9] *New EU framework on public procurement – ETUC key points for the transposition of Directive 2014/24/EU*, CES, Bruxelles, ottobre 2014.

3.1.Opportunità per le considerazioni di ordine sociale

Già nel 2011 la Commissione europea aveva cercato di chiarire come gli aspetti sociali possono trovare il loro posto nei contratti pubblici, pubblicando una Guida agli appalti pubblici socialmente responsabili.[10] La guida, oltre a essere uno strumento che aiuta le autorità pubbliche ad acquistare beni e servizi in modo socialmente responsabile in linea con le norme comunitarie, evidenzia il contributo che gli appalti pubblici possono dare per stimolare una maggiore inclusione sociale. Anche se il titolo appare promettente, alla fine le buone intenzioni della Commissione europea di "guidare il mercato verso una direzione più responsabile socialmente e contribuire così in generale a uno sviluppo sostenibile" rimangono costrette nei rigidi confini della connessione obbligatoria con l'oggetto del contratto pubblico e nel dogma della concorrenza tra Stati membri, concorrenza salariale inclusa, limitando così l'applicabilità dei contratti collettivi.

Per questo l'Art 18.2 della nuova direttiva mira ad assicurare il rispetto delle condizioni di lavoro in vigore nel luogo in cui esegue l'appalto, siano esse stipulate per legge e/o nei contratti collettivi. Se attuate correttamente, le nuove regole dovrebbero garantite, dopo la procedura di appalto pubblico, l'applicazione dei contratti collettivi in vigore nel luogo in cui si esegue l'appalto. L'obbligo di accertarsi che gli operatori economici rispettino le condizioni di lavoro in vigore ricade sugli Stati membri, non sulle amministrazioni aggiudicatrici locali, regionali o nazionali. Il passaggio dalla quasi 'obbligatoria' formula del prezzo più basso a un uso facoltativo di clausole sociali nella procedura di aggiudicazione è una sfida anche per i sindacati e le ONG che hanno fatto lobby per l'ampliamento delle regole per gli appalti pubblici: ora è il loro turno di monitorare l'andamento delle cose. Le autorità locali, regionali e nazionali non possono più nascondersi dietro il dogma dell'offerta più conveniente.

L'impiego di lavoratori distaccati nel contesto di un appalto pubblico può dare adito a conseguenze quanto al tipo di contratto collettivo imponibile all'impresa, secondo la trasposizione nazionale della direttiva sul distacco dei lavoratori. Ma un contratto pubblico che non prevede l'impiego di lavoratori distaccati deve essere eseguito nel totale rispetto della legislazione del lavoro e dei contratti collettivi in vigore nel luogo di esecuzione.

La questione è anche dove potranno figurare le considerazioni sociali: in tutte le fasi dell'appalto? Oppure alcune fasi sono escluse, per esempio le specifiche tecniche e le condizioni contrattuali? La direttiva non fa alcun riferimento all'Art. 18.2 in questa fase particolare. Un'autorità pubblica può sempre assicurare il rispetto della condizioni di lavoro in vigore specificando le condizioni di esecuzione dei contratti. Ma visto che l'Art. 18.2 è chiaramente obbligatorio e il suo rispetto va verificato in diverse occasioni nelle fasi successive della procedura, sarebbe logico che anche le leggi di trasposizione includessero un riferimento a considerazioni sociali obbligatorie già nella fase delle specifiche tecniche dato che il non rispetto delle stesse è un criterio di esclusione. In altre parole, l'offerente non può compensare il non rispetto offrendo altri "benefici" come ad esempio un'estensione delle garanzie.

Le condizioni contrattuali di esecuzione, in particolare, possono prevedere misure sociali senza necessariamente un legame con l'oggetto del contratto. Ai sensi del considerando 99, potranno privilegiare tra l'altro la formazione professionale in situ o la lotta alla disoccupazione. Un altro criterio importante è la qualità del personale, inclusa la sua organizzazione, qualifica ed esperienza, in quanto ciò può incidere sulla qualità dell'esecuzione dell'appalto (Art 67.2(b) e considerando 94). Potrebbero per esempio prevedere l'obbligo di attuare, durante l'esecuzione del contratto, misure di formazione per giovani o disoccupati, oppure il rispetto sostanziale delle convenzioni dell'ILO/OIL. L'apprendistato, strumento importante per il raggiungimento degli obiettivi della strategia Europa 2020 per una crescita intelligente, sostenibile e inclusiva, garantisce un'adeguata formazione dei giovani lavoratori in materia di qualità, competenze e standard di lavoro e di prevenzione dei rischi. Dovrebbe quindi essere un criterio di aggiudicazione importante, avendo il rilevante ruolo socio-politico di fornire posti di lavoro adeguati alle giovani generazioni. Questa possibilità era già presente negli appalti pubblici,

[10] Commissione europea (2011) *Buying Social: a guide to taking account of social considerations*, Bruxelles.

tuttavia ora è rafforzata dalla nuova direttiva grazie all'introduzione della nozione di "miglior rapporto qualità-prezzo". Le amministrazioni aggiudicatrici dovrebbero essere incoraggiate a scegliere criteri di aggiudicazione che permettano di ottenere un lavoro di qualità (considerando 92), tra cui l'organizzazione, qualifica ed esperienza del personale assegnato all'esecuzione del contratto in questione. Considerato l'inaccettabile tasso di disoccupazione nell'UE, in particolare tra i giovani, nella politica per gli appalti pubblici è cruciale sostenere gli operatori economici che offrono forme di apprendistato. Questa è per esempio l'opzione scelta da Norvegia e Austria, dove al momento di scegliere, l'offerta di apprendistato è rispettivamente un criterio di aggiudicazione e una condizione contrattuale.

Purtroppo questi buoni esempi non devono distoglierci dal problema di come verificare il rispetto di questi obblighi legali e di come le amministrazioni aggiudicatrici saranno in grado di controllarli. Ma la cosa non è impossibile, come dimostra un'altra buona prassi austriaca, la "legge contro il dumping salariale e sociale", che prevede rigidi controlli nei cantieri, l'interconnessione delle diverse autorità interessate, una maggiore informazione dei lavoratori sulla violazione dei contratti collettivi e l'applicazione di ammende considerevoli.

Da ultimo, la direttiva introduce la nozione di “costi del ciclo di vita" (Art. 68). L'applicazione del concetto di ciclo di vita nell'edilizia – dalla culla alla tomba, o dal disegno all'esecuzione – ha sempre avuto una stretta correlazione con la salute e la sicurezza (in relazione sia al cantiere sia al prodotto) per tutti gli utenti (i lavoratori lungo tutta la filiera di produzione, i cittadini e gli utenti finali). La nozione di ciclo di vita probabilmente non può servire ai fini della protezione sociale e della promozione salariale, ma l'aspetto 'salute dei lavoratori' potrebbe essere un'area di lavoro per l'attività sindacale.

3.2. Label e certificazioni

Un label di qualità è un marchio o un simbolo di autenticazione che permette al consumatore di identificare un prodotto o servizio che risponde a determinati criteri di qualità. Questo potrebbe essere un aspetto importante per i sindacati visto che i criteri sociali si stanno ritagliando una fetta di mercato (p.es. eco-bau, Design für Alle). È diverso dalla responsabilità sociale d'impresa, che è l'inclusione volontaria di aspetti sociali nella condotta di un'azienda, e dal social statement, che è un rendiconto a posteriori delle attività di sviluppo sostenibile di un'azienda. Nella sentenza “Max Havelaar”, la CEG stabiliva che l'acquirente non può fare riferimento a label specifici per attribuire punti supplementari nella scelta dell'offerta economicamente più vantaggiosa. La CEG confermava così la sua dottrina dell'oggetto del contratto. Pertanto, questo concetto non poteva coprire la specificazione di criteri pertinenti al ciclo di produzione (per esempio un particolare tipo di imballaggio), che sarebbe utile commercialmente ma che esula dall'oggetto del contratto. Alla fine, l'Art. 43 della nuova direttiva offre un sistema facoltativo che permette di richiedere un label specifico (la direttiva parla di ‘etichettature’) quale prova che i servizi o forniture in questione corrispondono alle caratteristiche sociali richieste. L'angusta visione della CEG è stata così scavalcata dal legislatore. Tuttavia questi requisiti di etichettatura "riguardano soltanto i criteri connessi all’oggetto del contratto", "nel quadro di un processo aperto e trasparente al quale possano partecipare tutte le parti interessate" e sono "stabiliti da terzi". In principio la codificazione della condizioni di ammissibilità dei label sociali può essere positiva, ma la sua applicazione si rivelerà difficile perché le condizioni sono rigide e l'applicazione è facoltativa.

I certificati sono certo una possibilità per imporre controlli a posteriori e assicurare standard di qualità nel settore edile, ma qui bisogna vedere chi definisce gli standard. Spetta al settore oggetto della regolamentazione? In questo caso è evidente che le norme non saranno soddisfacenti per quanto concerne le misure sanitarie e di sicurezza professionale dei lavoratori, anzi cercheranno di limitare i

costi riducendo al minimo gli standard obbligatori. Se gli standard sono definiti da un ente pubblico, e se i sindacati o i rappresentanti dei lavoratori hanno voce in capitolo nella procedura di definizione dei certificati, allora potranno avere un ruolo importante ed essere uno strumento nell'ambito della procedura di specificazione e di aggiudicazione nonché per le condizioni di esecuzione del contratto. In questo ambito ricade anche la creazione di liste privilegiate che enumerano le imprese che rispettano gli specifici criteri di qualità definiti dall'autorità competente e lo strumento della carta d'identità sociale. Si tratta di “uno strumento di certificazione del singolo lavoratore, contenente dati visibili e dati elettronici sicurizzati, inteso ad attestare che determinati requisiti sociali e/o di altra natura (p.es. qualifiche professionali, formazione alla salute e sicurezza sul luogo di lavoro, elementi di previdenza/protezione sociale, ecc.) sono stati rispettati dal datore e/o dal/la lavoratore/lavoratrice”. [11]

3.3. Linee guida – accordi non statutari

A prima vista gli accordi non statutari non sembrano essere il mezzo per arrivare ad appalti di "migliore qualità", ma potrebbero essere un punto di partenza per stabilire regole che alla fine sarebbero vincolanti. Spesso, gli accordi (p.es. le cosiddette “clausole sociali" nei contratti collettivi in Finlandia o nei Paesi Bassi, o “Towards 2016” in Irlanda) tra i sindacati e le imprese di un dato settore mirano a migliorare la qualità della formazione e della sicurezza sul cantiere e in seguito vengono estesi a tutto il territorio di uno Stato membro. Inoltre, se importati committenti pubblici chiedono ai loro enti preposti agli acquisti di rispettare determinati criteri sociali, si verificherà un notevole effetto di 'buoni e cattivi'.

Dunque, nel caso degli appalti pubblici, delle linee guide elaborate dalle autorità e dai contraenti potrebbero essere un punto di partenza laddove la struttura statale/federale o l'assenza di un organo centrale di acquisto non consentono misure legislative vincolanti. In questo caso, le linee guida potrebbero offrire un sostegno specifico alle amministrazioni aggiudicatrici e la non applicazione delle stesse potrebbe avere due conseguenze:

1. obbligo di giustificazione: l'offerente che non applica le linee guida relative alla qualità deve spiegare perché non lo fa;
2. i buoni e i cattivi: i sindacati potrebbero creare una lista nera e una lista bianca in base al rispetto o meno degli standard di qualità – i contraenti che adottano le linee guida e quelli che rifiutano di farlo.

3.4. Esclusione degli offerenti che non rispettano le condizioni di lavoro in vigore

L'Art. 56 stipula che l'amministrazione aggiudicatrice può decidere di non aggiudicare un appalto all’offerente che presenta l’offerta economicamente più vantaggiosa se l’offerta stessa non soddisfa gli obblighi di cui all’Art. 18.2. Si può pertanto concludere che la revisione offre ai singoli Stati membri la possibilità di stipulare motivi vincolanti di esclusione dalla partecipazione agli appalti, tra cui (oltre alla tassazione) la violazione della legislazione del lavoro da parte di un offerente. Le modifiche permettono in effetti alle autorità pubbliche di mettere in lista nera certe imprese e impedire loro di presentare offerte per appalti pubblici. L'uso della parola 'può' all'Art. 56 piuttosto che 'deve' è in

[11] Carte d'identità sociali nel settore edile in Europa, gennaio 2015, FETBB, Relazione finale

apparente contraddizione con l'Art. 18.2, dove l'obbligatorietà è chiara. La legislazione di trasposizione potrebbe, ci si augura, chiarire che le autorità pubbliche non hanno scelta in proposito: a un offerente che non rispetta la legislazione del lavoro o il contratto collettivo in vigore sul luogo di esecuzione non può essere aggiudicato l'appalto. Per di più, l'Art. 18.2 impone agli Stati membri l'obbligo di adottare misure appropriate, che dovrebbero includere misure atte a imporre l'effettiva applicazione dell'articolo stesso. In questo contesto, il considerando 39 fornisce ulteriori indicazioni: "I relativi obblighi potrebbero trovare riscontro in clausole contrattuali (...) che assicurino il rispetto dei contratti collettivi. Il mancato rispetto dei relativi obblighi potrebbe essere considerato un grave illecito perpetrato dall'operatore economico in questione che può comportare l'esclusione di quest'ultimo dalla procedura di aggiudicazione di un appalto pubblico".

I motivi di esclusione sono ulteriormente definiti all'Art. 57: l'autorità preposta può escludere dalla partecipazione alla procedura d'appalto un operatore economico laddove "possa dimostrare con qualunque mezzo adeguato la violazione degli obblighi applicabili di cui all'articolo 18.2". Gli Stati membri devono stipulare anche per quanto tempo l'esclusione resta in vigore. Se il periodo di esclusione non è altrimenti stipulato da una sentenza, l'esclusione non può estendersi oltre i tre anni dalla data della violazione.

Ne consegue che i criteri stipulati all'Art. 18.2 devono essere considerati come principi altrettanto importanti dei principi guida della legislazione sugli appalti pubblici, nella fattispecie: trasparenza, parità di trattamento e adeguatezza.

L'Art. 59 introduce una procedura semplificata: l'uso di un documento di gara unico europeo (DGUE), consistente in un'autodichiarazione aggiornata dell'operatore economico "come prova documentale preliminare". È estremamente importante prestare attenzione a questa disposizione in fase di trasposizione. L'abuso di questi documenti è relativamente facile e un'adeguata verifica da parte dell'autorità preposta o di un terzo indipendente è indispensabile. Sarebbe dunque opportuno imporre un obbligo legale di controllo approfondito dell'offerente.

Una delle questioni basilari in relazione all'esclusione è la necessità della prova. Tale necessità è giustificata per esempio quando in passato un'impresa ha dimostrato mancanze gravi o persistenti nell'esecuzione di appalti pubblici e/o laddove tali mancanze hanno portato alla rescissione anticipata di un precedente contratto, o a un risarcimento danno o altre sanzioni. Peraltro, tali prove devono essere basate necessariamente su esperienze avvenute sul proprio territorio nazionale, oppure possono essere considerati sufficienti eventuali abusi in materia di reclutamento di manodopera transfrontaliera e violazioni in altri paesi? Per esempio, è possibile per la Germania escludere un offerente sulla base di un rapporto negativo dell'ispettorato del lavoro del Lussemburgo? Può un'impresa che è stata portata in tribunale dai sindacati in Francia per mancato rispetto delle condizioni di lavoro essere esclusa in Belgio sulla base del verdetto?[12] Vi è una chiara necessità di definire i tipi di mancanze, le prove necessarie e le competenze delle autorità. Si dovrebbe anche considerare l'introduzione di un obbligo legale di informazione sull'offerente per verificare se questi ha violato leggi sulla sicurezza sociale, il dumping sociale o altre leggi, ammesso che nello Stato membro vi siano banche dati rilevanti.

[12] Un esempio famoso è quello di Atlanco-Rimec. Questo subcontraente è stato oggetto di diverse decisioni giuridiche e amministrative: questi verdetti possono essere utilizzati in altre giurisdizioni per escludere l'impresa? (si veda anche la sezione Buone prassi)

3.5. Prezzo più basso o offerta economicamente più vantaggiosa

Stabilire il criterio del prezzo più basso potrebbe non costituire un problema se le specifiche e le condizioni contrattuali prevedono già aspetti relativi a lavoro, occupazione e salute. Definire questi aspetti a livello delle specifiche presenta il vantaggio che queste non fanno riferimento all'oggetto del contratto ma all'impresa offerente. In più, il mancato rispetto costituisce valido motivo di esclusione dalla procedura di appalto. In base all'Art. 57 un offerente può anche essere escluso se trovato in violazione di norme sociali nazionali o nazionali riconosciute. Si può anche richiedere una dichiarazione di impegno a rispettare le disposizioni delle convenzioni fondamentali dell'ILO/OIL.

Ma la direttiva spiana anche la strada all'applicazione obbligatoria del criterio MEAT (most economically advantageous tender - offerta economicamente più vantaggiosa) e, in questo contesto, introduce il concetto di miglior rapporto qualità/prezzo (Art 67.2). Concetto utilizzato come nozione prioritaria per definire quella che l'amministrazione aggiudicatrice ritiene essere la migliore soluzione tra quelle offerte. Uno degli obiettivi della riforma annunciata dalla Commissione europea era di arrivare a un equilibrio tra la necessità di tenere conto delle esigenze sociali e ambientali evitando nel contempo di ostacolare l'apertura del mercato unico. Purtroppo è per quest'ultimo motivo che la Commissione europea non ha incluso un capitolo dedicato a clausole sociali obbligatorie, pertanto l'aggiudicazione di un contratto puramente sulla base del costo o del prezzo non è esclusa. Ma questo non dovrebbe comunque impedire ai sindacati di chiedere l'integrazione di clausole sociali nella legislazione nazionale, considerato che il criterio del puro costo esercita una pressione al ribasso sui salari, sulle condizioni di lavoro e sulla qualità del servizio. Benché il prezzo o costo sia un elemento che le amministrazioni aggiudicatrici devono obbligatoriamente valutare (Art. 67), queste potrebbero aggiungere un concetto di miglior rapporto qualità/prezzo con l'inclusione dei criteri qualitativi di cui all'Art. 67.2. I consideranda 97 e 99 della direttiva specificano l'ambito dell'Art. 67 come segue: "Inoltre, al fine di una migliore integrazione di considerazioni sociali ed ambientali nelle procedure di appalto, le amministrazioni aggiudicatrici dovrebbero avere la facoltà di ricorrere a criteri di aggiudicazione o condizioni di esecuzione dell'appalto riguardanti lavori, forniture o servizi (...) compresi fattori coinvolti nel processo specifico di produzione, prestazione o commercio» e relative condizioni, di questi lavori (...)". Ciò può includere "misure intese alla tutela della salute del personale coinvolto nei processi produttivi" e "tali criteri o condizioni potrebbero riferirsi (...) all'attuazione di azioni di formazione per disoccupati o giovani (...)".

Sta quindi agli Stati membri decidere di introdurre l'applicazione obbligatoria del principio MEAT nella procedura di aggiudicazione nonché quali criteri sociali introdurre. Nel quadro della procedura di attuazione, gli Stati membri potrebbero essere inclini a proporre un'applicazione facoltativa del MEAT adducendo che potrebbe comportare prezzi più elevati. Contro questo ragionamento, una nuova disposizione all'Art. 67.3 permette disposizioni vincolanti nella legislazione specifica di un settore. Questa possibilità è in fase di discussione in Austria, nella fattispecie per l'introduzione di un MEAT obbligatorio per il settore edile. In questo contesto occorre tenere presente che il rispetto della legislazione del lavoro e dei contratti collettivi in vigore sul luogo di esecuzione non può essere considerato un criterio da soppesare nella valutazione del miglior rapporto qualità/prezzo. È un obbligo puro e semplice.

3.6. Offerte anormalmente basse

Le esperienze hanno dimostrato che in un contesto transfrontaliero vi sono imprese, e lavoratori, pronti a eseguire lavori in condizioni salariali e di lavoro assai inferiore agli standard nazionali, specialmente nell'edilizia, in agricoltura, nelle imprese di pulizia e altre categorie di servizi.[13] Questo può portare a offerte anormalmente basse negli appalti pubblici sotto la bandiera dalla 'libera fornitura di servizi'. Diversi paesi hanno cercato di affrontare questo problema.

La direttiva del 2004 prevedeva che un'amministrazione aggiudicatrice potesse chiedere spiegazione per un'offerta 'anormalmente bassa' per una serie di motivi, compresa la richiesta che l'offerente dimostri il rispetto delle disposizioni relative alla tutela dell'occupazione e delle condizioni di lavoro in vigore nel luogo di esecuzione dei lavori. Al fine di migliorare l'applicazione delle clausole salariali e altre clausole sociali, molte leggi regionali tedesche sugli appalti contengono disposizioni dettagliate in merito e talvolta anche un obbligo per le amministrazioni aggiudicatrici di monitorare le imprese contraenti, in particolare in caso di 'offerte anormalmente basse', generalmente definite come inferiori almeno del 10% all'offerta più vicina.[14]

In taluni paesi la tendenza è di monitorare le condizioni di lavoro solo nel caso di offerte anormalmente basse, in particolare in paesi che non hanno ratificato le convenzioni dell'ILO/OIL. In simili situazioni esiste solo un riferimento assai generico al regolamento sugli appalti, in base al quale le condizioni di lavoro nelle imprese contraenti devono essere prese in considerazione in caso di offerte anormalmente basse.[15] Tuttavia, nel corso degli anni ancora troppe autorità pubbliche hanno semplicemente seguito e continuano a seguire l'approccio del prezzo più basso e non si occupano un granché dei criteri sociali, non da ultimo a causa della mancanza di fondi, ma anche della procedura macchinosa e della mancanza di personale competente.

La situazione è migliorata con le nuove regole? La formulazione della direttiva prevede un'esclusione delle offerte anormalmente basse che possano essere legate alla non osservanza degli obblighi di cui all'Art. 18.2 o agli obblighi di cui all'Art. 71 (sui subappalti). Innanzitutto occorre rispondere alla domanda: fino a che punto l'amministrazione aggiudicatrice ha l'obbligo di verificare le condizioni di lavoro in caso di offerta anormalmente bassa? L'Art. 69 prescrive infatti che, in caso di offerta anormalmente bassa, l'autorità pubblica è tenuta a chiedere spiegazione prima di ricusare l'offerta. Come la CES ha correttamente evidenziato, le autorità pubbliche non sono obbligate a richiedere spiegazioni specificamente collegate al rispetto dell'Art. 18.2. Secondo la CES si tratta di una scappatoia che va corretta nelle leggi di trasposizione. In caso di offerte anormalmente basse, le autorità pubbliche devono sistematicamente chiedere spiegazioni in relazione al rispetto dell'Art. 18.2 (CES 2014). L'Art. 69 fa riferimento anche alla cooperazione tra Stati membri in forma di scambio di informazioni. Tuttavia, per quanto riguarda le condizioni di lavoro, questo sembra limitato a situazioni di distacco e di conseguenza non rimuove gli interrogativi relativi a esperienze generali di violazione come menzionate al Capo 3.4.

[13] Cremers J. (2011) In search of cheap labour in Europe, CLR/International Books, Bruxelles/Utrecht

[14] Si veda Schulten et al (2012)

[15] In Estonia, la legge sugli appalti pubblici del 2007 stipula che 'se l'amministrazione aggiudicatrice trova che un'offerta è anormalmente bassa, deve informarsi sulle disposizioni in vigore sul luogo di esecuzione dell'appalto in materia di tutela dei lavoratori e di condizioni di lavoro' (citato in Schulten et al, 2012). Regno Unito, Lettonia e Lituania hanno disposizioni analoghe.

3.7. Subappalti ed esternalizzazione dei lavoratori – Distacco, agenzie interinali, altre modalità di outsourcing

Negli ultimi decenni sono state raccolte prove sufficienti per concludere che il ricorso a catene di subappalto è uno dei principali canali di aggiramento delle leggi sul lavoro e sulle condizioni di lavoro. Il relatore al Parlamento europeo Marc Tarabella ha introdotto il concetto di "processo di produzione socialmente sostenibile", definendolo come un processo che garantisce il rispetto della salute e sicurezza dei lavoratori e delle norme sociali. Ha quindi proposto di limitare i subappalti a cascata imponendo un limite di tre subcontraenti consecutivi e introducendo il principio di responsabilità lungo tutta la catena di subappalto per il rispetto dei diritti fondamentali, della salute e sicurezza dei lavoratori e della legislazione del lavoro in vigore. In questo spirito, alcuni progressi sono stati fatti, ma la nuova direttiva non contiene alcun limite obbligatorio.

Agli Stati membri si chiede di utilizzare il nuovo spazio di manovra di cui dispongono impostando misure appropriate a controllare il più possibile il rispetto delle norme sociali. L'Art. 71 fa riferimento all'osservanza delle disposizioni dell'Art. 18.2 in caso di subappalto, i cui obblighi si applicano anche ai subcontraenti. La vaga formulazione di questo articolo è già stata assai criticata. A prima vista, le nuove regole stabiliscono il principio di pari trattamento sul luogo di lavoro, ma sembrano limitarsi ai lavoratori nazionali. Non è chiaro che cosa bisogna rispettare nel caso di imprese che impiegano lavoratori distaccati. Affidarsi alla CEG in una situazione in cui la questione non è stata regolata dal legislatore non è molto promettente. In precedenti sentenze (Rüffert) la CEG ha giudicato che un'autorità pubblica che imponesse un livello salariale stipulato in un contratto collettivo che non sia universalmente o generalmente applicabile sarebbe in violazione della direttiva sul distacco e del Trattato. Dal punto di vista della CEG, una simile prescrizione obbligatoria costituisce un 'ostacolo' alla libera fornitura di servizi. La CES conclude correttamente che 'Se l'interpretazione fatta dalla CEG della logica della direttiva 96/71/CE fosse applicata rigidamente, un intero blocco della nuova legislazione sugli appalti pubblici potrebbe essere messo da parte in certi Stati membri'. Questo solleverebbe ancora ulteriori interrogativi sulla legittimità della CEG come co-legislatore. Quando la nuova direttiva sugli appalti pubblici entrerà in vigore, c'è da chiedersi se un altro caso Rüffert sarebbe ancora possibile (CES, 2014).

Occorre dunque tenere sotto attenta osservazione l'impiego della direttiva sul distacco nel quadro degli appalti pubblici. Una semplice autodichiarazione di un subcontraente non dovrebbe bastare. La direttiva di applicazione della direttiva 96/71/CE chiarisce le circostanze in cui si può fare ricorso al distacco. Le società di comodo senza una reale sede nel paese di origine e le società che ricorrono in modo permanente a lavoratori distaccati non possono pretendere di affidarsi alle disposizioni della direttiva 96/71/CE. Ne consegue che i lavoratori devono essere trattati come i lavoratori locali. L'Art. 71.6 chiarisce i motivi di esclusione dei subcontraenti e definisce tali misure dettagliatamente: il regime di responsabilità può essere esteso ai subappaltatori. In caso di violazione delle norme ILO/OIL e di altre norme ai sensi dell'allegato X dela direttiva, il contraente principale può essere obbligato per legge a sostituire i subappaltatori. Queste disposizioni possono essere estese ai fornitori. In altre parole, se un fornitore, nell'esecuzione di un contratto di fornitura viola le norme specificate all'Art. 18.2, questo può essere motivo di esclusione obbligatoria se così stabilito nella legislazione nazionale. Infatti, e in aggiunta, l'osservazione di tali pratiche ed esperienze analoghe in altri Stati membri dovrebbe essere motivo sufficiente per escludere un candidato.

Si dovrebbe mettere fine anche alla tendenza ad annacquare la responsabilità contrattuale del contraente principale attraverso catene indefinite di subappalti mediante l'introduzione di un limite legale. Si potrebbe per esempio limitare la catena al livello di sub-sub-contraente. L'offerente dovrebbe inoltre avere l'obbligo di eseguire le parti più critiche dei lavori e informare e chiedere l'autorizzazione dell'amministrazione aggiudicatrice per qualsiasi subcontraente. La responsabilità del contraente principale dovrebbe essere chiaramente definita in termini di legge. Ciò significa che in caso di mancanza o cattiva esecuzione, il contraente principale deve essere responsabile. Ma la

responsabilità è stipulata in modo assai diversi nei vari Stati membri. Quindi, nonostante a prima vista sembrino in essere rigorosi obblighi di legge, nella realtà non è così. Questo è il caso per esempio dell'Austria, dove la responsabilità decade in caso di fallimento del subcontraente. Se non vi fossero fondi si assistenza (in Austria, l'Insolvenz-Entgeldfonds), i lavoratori dei subcontraenti semplicemente non sarebbero pagati per il loro lavoro. Dunque è molto importante seguire il consiglio di Marc Tarabella, ovvero stabilire la responsabilità del contraente principale indipendentemente dalla situazione economica dei subcontraenti, ovvero la responsabilità oggettiva.

3.8. Prospettive

Fin dalla fondazione della Comunità economica europea nel 1957, i principi fondamentali della libera circolazione di beni, persone, servizi e capitali hanno rappresentato i pilastri principali della creazione di grande mercato unico europeo. L'approccio della Comunità era dunque principalmente economico, anche se i sei Stati fondatori non avevano trascurato gli aspetti sociali per il futuro: l'idea era che un sistema duale, con la Comunità economica europea incaricata della creazione di un mercato unico mentre gli Stati membri avrebbero mantenuto i rispettivi sistemi sociali nazionali e modalità di contrattazione collettiva o di minimo salariale, avrebbe reciprocamente migliorato lo sviluppo economico e il modello sociale in Europa. Tuttavia questa idea non si è realizzata ed è stata scavalcata con l'allargamento dell'UE, la liberalizzazione dei mercati, l'aumento dei lavoratori migranti e la globalizzazione dell'industria. Questi sviluppi hanno impatti sempre più negativi sulle condizioni di lavoro e salariali nel settore edile. In più, la liberalizzazione va di pari passo con l'abolizione die vincoli burocratici e la loro sostituzione con strumenti intelligenti. L'autoregolamentazione e l'autocertificazione sono i nuovi strumenti snelli proposti a livello comunitario.

Queste tendenze sono state fortemente osteggiate dai sindacati, specialmente nel settore edile con le sue carattersitiche di grande mobilità, alta intensità di manodopera, specifici e complessi processi di produzione, numerosi cantieri, alto tasso di incidenti di forme di frode sociale. Pertanto è indispensabile un controllo efficiente del rispetto degli obblighi di sicurezza sociale, delle condizioni di lavoro e salariali, della conformità agli strumenti di salute e sicurezza, della formazione e dell'apprendistato.

Tenendo conto delle persistenti limitazioni di bilancio e della pressione economica esercitata sulle amministrazioni aggiudicatrici, potrebbe essere necessario istituire un organo di controllo con il compito di sorvegliare l'esecuzione contrattuale delle due parti contrattuali: l'amministrazione aggiudicatrice e il contraente inclusi i suoi subcontraenti. Potrebbe trattarsi di un regolatore o di un pubblico ministero per gli appalti. Affinché la nuova attenzione per gli aspetti sociali e di salute e sicurezza nelle procedure degli appalti pubblici possa funzionare, l'inclusione dei sindacati come rappresentanti dei lavoratori deve essere considerata un importante obiettivo comune a livello europeo. [16]

[16] Come punto di partenza, o come esempio, potrebbe servire l'accordo nazionale raggiunto tra sindacati e datori di lavoro del settore edile nel Regno Unito: http://www.njceci.org.uk/national-agreement/

4. La Corte Europea di Giustizia e gli aspetti sociali degli appalti pubblici – panoramica

4.1 Introduzione

Le regole e procedure da applicare agli appalti pubblici hanno giocato un ruolo importante fin dall'inizio del progetto di mercato unico avviato a metà degli anni '80 dall'allora Comunità economica europea. Lo scopo della regolamentazione degli appalti pubblici era l'apertura alla concorrenza di progetti finanziati pubblici in tutto il mercato interno. La Commissione europea aveva avviato un pacchetto legislativo composto di direttive per opere pubbliche, servizi e concessioni. La regolamentazione doveva creare un quadro legale garantendo allo stesso tempo l'accesso di tutte le imprese europee ai contratti pubblici e una spesa pubblica efficiente ed efficace.

Le regole avrebbero dovuto avere un impatto significativo sulla prestazione economica generale dell'UE. Nei primi anni '90 la Commissione europea presentava la stesura della legislazione sugli appalti puramente come una 'questione tecnica' da non 'inquinare' con preoccupazioni ambientali o sociali. La versione ufficiale era che la legislazione UE era neutra rispetto alle considerazioni sociali nell'ambito degli appalti pubblici fintantoché venivano rispettati i principi generali di trasparenza, non discriminazione e pari trattamento. L'argomentazione prevalente era che il modo più efficace di spendere il denaro dei contribuenti e apportare il maggior beneficio alla comunità era quello di cercare l'offerta più bassa. Di conseguenza, gli appalti pubblici sono stati dominati per molto tempo dall'angusto dogma del prezzo più basso, senza tenere conto dei suoi effetti sui lavoratori e sull'ambiente.

In contrasto, le amministrazioni aggiudicatrici che volevano applicare criteri sociali o ambientali erano e sono tuttora costrette a seguire una procedura onerosa. Spesso, la procedura di aggiudicazione è stata giudicata nulla dalla CEG. Tuttavia, dato che la stragrande maggioranza dei progetti soggetti ad appalto pubblico è eseguita da manodopera a pagamento e che occorre calcolare i costi salariali e le condizioni di lavoro nell'offerta, vi è un forte legame tra diritti dei lavoratori e appalti pubblici. Inoltre, diversi Stati membri hanno una lunga tradizione nel servirsi dei loro appalti pubblici per promuovere vari obiettivi di politica sociale (Ahlberg e Bruun, 2012).

Le direttive di per sé sono basate su articoli e principi legati al mercato interno e sulla giurisprudenza. Nel corso degli anni, la Corte Europea di Giustizia (CEG) ha stipulato come interpretare gli articoli dei Trattati europei e i principi di libertà economica del mercato interno nel quadro degli appalti pubblici. In taluni casi ha anche accettato la nozione di considerazioni sociali nelle procedure di appalto. Per esempio, in **Commissione europea v. Francia** (C-225/98) la CEG ha accettato che la capacità dell'offerente di combattere la disoccupazione possa essere un criterio aggiuntivo di aggiudicazione, anche se non legato all'oggetto del contratto.

Ma in altri casi, e in particolare quelli legati al distacco dei lavoratori, la Commissione europea e la CEG hanno dimostrato (dagli anni '80 in poi) di voler limitare il modo in cui taluni Stati membri ponevano obiettivi obbligatori di politica sociale (o ambientale) nelle loro procedure di appalto. Talune sentenze della CEG hanno annacquato la legislazione sociale applicabile e le possibilità degli Stati membri di controllare la conformità contrattuale, nella fattispecie la loro competenza nel formulare norme di lavoro obbligatorie e disposizioni che tutte le imprese e chiunque facesse ricorso manodopera pagata nel territorio nazionale dovevano rispettare.

La CEG ha inoltre abolito unilateralmente parte del loro quadro normativo nazionale (standard e condizioni di lavoro) basato sulla legislazione del lavoro e sui contratti collettivi. Nei casi di violazione in cui si mettono in discussione i diritti dei lavoratori la CEG sembra attribuire poca importanza alle condizioni di lavoro prescritte e integrate nei sistemi nazionali di relazioni industriali, anche quando gli offerenti sono stati trattati equamente. Le sentenze della CEG sul distacco (in particolare le **cause Luxembourg e Rüffert**) hanno creato un situazione per cui i fornitori di servizi nazionali devono

rispettare norme vincolanti imposte dalla legislazione nazionale mentre i fornitori esteri non sono tenuti a rispettare gli stessi obblighi. Nel 2008, la Confederazione Europea dei Sindacati concludeva che la sentenza Rüffert ignorava la direttiva del 2004 sugli appalti pubblici che autorizzava esplicitamente le clausole sociali.

La sentenza non riconosceva il diritto degli Stati membri e delle autorità pubbliche di utilizzare gli strumenti degli appalti pubblici per contrastare la concorrenza sleale sulle condizioni di lavoro dei lavoratori dei fornitori di servizi transfrontalieri, giudicandoli incompatibili con la direttiva sul distacco. Né riconosce il diritto dei sindacati di rivendicare pari salario per pari condizioni di lavoro e l'applicazione ai lavoratori distaccati delle norme convenute nei contratti collettivi in vigore sul luogo di lavoro, paritaria per tutti gli offerenti e indipendentemente dalla nazionalità, al di là degli standard minimi riconosciuti dalla direttiva sul distacco.

4.2 Una breve rassegna

Le decisioni prese nel corso degli anni dalla Corte Europea di Giustizia in materia di clausole sociali negli appalti pubblici hanno avuto un impatto decisivo sulla revisione della direttiva sugli appalti pubblici e hanno sviluppato la forma legale come interpretata dai tribunali nazionali. Questa panoramica riassume alcune delle più importanti sentenze e altre azioni giuridiche della CEG e della Commissione europea.

Una delle cause più importanti, ancora sotto il regime della vecchia direttiva del Consiglio 71/305/CEE, che ha avuto un serio impatto sugli appalti in relazione alle questioni sociali è stata la cosiddetta **causa Beentjes** (C-31/87) che risale al 1988. La procedura ha avuto origine dalla causa nazionale mossa da un offerente contro la Stato olandese. In breve, la CEG ha stabilito che un criterio sociale di esecuzione contrattuale, che richiedeva all'aggiudicatario designato di impiegare disoccupati di lunga durata, può essere utilizzato nella procedura di aggiudicazione di un appalto pubblico purché rispetti tutte le rilevanti disposizioni della legislazione comunitaria. La CEG stipula che "la condizione relativa all'**impiego di disoccupati di lunga durata** è compatibile con la direttiva se non produce effetti discriminatori, diretti o indiretti, nei confronti di offerenti provenienti da altri Stati membri della Comunità. Una siffatta condizione specifica supplementare deve essere menzionata nel bando di gara".

La posizione della CEG nella causa Beentjes è stata ribadita nella **causa Nord-Pas-de-Calais** (C-225/98). È importante sottolineare che si trattava di una causa mossa dalla Commissione europea contro lo Stato francese. La Commissione tentava di neutralizzare l'esito della causa Beentjes che era stato positivo per le considerazioni sociali. La regione che aveva emesso il bando includeva tra le condizioni contrattuali la capacità dei contraenti di **contrastare la disoccupazione locale** come criterio di aggiudicazione. La Commissione europea sosteneva che le questioni occupazionali possono essere considerate una condizione contrattuale, ma non possono essere considerate come criterio di aggiudicazione. La CEG ha respinto l'argomentazione perché la Commissione europea non è riuscita a dimostrare che il criterio era discriminatorio e che non era stato menzionato nel bando di gara. Secondo la CEG, le amministrazioni aggiudicatrici possono utilizzare un siffatto criterio di aggiudicazione purché sia coerente con i principi fondamentali della legislazione comunitaria, in particolare il principio di non discriminazione.

Va osservato che ambedue le cause si riferiscono a **condizioni generali di 'politica sociale'**, non a condizioni di lavoro o altre disposizioni relative ai diritti dei lavoratori. Le sentenze della CEG non dicono che la prescrizione delle condizioni di lavoro è compatibile con la direttiva. Anche le conclusioni adottate dalla Commissione europea sono intrinsecamente contraddittorie. Secondo la comunicazione interpretativa della Commissione, le considerazioni sociali negli appalti pubblici sono applicabili solo

come criteri di aggiudicazione di tipo secondario, che non sono decisivi, ma che si possono utilizzare in caso di offerte altrimenti uguali. [17]

Un'altra sentenza interessante è stata emessa nel 2002. Nel frattempo le direttive di riferimento erano state oggetto di revisione nei primi anni '90 (in particolare la 92/50). Nella **causa Concordia Bus Finland v. Helsingin** (C-513/99) la CEG riconosce che un'amministrazione aggiudicatrice ha facoltà di includere considerazioni ambientali tra i criteri di aggiudicazione. Qui l'importanza è duplice: in primo luogo la CEG riconosce che **i criteri di aggiudicazione non devono necessariamente essere puramente economici**, in secondo luogo afferma che la "direttiva 92/50 non esclude la possibilità per l'amministrazione aggiudicatrice di avvalersi di criteri relativi alla tutela dell'ambiente in sede di valutazione dell'offerta economicamente più vantaggiosa", purché i criteri adottati per determinare l'offerta economicamente più vantaggiosa siano applicati "nel rispetto delle norme procedurali della direttiva 92/50, in particolare delle sue disposizioni in materia di pubblicità". L'importanza della sentenza va oltre le dirette conseguenze della causa. La CEG ha infatti formulato un **quadro di riferimento per le amministrazioni aggiudicatrici**: siffatti criteri ambientali possono essere presi in considerazione allorché **sono collegati all'oggetto di un appalto**; non sono tali da conferire all'amministrazione aggiudicatrice una libertà incondizionata di scelta; sono espressamente menzionati nei documenti contrattuali o nel bando di gara; e rispettano i principi fondamentali della legislazione comunitaria, in particolare il principio di non discriminazione.

Nel 2003, nella causa del 2003 C-448/01 **Wienstrom v. Austria** è stato applicato questo ragionamento: la direttiva 92/50 "non può essere interpretata nel senso che ciascuno dei **criteri di attribuzione** adottati dall'amministrazione aggiudicatrice al fine di individuare l'offerta economicamente più vantaggiosa **debba necessariamente essere di natura meramente economica**". Tuttavia la CEG conclude che vi è violazione perché il criterio di attribuzione non era accompagnato da un requisito che permettesse l'effettiva verifica delle informazioni fornite dagli offerenti. Di conseguenza la procedura di aggiudicazione è secondo la CEG incompatibile con i principi del diritto comunitario in materia di appalti pubblici.

Nella **causa Lianakis** (C-532/06) la CEG chiarisce che i criteri di selezione e i criteri di aggiudicazione devono essere chiaramente distinti. Ai fini della trasparenza e della parità di trattamento, tutti gli elementi presi in considerazione dell'amministrazione aggiudicatrice nell'identificare **l'offerta economicamente più vantaggiosa** devono chiaramente essere resi noti in anticipo. Tuttavia in questo modo il margine di interpretazione delle amministrazioni aggiudicatrici sarà ridotto e non consente loro di dare la priorità a offerte più 'sociali' rispetto ad altre a meno che non abbiano stipulati i relativi criteri in modo sufficientemente dettagliato.

Per alleviate l'onere di definire i criteri di attribuzione e attribuire le quote, le amministrazioni aggiudicatrici avevano iniziato a fare riferimento ai **label** anziché utilizzare delle specifiche tecniche per descrivere l'oggetto dell'appalto. Nella **causa Max Havelaar** (C-368/10) la CEG ha ammesso in via di principio che dei **criteri sociali o ambientali** – nello specifico prodotti provenienti da agricoltura biologica – **possono essere privilegiati**. Applicata a un contratto edile, questa sentenza significa che un'impresa i cui prodotti soddisfano le specifiche tecniche non è tenuta ad avere un label ecologico. Basta solo che possa provare che il prodotto risponde alle specifiche in questione. Tenuto conto dell'ampio ventaglio di label nazionali ed europei, questa sentenza ha una duplice implicazione: a) gli acquirenti pubblici possono introdurre criteri sociali e b) gli oneri amministrativi per le imprese sono limitati perché non sono tenute ad acquisire label specifici ma solo a provare il rispetto delle qualificazioni richieste.

La consapevolezza della necessità di prendere l'iniziativa sugli aspetti sociali si sta facendo sempre evidente presso le amministrazioni aggiudicanti a livello federale e locale. Per esempio, il land Nordrhein-Westfalen ha stipulato che in tutti gli appalti pubblici devono essere applicati i **minimi**

[17] Comunicazione interpretativa della Commissione sul diritto comunitario degli appalti pubblici e le possibilità di integrare aspetti sociali negli appalti pubblici, COM/2001/0566 def.

salariali. La città di Dortmund ha interpretato questa disposizione in modo tale che qualsiasi subcontraente, indipendentemente dalla sue sede legale e dal luogo di esecuzione dei servizi, deve pagare i minimi salariali vigenti in Germania.

In questa causa, la **Staatsdruckerei** (tipografia di Stato) aveva esternalizzato l'oggetto principale dell'appalto a una società polacca. La CEG ha deciso che nella fattispecie i minimi salariali tedeschi non erano applicabili. Dal punto di vista del diritto internazionale sembra logico che la giurisdizione di uno Stato membro debba terminare ai confini del suo territorio. Ma la CEG non ha utilizzato questa argomentazione facendo invece riferimento ai principi del mercato interno. Un ragionamento che scivola in un'argomentazione alquanto cinica quando la CEG afferma che la legislazione nazionale per la tutela dei lavoratori appare sproporzionata "imponendo, infatti, un salario minimo fisso che corrisponde sì a quello richiesto per assicurare ai lavoratori in Germania una retribuzione congrua con riferimento al costo della vita in tale Stato, ma che non ha alcun rapporto con il costo della vita nello Stato membro in cui le prestazioni relative all'appalto pubblico saranno effettuate (la Polonia) e che non consentirebbe, di conseguenza, ai subappaltatori stabiliti in quest'ultimo Stato membro di trarre un vantaggio concorrenziale dalle differenze esistenti tra le rispettive tariffe salariali".

Anche qui la lezione è duplice: primo, la CEG continua a privilegiare la predominanza della concorrenza tra Stati membri al di sopra di tutti gli altri principi. Secondo, per evitare questo tipo di interferenze del co-legislatore europeo, le amministrazioni aggiudicanti dovrebbe essere tenute a obbligare il contraente principale ad assumere in proprio tutto l'oggetto dell'appalto o gran parte di esso. E la catena di subappalto dovrebbe essere limitata per legge.

Queste misure consentirebbero di evitare la concorrenza sleale a spese dei lavoratori e dei loro salari.

4.3 Impatto dell'"esternalizzazione dei lavoratori" – lavoro esterno: sentenze sul distacco, out-sourcing, in-sourcing (reclutamento di manodopera), agenzie interinali

Le normative sul distacco sono state oggetto di una serie di sentenze della CEG. L'esito di queste cause ha dimostrato che la CEG e la CE si stanno adoperando per un'interpretazione angusta e restrittiva della direttiva sul distacco, con importanti conseguenze per le procedure di aggiudicazione pubblica degli appalti.

Gli Stati membri hanno adottato un approccio diverso rispetto al ricorso all'insourcing / outsourcing da parte delle amministrazioni aggiudicanti. Il Belgio per esempio ha regolamentato i lavoratori interinali in modo tale che devono essere accreditati a ricevere una formazione di base. In Norvegia e Austria il legislatore ha stabilito per legge che i contratti di subappalto e di lavoro interinali sono equiparati. In questo modo il livello ammissibile di "lavoro esternalizzato" è automaticamente ridotto. L'esperienza di taluni Stati membri dimostra però che non basta limitare la catena delle mansioni esternalizzate per allentare la pressione sui salari. Nel Regno Unito per esempio, in genere il contraente principale impone le condizioni contrattuali incluso l'obbligo per i subcontraenti di pagare una penale in caso di non osservanza delle normative in vigore anche se sono l'anello più debole della catena.

In diversi casi (come dimostrano le cause Rüffert e Laval) l'interpretazione della CEG della disposizione del Trattato relativa alla libera circolazione dei servizi limita la possibilità di definire standard di lavoro attraverso meccanismi come i contratti collettivi e le clausole sociali negli appalti pubblici (Van Hoek e Houwerzijl 2011). Queste sentenze della CEG interferiscono dunque con la possibilità di prescrivere disposizioni vincolanti in merito alle condizioni di lavoro. La questione fondamentale è che cosa significa 'criteri sociali compatibili con il diritto comunitario' (o la legislazione UE). La neutralità suggerita comporta che, dopo le sentenze Laval e Rüffert, se un contratto è eseguito da lavoratori

distaccati da un altro paese l'amministrazione aggiudicatrice non può rendere la partecipazione a un appalto pubblico 'soggetta all'osservanza dei termini e condizioni di un qualsiasi contratto collettivo', una limitazione che non si applica se il contratto è eseguito da lavoratori locali (Ahlberg & Bruun, 2012).

La CEG è molto chiara anche nella **causa** di inadempimento mossa dalla **Commissione europea v. il Granducato del Lussemburgo**. Secondo la CEG, l'elenco di prescrizioni della direttiva sul distacco in materia di diritto e condizioni di lavoro è esaustivo piuttosto che una base minima di diritti. Al considerando 32 della causa Lussemburgo, la CEG afferma che l'ambito delle disposizioni vincolanti nella legislazione nazionale è limitato a quelle "che, per la loro natura ed il loro obiettivo, rispondono alle esigenze imperative dell'interesse pubblico" (CEG, causa C-319/06). Secondo la CEG, non sta agli Stati membri determinare unilateralmente una politica che giustifica disposizioni obbligatorie addizionali oltre a quelle minime previste nella direttiva. Nella pratica, questa limitazione della CEG significa che non è possibile imporre a imprese estere **un livello di protezione superiore a quello minimo stipulato nella direttiva sui servizi**[18] per i loro lavoratori distaccati. Come già detto, le sentenze della CEG creano una situazione per cui i fornitori di servizi esteri non sono tenuti a rispettare le disposizioni vincolanti cui non si può derogare in base alla legislazione nazionale e che devono invece essere rispettate dagli offerenti locali.

Questa presa di posizione del co-legislatore europeo è inaccettabile da un punto di vista sindacale poiché mina la buona volontà delle amministrazioni aggiudicanti e della legislazione nazionale nella lotta contro le inique condizioni di lavoro: da una parte i lavoratori cui si applicano i contratti collettivi locali, dall'altra parte quelli di altri paesi dell'UE che potrebbero ricevere salari inferiori. È chiaro che interpretare il mercato unico in questo modo, che si attiene a una dottrina di "ingresso nel mercato", significa aumentare le tensioni sociali. La conclusione della CEG nella **causa Bundesdruckerei v. Stadt Dortmund** (C549/13) appare come l'apice più cinico della dottrina di mercato: "tale normativa, imponendo (...) un salario minimo fisso, (...) non consentendo ai subappaltatori stabiliti in un altro Stato membro di trarre un vantaggio concorrenziale dalle differenze esistenti tra le rispettive tariffe salariali, va oltre quanto è necessario per assicurare il raggiungimento dell'obiettivo della protezione dei lavoratori".

Una **causa** analoga (C-115/2014) è in attesa di un verdetto preliminare della Corte Europea di Giustizia. La causa è mossa dalla compagnia postale **RegioPost GmbH** contro al Città di Landau in merito alla legge che impone l'obbligo di applicare il minimo salariale stabilito dai contratti collettivi (Landestariftreuegesetz Rheinland-Pfalz). Tale minimo ammonta a 8,70 euro (ora). Riferendosi alla causa Rüffert, il tribunale di Coblenza ha prospettato alla CEG l'opinione che questo minimo salariale viola il diritto comunitario in quanto rappresenta una chiusura di mercato per società di altri Stati membri dove i minimi salariali sono inferiori. Dato che la legge in questione stipula minimi salariali solo per i contratti pubblici ma non per quelli privati, non si tratta di un minimo applicabile in generale. Si prevede una decisione entro l'anno. Occorre però tenere presente per prima cosa che la misura in questione è stipulata legalmente ai sensi dell'Art. 3 paragrafo 1 della direttiva sul distacco, si tratta quindi di una misura di Stato e non solo di un contratto collettivo. In secondo luogo, dal 1.1.2015 va applicato il salario di 8,5 euro stipulato dalla legislazione federale. Pertanto, per lo meno da ora in poi, le condizioni fissate all'Art. 3 paragrafo 1 della direttiva sul distacco sono rispettate.

Fa sperare anche un'altra recente sentenza nella causa C-413/13: "falsi lavoratori autonomi". Con questa sentenza, la CEG ammette che i minimi salariali e i termini di assunzione stipulati nei contratti collettivi sono applicabili anche ai "**falsi lavoratori autonomi**". La sentenza nasce da una **causa** intentata dal sindacato olandese **FNV KIEM** che contestava l'inquadramento di musicisti freelance come 'imprese' individuali. In base alla legislazione olandese sulla concorrenza, i sindacati non erano autorizzati a condurre contrattazioni collettive sulle tariffe con il datore di lavoro per conto di lavoratori autonomi. Il contratto collettivo olandese imponeva tariffe minime non soltanto per i supplenti assunti

[18] Considerando 17: "considerando che le norme imperative di protezione minima in vigore nel paese ospite non devono ostacolare l'applicazione di condizioni di lavoro e di occupazione che siano più favorevoli ai lavoratori".

nell’ambito di un contratto di lavoro, ma anche per i supplenti che esercitano la loro attività in forza di un contratto d’opera, e che non sono considerati "lavoratori" ai sensi del contratto collettivo medesimo ("supplenti autonomi"). La sentenza della CEG determina che i **falsi autonomi**, ossia dei prestatori che si trovano in una situazione paragonabile a quella dei lavoratori, **possono godere dei diritti stipulati per i lavoratori dipendenti in un contratto collettivo**.

Un'ultima causa da menzionare in questa sede è quella dei **lavoratori polacchi sottopagati in Finlandia** (Sähköalojen ammattiliitto ry v. Elektrobudowa Spółka Akcyjna, C-396/13). Nella sentenza finale la CEG sottolinea che i termini e condizioni di assunzione concessi ai lavoratori distaccati devono essere definiti per legge dal paese ospitante (purché siano 'universalmente applicabili, vincolanti e trasparenti'). Nella causa, il contraente estero contestava il diritto dei sindacati del paese ospitante di adire le vie legali poiché la relazione di lavoro era basata sulla legislazione del paese di origine. La CEG doveva dunque decidere se il diritto a un effettivo rimedio, previsto dalla Carta dei diritti fondamentali, per reclami trasferiti nel quadro della direttiva sul distacco, potesse essere bloccato dalla normativa del paese di origine (che vieta il trasferimento di reclami derivanti dalla relazione di lavoro). La CEG ha stabilito che **il sindacato del paese ospitante è ammissibile** perché il suo stato è governato dalla legislazione procedurale finlandese e la direttiva sul distacco dei lavoratori chiarisce bene che le questioni relative ai **minimi salariali sono governate,** indipendentemente dalla legge applicabile alla determinata relazione di lavoro, **dalla legge del paese ospitante**. Con questo verdetto **una società può essere portata in tribunale nel paese ospitante**, e questo potrebbe avere conseguenze dirette sulle future gare di appalto in quello stesso paese.

Ma in ogni caso, il semplice ricorso a lavoratori distaccati va tenuto attentamente sotto controllo. La nuova direttiva di applicazione della direttiva 96/71/CE chiarisce le circostanze in cui si può fare ricorso al distacco. Le società senza una reale sede nel paese di origine (società di comodo) e le società che ricorrono in modo permanente a lavoratori distaccati non possono pretendere di affidarsi alle disposizioni della direttiva 2014/67/CE. Dato che il considerando 37 della nuova direttiva conferisce un'importanza sproporzionata alla dottrine di "ingresso nel mercato" applicata dalla CEG, sembrerebbe saggio non trasporre tale disposizione nella legislazione nazionale.

5. Best practices

Precondition for the recording of best practices within the framework of this project was that they can demonstrate a tangible and measurable positive real output with regard to social considerations within the public procurement procedure.

5.1. Preventive measures to avoid that the public procurement procedure is abused/circumvented

France

Key point/background – Black list

The law relating to the posting of workers was introduced in July 2014 (**loi n°2014-790 du 10 juillet 2014) to reinforce the controls and penalties against undertakings employing posted workers at conditions less advantageous than local workers.**

Description of the measure in discussion/already in place

One element of this new legislation is the introduction of a black list, which will be published on a website. This list contains for a maximum time limit of two years all companies which have breached the above mentioned law, i.e. have been convicted for illegal employment. The requirement of publishing this information is imposed by the judge when deciding that a breach of labour law has occurred. The internet website is to be put into force by the Ministry of Labour.

Ireland

Key point/background – Exclusion from public procurement

The Irish public procurement market is undergoing a period of transformation. Traditionally, a semi-centralised procurement system operated in Ireland with various central government departments, local authorities and semi-state bodies held individually responsible for their own procurement requirements. The formalisation and establishment of a new Office of Government Procurement ("OGP") indicated a national movement towards a centrally controlled purchasing system. The OGP commenced operations in 2014, and together with four key sectors (Health, Defence, Education and Local Government), takes responsibility for sourcing all goods and services on behalf of the Public Service. The three overriding goals of the office are:

- To integrate procurement policy, strategy and operations in one office,
- To strengthen spend analytics and data management,
- To secure significant savings

Description of the measure in discussion/already in place

Within the process of adopting the three new EU public procurement Directives, the OGP launched a public consultation on the transposition of the new Directives on 31st October 2014.

The OGP is now considering how it will transpose the discretionary clauses laid out in the 2014 EU Procurement Directives. The OGP considers a mandatory exclusion of economic operators from procurement procedures for a certain time-span in the following transgressions:

- poor performance,
- submission of low-tenders and
- failure to comply with employment legislation.

Italy

Key point/background – White list

One of the biggest problems in public tenders in Italy is the existence of corruption and criminal organizations´ interests in public procurement procedures.

In the course of the last 30 years many governments have attempted to fight this phenomenon. In 2010 the government adopted a measure called "White List".

Description of the measure in discussion/already in place

To fight corruption, the government established a new agency called ANAC (National Anti-Corruption Authority) in 2014. The tasks of ANAC are to prevent corruption in public administration bodies as well as to control and supervise public procurement.

To support this measure, a White List was established. In the White List are registered those companies that are authorized to participate in public procurement procedures as contractors or subcontractors. Every employer, employee or supplier active on a worksite, having any form of contract relation to the contractor, must be checked as to links with criminal organizations.

The authorisation is subject to various controls and can be revoked. Companies which are cancelled from the list are prohibited to take part in public procurement procedures.

The precondition to be cancelled from the list is that the companies or persons with legal liability in the company have been condemned for corruption, fraud, or are suspected or involved in investigations related to connection with criminal organizations.

The White List also takes into account criteria relating to good reputation with regard to the company as a whole as well as to the members of the management. The White List is managed by the "Prefettura" (territorial entities of the central government) and is accessible to public authorities.

Italy

Key point/background – Centralised procurement body

Public procurement in Italy is characterised by a very inhomogeneous federal structure. Therefore, the government envisages a massive reduction of the number of public administration agencies that can call for tenders (actually about 30,000). This large number of entities makes it difficult to control public tenders (for instance, what kind of tenders, based on which standards, the quality level of work performed, duration of a worksite). This unstructured approach brings about a lack of control as well as criminal infiltration and corruption.

Description of the measure in discussion/already in place

The aim is to strongly reduce the number of bodies which can call for tenders, merging them in order to ensure the best quality of procedures and technical specification as to design and management of public procurement procedures as well as more control opportunities with regard to the contract performance.

Malta

Key point/background – Exclusion from public procurement; black list

The government aims to tackle precarious employment in the procurement of public works by means of a new legal notice (L.N. 65 of 2015. Public procurement (Amendment) regulations, 2015). It notes that companies breaching public procurement regulations or the Employment Act could be liable to being blacklisted for between six months and two years.

Description of the measure in discussion/already in place

The measure is to be carried out by the Director of Employment and Industrial Relations who shall request the Commercial Sanctions Tribunal to blacklist an individual from participating in procedures for the award of public contracts if he:

(a) has been found guilty of an offence in terms of the Employment and Industrial Relations Act; (b) has failed to provide employees with a written contract of service;
(c) has failed to provide employees with a detailed pay slip containing all relevant details;
(d) failed to deposit wages or salaries by direct payment on the employee's bank account;
(e) fails to provide the relevant bank statements of wages and salaries deposited and copies of detailed pay-slips which are to be made available as and when required by the Director of Industrial and Employment relations;
(f) has subcontracted a public contract to another person employing the same employees of the principle contractor to carry out the same or similar duties for the execution of the said public contract.
In the run-up to introducing this legal notice, the government blacklisted two companies from public contracts for two years because of precarious work. During this time period the convicted party will be banned from bidding for government tenders.
Since the beginning of 2015, bidders for public contracts have also been obliged to offer a minimum hourly rate equivalent to the basic wage for civil servants.
Finally, the government has increased the number of inspectors to carry out more frequent onsite inspections.

UK

Key point/background - **Blacklisting**
In the UK procurement practice is somewhat elusive from the involvement of trade unions. Comparable to Italy, a vast number of public administration agencies exists which all have their own processes and minimal governance.

Description of the measure in discussion/already in place
Some UK public bodies have written into procurement procedures statements on blacklisting due to the persecution and exclusion of trade union members carrying out legitimate trade union business on the grounds of health and safety. Some Statements are worded more strongly than others. An extract from Cambridge City Council is below:
'Cambridge City Council deplores the illegal practice of blacklisting within the construction industry and will ensure that any company known to have been involved in blacklisting practices that have not indemnified their victims will not be invited to tender for contracts until they have:

1 Identified the steps taken to remedy blacklisting for all affected workers
2 Identified the steps taken to ensure blacklisting will not happen again
3 Given assurances that they do not employ individuals who were named contacts involved in "The Consulting Association", providing black lists with members of trade unions to private companies.

UNITE´s view is that all public bodies can adopt this practice with one common statement on this key blacklisting issue. There is legislation already in place to allow for this all be it not very strong and it is a known fact that the companies involved in the UK blacklisting scandal have not been subject to any penalties. On blacklisting there are 3 key issues that need to be addressed –

- Stopping blacklisters tendering for public funded contracts.
- Public bodies having the ability to terminate contracts, if a company is found to be blacklisting after the contract award.
- Heavy and realistic fines for perpetrating companies.

UK/Scotland

Key point/background - **Combat black-listing**
In Scotland certain companies offer a list of persons that engage in trade union´s activities against payment. This practice is prohibited by the Employment Relations Act 1999 (Blacklists) and by the Trade union and Labour Relations (Consolidation) Act 1992.

Description of the measure in discussion/already in place

In order to ensure that blacklisting is not used in connection with the performance of public contracts in Scotland, the government put in place two measures:

Any company which engages in or has engaged in blacklisting of employees or potential employees is considered to have committed an act of grave misconduct in the course of its business and should be excluded from bidding for a public contract.

The contract will be terminated if a supplier is found to have breached relevant blacklisting legislation during the course of the contract.

Switzerland

Key point/background – **Positive and negative list**

Today the provisions on Public procurement are regulated on two distinct legal levels (federal and cantonal level): in the "Bundesgesetz über das öffentliche Beschaffungswesen" (BöB, federal) and the" Interkantonale Vereinbarung über das öffentliche Beschaffungswesen" (IVöB). Both provisions are in process of reform.

In order to allow the contracting authorities to control the compliance with the contract conditions and to better comply with the target of sustainable procurement, as much transparency as possible about the bidder market has to be obtained. This includes knowledge about the location of contract performance and of production as well as about the whole delivery and sub-contractor chain. Self-declarations by the bidders are not sufficient, an in depth examination by the contracting authority is necessary. To support this control, a positive list has been established in some cantons and a negative list is aimed to be established at the occasion of the transformation of the new Directive into Swiss law by the Trade Unions.

Description of the measure in discussion/already in place

The positive list includes all companies that have undergone an in-depth control and have proven to fulfil all legal conditions in order to participate in public procurement procedures. Such a list has been established in the Kanton of Zurich by the Trade Union "Unia" in order to ensure the subcontractor's accountability. The Trade Union aims at implementing this kind of positive list also for the procurement sector. The list should include only those companies which are not in breach with their obligations of payment of social security contributions, taxes, as well as minimum tariffs. Moreover, the establishment of a negative list is planned, which enumerates all excluded bidders. This comprises bidders that violated working condition standards and other relevant legal obligations (social or wage dumping, discrimination) within the last 10 years. Such companies shall not be allowed to participate in public procurement procedures for this time span (i.e. 10 years). This centralised negative list shall be maintained for the whole territory of Switzerland and constantly be up-dated. Details should be regulated by way of ordinance.

5.2. Legislative measures to fight social dumping practices – fair level playing field

Austria

Key point/background – Combat against social dumping, equal pay for equal work in the same place
The construction sector is characterised by mobile working conditions and the employment of workers coming from the whole EU, often sent by companies without establishment in the country of the construction site. This offers a wide field of application of different, often unfair, labour conditions and wages.

Point of departure: An actual case
Members of the Financial Police, inspecting a building site came across 21 Polish, four Hungarian and one Slovenian citizen, who were carrying out dry wall installation work. Based on the written results of the interrogations it was established that the contracts for work were false, and by declaring "bogus self-employment" attempts had been made to conceal the true nature of the working relationships.

Legal assessment of the case: The Financial Police carries out inspections to check whether the Austrian wage provisions are adhered to. Here too, it must actually be checked on the basis of circumstances, whether the workers involved are "bogus self-employed", hence, workers who only pretend to be self-employed, but who in reality are employees. If this is the case it will be checked whether the wages the people concerned receive, at least correspond to the relevant collective agreement (here: building and construction industry—workers). If the applicable basic wage is undercut, it is a case of wage dumping. The pretence client, who is in fact the employer, would then be confronted with a high administrative fine and moreover could expect procedures to withdraw the trade licence respectively—if it concerns a foreign employer—being banned from being active in Austria for several years.

Description of the measure in discussion/already in place
In order to prevent unfair labour conditions when awarding construction works within public procedure, companies that were held liable by an administrative decision have to be excluded of the bidding procedure, as they cannot fulfil the specification criteria. Non-fulfilment of specification criteria is a knock-out reason.
Requiring the adherence to Austrian wages is one thing, their practical implementation another. It had only been provided for that workers could assert their entitlements under civil law. A posted Hungarian iron bender for example who continues only to be paid in accordance with

Hungarian provisions for his work in Austria, may sue for the difference to the Austrian Collective agreement for the building and construction industry. However, practice shows that this has hardly ever happened. In most cases, workers earn more abroad than in their native country, hence the incentive to claim the difference does hardly exist. Apart from that workers must expect that they will no longer be employed once they lodged their claim. Hence, in case of short-term posted or cross-border transferred workers, the sheer possibility to assert any claims themselves is not suited for enforcement. Moreover, the risk of the employer is very low. At worst he has only to pay what he would have to pay in the first place. Hence, trade unions and chambers of labour have requested for years that Austria sets up an official control mechanism with the power to impose sanctions if the wages and salaries provided for are not adhered to.

In 2011, Austria implemented the Anti-Wage and Social Dumping Act (Lohn- und Sozialdumpingbekämpfungsgesetz – LSDB-G), which stipulates a wide range of possibilities for the public administration to supervise the compliance of Austrian legislation referring to wages. This law is inspired by the principle of "equal pay for equal work in the same place**"** in order to prevent competition at the expense of wages. As the Posting of Workers Directive also includes cross-border transfer, this principle also applies to temporary workers, who are transferred/loaned from one Member State to another.
The LSDB-G now includes an official control mechanism for the wages and salaries provided for. Most provisions refer exclusively to employers from other EU and third countries with no establishment in Austria, employing workers with usual working place in Austria, posted to Austria or within a temporary employment agreement. Central provision is that any such employer has to pay the wages as set in the relevant legal (by law or ordonnance) or collective agreement. Any violation is regarded as an administrative statutory offence and penalised.

This mechanism does not only apply to posted but to all workers. That means, if a domestic employer underpays his workers, he can expect sanctions. However, the competence of the authorities varies. Whilst the local control for cross-border workers who have been posted or transferred is carried out by the Financial Police, workers, who have their usual place of work in Austria, are checked by the respective Regional Health Insurance Fund. If the Regional Health Insurance Fund finds that wage dumping exists, it will notify the regional administrative authority. The latter will then take legal action and, if applicable, impose the penalty on the employer.

In cases with cross-border reference, the Financial Police will in general not file the complaint itself, but use a separate institution at the Regional Health Insurance Fund, in Vienna the so-called LSDB Competence Centre. The Financial Police will therefore carry out a rough check on site and then forward the file to the LSDB Competence Centre to conduct an in-depth check. If the latter finds that the determined basic wage has been undercut, it will file a complaint.

Apart from the authorities mentioned, the Construction Workers' Holiday and Severance Pay Fund is also called to carry out checks and file complaints within the scope of its responsibility.
The level of sanctions orientates itself on the Aliens' Employment Act. The penalties range between € 1,000 and € 10,000 for each employee. In case of wage dumping affecting more than three workers, the range of penalties per employee is automatically increased. In this case, it lies between € 2,000 and € 20,000 per employee, and in the case of repeated infringement between € 4,000 and € 50,000.

Concrete example for the calculation of penalties: If a construction company would speculate that by underpaying wages provided for by the collective agreement it would obtain a competitive advantage over its competitors and if inspectors find that wage dumping on the building site has taken place in case of 5 workers, the employer's minimum penalty would be € 10,000 (2.000 x 5) respectively the penalties would range between € 10,000 to € 100,000. In the case of repeated infringement, the minimum penalty would be € 20,000 and the range of penalties € 20,000 to € 250,000. The employer could also expect his trade licence to be withdrawn or—in case of a foreign employer—being banned from working in Austria for at least one year.
However, the application of the law was hampered by the fact that it mainly depended on the workers´ willingness to initiate proceedings in case of abuse.

Therefore, in 2015, the LSDB-G has been amended according to the requests of Austrian Chamber of Labour and Trade Union in order close loopholes relating to control and workers´ information:

- Extension of the above mentioned authorities´ power of control: besides the basic salary they are empowered to assess the correctness of compensation for overtime, extra allowances, special remunerations and bonuses. Before the recast, they were only competent to control the correctness of the basic salary.
- If the employer is not able to provide the wage records on the construction site, the new penalties amount from 1000€ to 10 000 € per worker. Thus, the non-provision of records is threatened by the same penalties as the non-payment of the correct wages.
- The statutory period of limitation for cases of wage dumping has been extended from one to three years. Hence, unpaid wages and connected legal titles can be called up for the last three years.
- The limit of prosecution has also been extended from 1 to 3 years. Within this time span the competent authorities can enact onsite controls and refer eventual violations to the administrative authorities.
- In case that wage dumping against a worker has been legally established by the regional administrative authority (authority of first instance), all the employees of the relevant company have to be informed. This measure was deemed to be necessary in order to assure that all employees become aware of the eventual incorrectness of their payment roll and are able to seek redress.

France

Key point/background – Ex-ante in depth control

The Social Security Act (loi n°2013-1203 du 23 décembre 2013 sur le financement de la sécurité sociale) was amended in 2013 to reinforce the liability of contracting authorities for ex-ante in depth control.

Description of the measure in discussion/already in place

Prior to the award of a contract amounting to a sum above 3000 euro, the contracting authority has

- to check if the client contractor has fulfilled all social and tax obligations;
- to ask for the necessary documents to prove that the future client company is in conformity with social and labour law and has not been convicted for illegal employment;
- to check if the client contractor has paid the due social security contributions.

In case the contracting authority did not comply with this control liability, it is jointly held liable for the due contributions if it turns out that the client contractor employs illegal workers.

Germany

Key point/background – Combat against abusive wage cutting and control mechanisms

Construction and other services, which are comprised by the workers´ posting law, are only allowed to be attributed to such companies, which have signed a written obligation that they will pay their employees the remuneration amounting to the sum and corresponding to the conditions determined in the tariff contract to which the employee is bound under the workers´ posting law. This legal obligation is set in 14 of the 16 German Länder.

Description of the measure in discussion/already in place

As for other cases, where tariffs do not exist, the minimum wage of 8,8 € as set specifically for public procurement contracts has to be applied in case of public tenders outside the scope of application of sector-specific minimum wages. In Bremen (one of the German Länder), the federal legislator has established a central "special commission minimum wage" liable for the implementation and control. For this purpose, the federal law provides that the contracting authority has to agree with the contracting company that the tendering authority is allowed to undertake controls and to assess the payroll accounting, relating to the workers employed for the accomplishment of the public contract. Furthermore, it has to be agreed that the contracting authority is empowered to question the workers on the wages paid and their working conditions.

Moreover, § 16 al. 3 of the Tariff Adherence and Public Procurement Act of Bremen stipulates the general obligation of all contracting authorities to inform the "special commission minimum wage" about any awarded construction or service contract. The special commission registers these informations by an electronic collection system. The choice of control samples is further undertaken by the special commission on basis of the reported contracts. Within the selection process focus is put on such cases of public contracts which are typical for low wage sectors. The control is carried out by the contracting authority in close cooperation with the "financial control black labour", responsible for minimum wage controls outside public procurement.
In case that these controls reveal breaches threatened by penalties, they are reported to the competent authority "finance control black labour".
Moreover, within the context of sanctions specifically applying in public procurement cases, the federal law foresees a contractual penalty amounting to 1% for each breach of the minimum tariff, in case of repeated breaches up to 10% of the value of the contract value. The main contractor is liable for the abiding by the tariff applicable by the sub-contractors, which are employed for the execution of the contract. If manifold breaches occur, the contracting company may be dismissed without notice and asked for damages compensation.
And finally: The contracting company can be banned from any further public procurement procedure for an exclusion period of 2 years by a respective registration in the public procurement register.
Similar central control authorities exist in federal laws of Berlin, Nordrhein-Westfalen and Hamburg .

Italy

Key point/background - Combat against irregularity in payments of salaries and contributions

The construction sector in Italy is characterized by a low level of workers' rights. This fact is linked to several reasons. The most important one being that in general the award criteria applied in public procurement procedures is the lowest price. Trade Unions CGIL,CISL,UIL engage to improve the relevant legislation. Abuse of workers goes hand in hand with contribution evasion, unclear labour relations, absence of controls on construction sites by competent authorities, attempts of infiltration by organized crime in public procurement, lack of respect of health and safety measures especially with regard to subcontractors.

Description of the measure in discussion/already in place

To fight against abuses of payment of salaries and contributions, the Italian Public Procurement Act states that every company participating in a public procedure must produce a document certifying that payments of contributions to public social insurance agencies were correctly disbursed, including insurance against work injuries and pension contributions. This document is issued by "Cassa Edile" in accordance with national insurance companies for safety and pensions. "Cassa Edile" is a part of the bilateral relationship entity. It is a bipartite organism composed by Trade unions and employers´ representatives of national collective agreements (Sistema Bilaterale delle Costruzioni) and it is an entity established by the national collective agreement for construction workers that ensures the payment of a part of the workers' salary, such as vacation pay and other rights established by collective agreements.

This relevant document is called "DURC" (Certification of Labour Compliance, Documento Unico di Regolarità Contributiva).

If companies cannot provide this document to the contracting authority, they are automatically excluded from public tenders procedures.

The DURC is fully computerized and the contractors have to hand it over for every SAL (state of advancement of works) before asking the relevant compensation for accomplished works from the contracting authority. DURC is managed by "Cassa Edile", INPS (National Institute of Social Pensions) and INAIL (National institute of injuries on workplace).

Unfortunately, some loopholes have still to be closed: This system does not guarantee the payment of the monthly salaries. Some companies just pay the contributions in order to receive the DURC, which they have to hand over to contracting authority, without subsequently paying the monthly salaries to their workers.

Latvia

Key point/background - Prevention of wage dumping

Practice shows that the client contractors in the construction sector often pay a wages to their employees, which do not even amount to the average wage in the sector. In many cases under table pay is involved. To prevent spreading of gray economics, the "State Revenue Service" introduced amendments to the existing public procurement law.

Description of the measure (which will come into force on August 1, 2015)

All contracting authorities are obliged to evaluate if the tender is not abnormally cheap. All economic operators have to prove that their employees and the their subcontractor's employees are receiving at least 80% of the average hourly wage rate in the specific profession based on the relevant NACE code, for the first nine months of the last year. For example if company X is participating in the tender on January 1, 2015, then it has to prove that for the period between January 1, 2014 and September 1, 2014 (nine months) it has paid its employees at least 80% of the average hourly wage rate in the relevant sector based on the applicable NACE code. The amount of the average hourly wage rate for various sectors and professions is established by the State Revenue Service. These average hourly wage rates are publicly available on its website: https://www.vid.gov.lv/default.aspx?tabid=11&id=6864&hl=1

Norway

Key point/background - **Administrative regulation on wages and working conditions in public procurement**
In implementing ILO convention 94 (Convention concerning labour clauses in public contracts), an administrative regulation on wages and working conditions in public procurement was introduced. The regulation has since been evaluated by the EFTA court of justice and has been adjusted accordingly.
It aims at ensuring that public procurement contributes to creating a level playing field and fair competition and does not contribute to creating distortions in the labor market. The administrative regulation is also introduced to fulfill the obligations set out in the Posting or Workers Directive.

Description of the measure in discussion/already in place
The administrative regulation stipulates that companies, which provide services and construction work to public authorities, are obliged to apply wages and working conditions equal to those determined by generally applicable regulation or national collective agreements.

Portugal

Key point/background - **Level playing field, public procurement portal**
The «Instituto da Construção e do Imobiliário» (InCI) is the regulating entity for the construction and real estate sector in Portugal. The entitlement to exercise any of those activities is issued under its supervision (e.g. «construction authorization», «registration of the entity», «real estate operating licence»). Alongside, it tries to improve a «modern» and «competitive» market in those sectors through an «inspecting and supervisory action».

Description of the measure in discussion/already in place
From 2009 onwards, this institution, placed under the aegis of the Portuguese Ministry of Economics and Employment, publishes annual reports on the situation of these sectors, relying specifically on the data gathered through the «portal BASE», the «public procurement portal». The «portal BASE» was part of the new «Código de Contratos Públicos» (CCP) [«Public Contracts Code»], created to transpose the European norms (Directive 2004/18/EC) into the Portuguese legislation. The official reports highlight two distinctive aspects of this portal. First, it gathers in a single electronic portal all the information concerning public procurement in Portugal (being the first European Member State doing so). Even if there are 8 electronic platforms for the public procurement, those are accessible and connected with the «portal BASE» (InCI, 2013: 7, 16-17). Second, it seems to involve relatively high proportions of the total of contracts from the public procurement. Since 2009, tender procedures in Portugal must be performed through an electronic platform. The electronic public procurement rate in Portugal is 75% (2010), whereas the EU average is estimated to be less than 5%» (InCI, 2012: 9). For 2011, practically 62% of the procurement procedures were carried out using the electronic platforms for public procurement, a percentage that goes to 92% considering only the procedures related to values above the limits set in the EU Public Procurement Directives. The «InCi» states that the principal virtues of such electronic procurement are the «accountability» and «transparency» of the public organizations regarding public spending, besides offering exhaustive and immediate statistical information that any company or citizen can access.

5.3. Transparency measures for sub-contracting chains

Austria

Key point/background – Limitation of subcontracting chain

Austrian institutions are often confronted with workers´ claims against their employers of the construction sector relating to unpaid wages. Mostly, they come from other EU countries and cannot even identify who their employing company is, nor its name nor location. Of course, they are not able to identify the main contractor for whom their employer, normally a sub-contractor, was working. In most of the cases it turns out that the sub-contractor went bankrupt and did neither pay social contributions nor the workers´ wages, in which case the workers can refer to the publicly funded "Insolvenz-Entgelt-Fonds" (supplied by employers´ contributions and public funds) to be reimbursed.

This is a very unsatisfactory situation especially in the case of contracting authorities who tend to award the bid with the lowest price. However, it often turns out to be the most expensive one in those cases that the sub-contractor goes bankrupt and the public has to pay the workers´ wages.

Description of the measure in discussion/already in place

Following the lead initiative of the Austrian social partners of the construction sector (amidst others Gewerkschaft Bau-Holz) the Austrian legislator proposed to cut the sub-contractor´s chain at the second level except in case that the contracting authority allows to employ further sub-contractors for certain specified crafts and where this is objectively justified. However, this is not admissible for the critical tasks of the craft (§ 83 Abs 5 and 240 Abs 5 , draft Austrian Public Procurement Law).

Austria

Key point/background – Exclusion of subcontractors for critical tasks; ÖBB

ÖBB is the Austrian railway company in public ownership. It goes without saying that for safety and security reasons of its passengers, the main factor for ÖBB´s construction activities is the quality of the construction performance. The economic pressure on bidders is high, the market situation is strained. To improve profits, the client contractors more and more often recur to the business model of subcontracting.

Description of the measure in discussion/already in place

In 2014, ÖBB decided to set the following priorities: The critical tasks have to be carried out by the economic operator whose technical and economic specification had been verified by an in depth assessment when awarding the contract.

As quality often is watered down by the employment of too many subcontractors, ÖBB decided to include new award criteria into its tenders:

- At least 50% of the critical tasks have to be carried out by way of own performance
- Main subcontractors have to fulfil all specification criteria. They have to carry out 80% of the work by own performance
- Prior to the employment of any subcontractor, ÖBB has to consent
- Sub-subcontracting is restricted
- In case of reasonable grounds that a breach of these obligations has occurred, a contractual penalty applies.

Since June 2014, about 30 projects amounting to a total volume of ca. € 400 million have been awarded on basis of these principles.

Denmark

Key point/background - **subcontracting and exclusion grounds**
During 2014, a tripartite working group has been elaborating a proposal for a new law on public procurement on the basis of the new EU Public Procurement Directives.

Description of the measure being discussed
The proposal was presented to the Danish parliament on 18 March 2015 and is expected to enter into force in October 2015.
In the remarks for the proposal it says that social provisions can be used as long as they comply with the EU-law and Danish law. The trade union participates in several working groups in this area and works intensely with this subject.
It currently requests the right of the client to approve all subcontractors prior to their employment. Moreover, trade union asks for the exclusion of subcontractors that proved to be fraudulent in the past.

France

Key point/background – **Better framework for subcontracting**
Subcontracting is an important case for the French trade unions. Frequently, client contractors roll over practically the whole subject matter of the contractual tasks on subcontractors, thus completely watering down the liability and in the end leaving society with the costs of non-compliance with the contractual obligations.

Description of the measure in discussion/already in place
Article 54 of the Public Procurement Act foresees the admissibility of subcontracting. However, the contracting authority can demand that certain tasks which are deemed to be essential for the contract have to be undertaken by the client contractor himself. This provision is further defined by the Law concerning sub-contracting (loi du 31 décembre 1975) specifying that although subcontracting is admissible, a significant part comprising certain essential tasks of the contract has to be undertaken by the main contractor.

Italy

Key point/background and measure – **Subcontractors and involvement of trade unions**
An important measure to ensure transparency for subcontractors is the obligation to forward to the contracting authority the list of subcontractors to be involved in the execution of the works prior to the beginning of construction works on the site. The access to the construction site is subject to authorization. Authorization is issued by the contracting authority. The following persons are endowed for inspection: representatives of the public entity, the labour inspectorate or the Health and Safety authority. Breaches of relevant legal provisions are threatened by administrative sanctions.

Description of the measure in discussion/already in place
Article 118, indent 6 of the Public Procurement Code (Decreto legislative 163/06) establishes that "Prior to the beginning of the work, the contractor as well as the subcontractors through him shall provide the client with documentation confirming that the social security authorities, including the Local Construction Fund, have been notified of the work and provided by a copy of the plan according to the provisions in paragraph 7 (plan on safety at work place)." In order to enable the payment of the amounts due on completion of various stages of the work and completion of the work as a whole, the contractor, and through him, the subcontractors shall provide the client authority or administration with a Single Insurance Contribution Payment Certificate (DURC). The DURC is mandatory to perform construction contracts under a building permit. The effect of this regulation is that all the employers in the construction sector must abide by the applicable collective agreements, otherwise the certificate is not issued. As a consequence, a tenderer who does not apply the sector-specific collective agreement is excluded from the tendering procedure.

Moreover, prior to the beginning of works the contracting company has to send a "Preliminary Note", indicating every person involved in the works to the competent authority (Labour Inspectorate and Health and Safety Agency).
The national collective bargaining agreement for construction workers also foresees that the contractors have to inform local trade unions about the number of subcontractors, the collective bargaining agreement applied to the workers, the number of workers involved in the execution of the works and the duration of works.

Italy

Key point/background and measure – Requirement of the client contractor to perform certain tasks
The Italian Public Procurement Code provides specific rules for the protection of the rights of workers executing a public contract as well as for the selection of contractors and subcontractors.

Description of the measure in discussion/already in place
The subcontractor must be authorised by the contracting authority which verifies the content of the contract, the kind of activity subcontracted and the qualifying requirements of the subcontractor. Moreover, only a maximum of 30% of the value of the prevailing work (so called "categoria", which must be specified in the tender) for which the contract is to be awarded can be subcontracted to a third party. Further subcontracting is not allowed.

Netherlands

Key point/background – Code of conduct formulated by the client contractors
In 2008 a group of large contractors formulated a code of conduct. The main aim of the code was to elaborate a fair and transparent treatment in a chain of production among clients, contractors, subcontractors and suppliers. Moreover, the code also included several principles for a more social and sustainable procurement. As a follow-up of the initiative, an independent association *Bewuste Bouwers* (Conscience Builders) was formalised in 2010 with five basic principles: transparency, safety, sustainability, quality and social conduct. (http://www.bewustebouwers.nl/organisatie)

Description of the measure in discussion/already in place
The client contractors stated that they expected public and private clients to take more account of societal effects of the building activities. Therefore, the work should be based on price and quality, with more room for innovation.

Part of the code is the notion of the joint liability of the client and the main contractor. Together with the client the contractors shall guarantee a safe and healthy workplace, with social and sustainable working methods. The involved companies have agreed to integrate the principles of the code in their daily business.

Communication is the key value in the approach and the safety applies to the workers, visitors and the local residents. On the website of the association several projects are listed, which received a site related certificate as a result of the observance of the principles of the code. Auditors may visit the sites to assess the compliance with the principles and the certificate can be withdrawn in case of a negative audit. In 2013 a (completely revised) handbook was produced. Unfortunately, the chapter on the social dimension is superficial, apart from the health and safety norms. There is mostly reference to clean facilities and to the engagement of minorities and apprentices.

Hitherto, observers signal that the principles have not become popular; even the main procurement offices that deal with public tenders often do not know about the existence of the code. Nevertheless, according to a recent article on the association's website the code has produced some effects. The authors cite several examples where the local authorities have integrated the code in their tender. An ad random glance over the 854 certificated and registered sites reveals that especially ecological concerns and the relationship with other stakeholders, like the clients or the local residents in the neighbourhood of a building project (noise nuisance,

waste management), have become a core aspect of the application of the code (http://www.bewustebouwers.nl/wp-content/uploads/2014/10/Bouwend-NL-artikel-Jansma-en-provincie-Friesland-sept-2014.pdf visited 23-03-2015).

Norway

Key point/background - **Limitation of the number of subcontracting levels under the main contractor**

Both public control authorities, the trade unions and several research institutions claim that the more levels under the main contractor, the less transparency and control. From this factor derives more social dumping and crime in the construction sector. By shortening the contracting chain it will be easier to put in place control mechanisms to secure compliance with legislation. Several local communities have already adopted maximum levels in the contracting chain, and experience shows that the big contractors quickly adapt to such legislation. The Norwegian government is working on the implementation of the new EU Public Procurement Directive. The Norwegian Construction Trade Unions intend to campaign for the inclusion of good practices that have been established by local authorities into national law.

Description of the measure in discussion/already in place

In 2015, the government will change legislation so as to have the possibility to limit the maximum number of admissible subcontracting levels in the subcontracting chain in public procurement. It is expected that it will be left to local and regional authorities to stipulate the limitation according to local preferences and necessities. The parliamentarian opposition has proposed to have an absolute maximum limit of 2 levels under the main contractor.

Public procurement giants like Statsbygg (public property owner), Veivesenet (Road construction) and Forsvarsbygg (Defence property) already apply a limit of two levels of subcontractors in their procurement policy.

Norway

Key point/background - **Contractor clause and demand of own employees**

Originally, this regulation was introduced to combat misuse of false self-employment. Today the regulation is also used to tackle misuse of obscure work contracts and to reduce the number of hired workers with temporary contracts, a business model incompatible with the legislation on regular work contracts. This measure aims at supporting reliable companies contracting a large number of permanent employees and possessing own competence. Experience shows that these companies are more trustworthy and often are organized workplaces ("Union Workplaces- Safer Workplaces").

Description of the measure in discussion/already in place

In the administrative regulation on public procurement a provision stipulates that the contracting company shall dispose of own employees. For construction work executed in Norway the main contracting authority can define as a specification criterion for a contract to be executed that the construction work has to be performed by the contracting company and its own employees, or by subcontractors and their employees or by employing legally hired workforce. The main contractor can demand that the employment of single person companies, which are not the main contractor or a subcontractor, has to be justified.

Slovenia

Key point/background – Combat against lenient payment discipline

In the Republic of Slovenia the Public Procurement Act lays down the mandatory actions required of contracting authorities and tenderers in awarding public supply contracts, public service contracts and public works contracts. The competent authority is the Public Procurement Directorate. Due to increasing lack of payment discipline, which affected subcontractors as vulnerable participants in public procurement, the legislator´s attention was turned on the regulation of this legal area to avoid that subcontractors "plunge" as a result of the principal contractor´s default. It aims at reinforcing the strength and resistance of the subcontracting chain, indirectly benefitting the subcontractor´s workers.

Description of the measure in discussion/already in place

In order to ensure financial discipline, the Public Procurement Act includes provisions in case the client contractor employs subcontractors. In such a case, the contracting authority is entitled to pay directly to subcontractors, on the basis of endorsed invoices or statements. Furthermore, the main contractor is obliged to attach endorsed invoices or status reports of his subcontractors to his own invoice or statement. Violation of these provisions is considered to be grave misconduct and is punishable.

Spain

Key point/background – Limitation of subcontracting chain

The signatories of the general construction industry agreement expressed to the parliamentary groups and the government the need to regulate outsourcing in the construction sector. This consultation resulted in the Act 32/2006 of 18 October, which regulates this subject matter.

Description of the measure in discussion/already in place

The measure is twofold: On the one hand, it limits the subcontracting chain to maximum two levels of companies. The main contractor can subcontract any work package such as for example shuttering, provided that the subcontractor has a company structure (offices), equipment, tools and machinery, as well as offers training for his employees

On the other hand, it establishes a minimum percentage (30%) of workers to be employed with permanent contracts at every level of the subcontracting chain. These provisions showed a practical improvement as to workers´ conditions and a significant reduction of risks resulting from the mere fact of temporary employment.

5.4. Strengthening of main contractor´s liability

Austria

Key point/background - **Liability of general contractor with reference to public procurement** (§ 7 c of Austrian labour contract alteration act)
This legislation aims at resolving the problem that public contracts, mainly in the construction sector, are awarded to companies, which at the end of the day do not carry out the contract by themselves but shift at least parts of the works to be carried out by other companies. Those companies often do not fulfill their contractual obligations by paying the wages, taxes and social security contributions for their workers but go bankrupt. The payment obligation is shifted to the Insolvency-Compensation Fund. The final result is that the client contractor earns the reward for its performance whereas society bears the cost.

Description of the measure in discussion/already in place
indent 2 of § 7 stipulates the main contractor´s liability as follows:

- The main contractor is liable as guarantor for all wage claims of workers. The main contractor´s liability only comes into being if the obligation has been claimed unsuccessfully against the primary debtor before court.
- The same is valid in cases that the subcontractor passes the whole or part of the contract to further subcontractors against contractual agreement.

Indent 3 refers explicitly to the construction sector without special reference to public procurement law. The main contractor is generally held liable as deficiency guarantor. This means that the guarantor can be held liable in the first place, even if insolvency proceedings relating to the main debtor (e.g. the subcontractor) has not been opened. The same is valid in case that the main contractor is of unknown current location at the maturity of the payment.
This general liability is limited insofar as the workers´ claims for remuneration have to be asserted by judicial procedure within 6 months after having accomplished their performance, otherwise the main contractor´s liability expires.
However, the main loophole is opened be the provision that the liability of the main contractor expires in case of judicial declaration of bankruptcy of the subcontractor. A case of legislative contradiction!
In conclusion, it has to be stated that the aim of the above mentioned provision is well intentioned, however, it still needs improvement:
First of all it takes for granted that the workers concerned know that their production site has been established within a public procurement contract. Secondly, they have to know their client contractor. But even if they have this information, they lack the right of access to the public procurement contract. There is no transparent, freely accessible register in Austria, which offers information about public contracts, which main contractor has been awarded and which subcontractors were assigned. Hence, it is impossible to establish if incompetent or insolvent subcontractors have been contracted. As this is the pre-condition for the main contractor´s liability according to indent 2, it is practically unenforceable.
The second alternative in indent 3 is limited to the construction sector. The systematic social dumping within this sector is based on the establishment of an opaque chain of subcontractors, at the end of which is to be found a company established for the only reason to make workers work without payment and to transfer the payment obligation to the insolvency-compensation fund. If the direct liability access to the main contractor is excluded in case of insolvency of the subcontractor, then in most of the cases the - at first sight straight forward and efficient - liability proves to be quite powerless.

Therefore, an expert group „combat of social dumping“ has been established which also aims at the improvement of the main contractor´s liability, as the current legal situation provides for the total elimination of responsibility in case of the insolvency of the subcontractor. Hence, the system still relies on the last piece of the chain. Until the workers have obtained all necessary information, insolvency of the subcontractor occurred and the main contractor´s liability expires. The positive side of a new proposal is the information obligation. According to this, the company has to inform the workers within 14 days about all subcontractors and passed on construction works. In case of deficiency, the main contractor is held liable for all passed on construction works, until he provides the information requested.

France

Key point/background – Joint liability of client contractors and subcontractors for the compliance with minimum wages

Article 5 of the law of 10.7.2014 imposes a joint obligation to abide by the payment of minimum wages based on law or collective agreements.

Description of the measure in discussion/already in place

In case that the building contractor or the contracting authority is informed about any non-payment of the due wages by the client contractor or subcontractors, they are obliged to immediately put an end to this situation. They have to provide a written prove to the administrative authority that the wages have been paid. At the same time, the responsible control agent has to be informed. In case that the contracting authority respectively the building contractor breaches this obligation, he is held jointly responsible with the subcontractor to pay the salary, penalty and contributions.

Germany

Key point/background – Liability for minimum wage throughout the subcontractors´ chain

Often the main contractor offers calculation details within his bid that covers the wages as set by collective agreements. However, by employing sub-contractors, in many cases these wages are not paid at all or a much lower salary is offered. In many cases, the workers on the site are not employed but act as bogus self-employed contractors on whom collective agreements, minimum wages and minimum health and workers´ protection rights do not apply.

To combat these unfair practices, many German Länder introduced the liability of the main contractor to pay minimum wages or wages as set in collective agreements, if the subcontractor fails to do so.

Description of the measure in discussion/already in place:

§ 14 Arbeitsentgeltgesetz (Act on the Work´s Remuneration – relating to sector specific tariff minimum wages) and § 13 Mindestlohngesetz (Act on Minimum Wages – relating to the newly introduced minimum wage applicable in the whole country) stipulate that the legal minimum wage is owed throughout the subcontractor chain and regardless of culpability by the main contractor. From this follows that in case of bankruptcy of one of the sub-contractors, the workers can ask regress from the main contractor. The same accounts for the payment liability for social contributions. This liability brings about the obligation of the contracting authority to carry out a plausibility assessment of the bid, the requirement of a guarantee of the client contractor for regular and timely payment of the minimum wage, as well as the obligation of the main contractor to undertake all measures to oblige his subcontractors to undertake the same obligations. This guarantee further includes the agreement on an information or even necessity of consent by the contracting authority if subcontractors are employed. Additionally, enforceable securities to mitigate the liability risk of the contracting authority are often agreed on, as well as the right of the contracting authority to step back from the contract in case of non-payment of the minimum wage.

Switzerland

Key point/background – Joint liability of contractors´ chain; compulsory control of negative list

This measure includes a twofold aim: Firstly, to avoid the shifting of risks from the client contractor to the weakest part of the contracting chain. Secondly, to oblige the main contractor to undertake certain control steps prior to any employment of sub-contractors.

Description of the measure in discussion/already in place

The client contractor is held jointly and wholly liable for the non-payment of minimum wages and non-compliance with working conditions by the sub-contractors. Moreover, sub-contractors that are enumerated on the black list are to be excluded from any contract. The sub-contractor has to prove the compliance with working security and working conditions.

However, the client contractor is held reliable on basis of civil law only in case that the subcontractor was sued without success or cannot be sued. The client contractor can free himself from liability if he is able to prove he undertook a due diligence assessment of the subcontractor´s application of minimum wages and legally binding working conditions. This he can achieve by providing convincing evidence by relevant documents.

5.5. Most economically advantageous price – lowest price

Austria

Key point/background – Initiative "Fair Procurement"

This initiative originates from the construction sector, where the social partners – companies of the construction sector and the trade union of the construction sector (Gewerkschaft Bau Holz) – decided to take decisive steps against:

- on the one hand unfair competition by companies not abiding by legal standards and collective agreements;
- on the other hand wage dumping and non-compliance with workers´ rights.

The success of the initiative until now – public procurement, normally considered to be a boring issue for specialised lawyers, was made presentable for Joe Citizen – is to be explained by the joint action between representatives of companies and the sector-specific trade union.

Description of the measure in discussion/already in place

In its article 67 indent 2 the new EU Procurement Directive paves the way for mandatory application of the most economically advantageous price in a specific sector. Implementation into national legislation implies that the contracting authority is not allowed to refer to price only as a criterion but has to establish at least one more quality criterion. This seems at first sight simple and an easy way to achieve better working conditions and to reduce predatory price competition on the workers´ shoulders. However, a lot of fine tuning is necessary in order to avoid bogus criteria, like for example a longer time of guarantees or other so called "zero-criteria". With a view to the strong opposition of the contracting authorities, it seems even to be necessary to establish a list of criteria that are deemed to be valid in order to establish the best price-quality ratio within the meaning of article 67 indent 2 EU Procurement Directive.

Of course, the initiative also tackles the issue of sub-contracting chains by proposing a) the limitation to maximum two levels b) the equation of personnel leasing agencies and affiliated companies with sub-contracting companies.

Moreover, the initiative proposes a ban from procurement procedures for a period of 12 months in case of legally binding statement of infringement of labour rights.

By now, the Austrian government has forwarded a draft which includes the main demands of the initiative for public consultation.

Bulgaria

Key point/background – Award criterion "most economically advantageous tender"; metro Sofia

Bulgarian public procurement is characterised by price dumping often resulting in the bankruptcy of the bidder, followed by non-payment of sub-contractors and their workers involved.

Therefore, when the expansion of the metro network in Sofia was decided, a combination of strong exclusion grounds and award criteria to prevent social dumping where set by the contracting authority.

Description of the measure in discussion/already in place

At the specification stage, strong exclusion grounds and clear contract performance conditions were determined ex-ante. The most economically advantageous price was set as award criterion. Sub-contractors had to proof their economic and technical performance capacity. The final payment of the contracting authority was only to be effected after the written proof of the client contractor that he has paid all sub-contractors, as well that all public debts (social security, taxes) have been cleared. Moreover, in 2006 a Chamber of Builders has been established. Any company that intends to participate in a public tender has to be registered with this Chamber. Prerequisite to its registration is the fulfilment of a number of social criteria requirements.

Italy

Key point/background – Award criterion "adequate and sufficient" labour cost

In order to avoid that the contract is awarded to a contractor on the basis of the lowest price on the shoulders of the workers´ wages, a new mechanism hast been introduced in order to ensure that the wages of the most representative collective agreement are paid.

Description of the measure in discussion/already in place

When the awarding criterion is based on the criterion of the lowest price, the contracting authority has to assess that the economic value of the tender is "adequate and sufficient to cover the labour and safety measures cost" and if it is "reasonable compared to the size and characteristics of the works". The adequate and sufficient labour cost is calculated on the basis of tables that are periodically collected by the Ministry of Labour, based on economic values of welfare and social security rules provided by collective agreements signed by the comparatively most representative trade unions.

Poland

Key point/background - Abnormally low tender

Lowest price is usually a reason for distortion of competition and cause of social dumping. Reliable companies cannot be competitive in circumstances when other companies are offering abnormally low tenders. This is the reason, why exclusion of bids with an abnormally low price is such an important tool for contracting authorities. However, as experience in Poland shows, this can only be a first step to prevent social dumping.

Description of the measure already in place (since October 19, 2014)

According to Public procurement law article 90.1., the bid has to be assessed if the price of a tender appears to be abnormally low in relation to the subject matter of a contract and raises doubts of the contracting authority as to the possibility of performing the subject matter of a contract .This clarification is mandatory, if the price is lower than 30% of the contract value or the arithmetic average of prices of all submitted tenders. The clarification obligation includes the submission of evidence in particular as regards: the economic method of contract performance, technical solutions chosen or the exceptionally favorable conditions for performance of contract available to the economic operator, the originality of the economic operator's design, and finally labour costs, the amount of which may not be lower than the minimum wage established.

Serbia

Key point/background – ILO Convention 94; scoring of social award criteria

After the ratification of the ILO Convention 94 (Convention concerning labour clauses in public contracts) in the National Assembly of the Republic of Serbia which made its provisions part of the national legislation, and thanks to the initiative made by the Autonomous Trade Union of Road Maintenance Workers of Serbia, the creation of the conditions for the application of the provisions and the spirit of this Convention was launched.

Description of the measure in discussion/already in place

Within these efforts the following activities and measures were taken: The Autonomous Trade Union of Road Maintenance Workers of Serbia and the Ministry of Construction, Traffic and Infrastructure agreed to form a Working Group that would take measures to provide for the application of the provisions of the ILO Convention 94.

In accordance with this agreement and the decision of the Ministry issued on 2.10.2014, this Working Group was formed, comprising representatives of the Ministry of Construction, Traffic and Infrastructure, Central Registry for Mandatory Social Insurance, Ministry of Finances (The Tax Administration), Ministry of Labour (Labour Inspectorate), Agency for Business Entities and Autonomous Trade Union of Road Maintenance Workers of Serbia. The working group was endowed with the following tasks:

- To determine criteria to set the level of compliance of business entities with the legal obligations undertaken through contracts in the field of traffic infrastructure, as well as in relation to the design, construction and supervision of standards and recommendations of good practice set by the ILO, and as to the monitoring of financial, business, technical, and human resource capacities;
- To create a preliminary list of business entities and other organizations which abide by the established criteria.

According to these tasks, the Working Group established the following criteria:

- Criterion that indicates the number of persons employed for an indefinite period of time, for a fixed period of time and the number of persons hired on the basis of contracts for temporary and occasional jobs;
- Criterion that indicates the frequency of light and heavy injuries at the workplace;
- Criterion relating to "undeclared work",
- Criterion relating to the indebtedness of the business entity and to the contribution to the public revenue (taxes, contributions for mandatory social insurance – retirement and disability insurance, health insurance and insurance for the case of unemployment).

These criteria correspond to a „scoring", that is processed by an index. Certain criteria have positive implications while the others have negative implications. Multiplying the values of the criteria with the index, one manages to achieve the equalization of values of all criteria in order to avoid the dominance of certain criteria over the others.

Assessment example for the number of points based on a specific case:

1. The Company has 759 permanently employed workers, multiplied by the factor 3 leads to 2277 points;
2. There are 236 employees working for a fixed period of time which is multiplied by the factor 2 scoring 472 points;
3. There was one serious occupational injury, multiplied by the factor 500, thus scoring 500 points;
4. There happened 5 smaller injuries which are multiplied by 100, scoring 500 points;
5. There was no undeclared work reported;
6. Debt based on public revenues is 2.912.407.170,06 dinars, divided by the index 100.000 scores 29.124.07.

Adding the points for positive criteria and then reducing them by the points for the negative criteria sums up to **27.375,07** which is the number of points relevant for the awarding procedure.

According to the above mentioned criteria a list has been established, containing about 540 business entities out of which almost one half have negative results.

In the next period the Working Group has the task to quarterly update the list.

At the same time, starting with the second half of 2015, the „Central Registry for Mandatory Social Insurance" has the obligation to start updating and sending monthly data about the type of employment relation of hired people and data about the basis (paid salaries and wages) on which contributions are paid as well as the amount of these contributions.

The Working Group made a recommendation for amendments of the Law on Public Procurement in accordance with the previously mentioned criteria.

In any case, already the adoption and publishing of this list has had a positive effect on the behaviour of the contractors and subcontractors especially when it comes to the public contracts, or labour clauses in public contracts. This activity, for example, led to the improvement as to the regularity in payments of salaries and contributions, as well as with regard to the type of employment of people hired leading to the predominance of permanently employed workers.

It is obvious that there is still a lot of work ahead of trade unions, however, it is certain that they will manage to establish a system where the public contracts will be awarded only to such employers, who respect labour clauses, or to those, who regularly pay salaries and contributions for mandatory social insurance and whose employees have a permanent contract, as well as those who do not have reported labour related injuries.

Switzerland

Key point/background – Mandatory inclusion of quality criteria in the awarding procedure

According to the demand of the Swiss trade unions, the bids have to be assessed not only on the basis of the price but also on quality criteria. This is necessary to secure that the contracting authorities can fulfil their tasks relating to social policies. Such provisions already exist in some "Kanton" and shall be introduced on federal level. Moreover, criteria that aim at releasing the pressure on workers by employing them on normal contract conditions, thus not passing on the risk, shall account for additional points in the award weighting.

Description of the measure in discussion/already in place

The relevant provision (art 31 the Interkantonale Vereinbarung über das öffentliche Beschaffungswesen IVÖB which is under reform process) shall be amended in such a way that the bids have to be assessed on the basis of price and quality criteria. The quality criteria are cited in the legal provision and comprise amidst others life cycle costs, delivery conditions, sustainability, client-related service. The public authority awards the contract only to such companies that guarantee the compliance with minimum working conditions at the location of performance. These include minimum tariffs regardless of whether they have been declared binding, the standard working conditions and, where such provisions do not exist, the factual working conditions according to the principles of the relevant profession and location of performance. If necessary, equally represented entities have to be heard. Such entity could be a "Tripartite Commission" as it has already been established by the legislation on dispatched workers on basis of the relevant EU directive (art. Art. 5 Entsendegesetz).
In case the contracting authority does not use capacity oriented variable working times, this fact qualifies for a positive award criterion (new Art 31). Moreover, any company that employs apprentices shall be awarded with extra points within the awarding procedure, as Trade Unions have demanded.

5.6. Social Considerations

Austria

Key point/background – Joint consideration of social aspects in contract conditions; City of Vienna

The Vienna administrative body (Magistrat der Stadt Wien) regularly sets the conditions and modalities for all its subordinate contracting authorities. These conditions are established according to the result of a coordination procedure between subordinate authorities as well as its outsourced companies under public ownership. These conditions and modalities ("general procurement conditions of the City of Vienna) explicitly refer to the application of certain social clauses, control mechanisms and right of withdrawal in case of violation of contractual clauses. This set of rules is declared mandatory by ordonnance of the chief civil servant of City of Vienna.

Description of the measure in discussion/already in place

The first relevant clause refers to the ban of exploitative child labour which opens the right of withdrawal from the contract. The client contractor is held liable for all subcontractors and providers. The second set of clauses refers to subcontracting, causing the major problem with regard to the contract performance. The general conditions establish a ban to subcontract the whole subject matter of the contract. Subcontracting is only admissible after the explicit consent of the contracting authority. The same accounts for the change of the subcontractor. The contracting authority has the right to refuse a change in case of lacking qualification or violation of the ban of exploitative child labour.

Moreover, the liability for the contract performance remains with the main contractor. The same accounts for personnel leasing.

Although the City of Vienna could have included many more social and vocational aspects into these general contracting conditions, they are a good basis to agree on more in the future.

Austria

Key point/background – Apprenticeship; Guidelines – City of Vienna

At the beginning of 2013, City of Vienna started a pilot project aiming at setting priority to companies offering training for young people when directly awarding public contracts. This measure emphasizes the willingness of the City to give preferential treatment to such socially responsible companies. To support its tendering entities, City of Vienna devised a so called "work tool".

Description of the measure in discussion/already in place

The pilot project takes into consideration that not all Member States offer "dual" training like it is typical for Austria and Germany and therefore refers to a wider definition, taking also into consideration also comparable methods of training. Those companies, which have trained at least one apprentice for at least three months within the last three years shall achieve special points within the award evaluation.

Also, the measure only applies in the construction sector when direct award is possible, that is with tendering limits below the thresholds of the EU Procurement Directive and with no relevance for the internal market.

In order to alleviate the burden on the contracting authority, the register of client contractors (Auftragnehmerkataster Österreich) reports the apprentices of the registered companies on a yearly basis and makes it evident for the contracting authorities.

Belgium

Key point/background – One specialised regional helpdesk 'RenoWatt'
Basic aim is to assist local initiatives in the field of energy friendly procurement that focus on the creation of long-term and sustainable employment.

Description of the measure in discussion/already in place
Starting point of the project was the creation of the GRE (Groupement Redéploiement Economique) in 2004 after the announcement of the closure of an Arcelor Mittal plant. Basic reasoning is that with a large majority of the public building stock dating back 20 years, there is a lot to win with an ambitious energy saving renovation project (of 60% of the existing stock) that targets the decrease of the total of the energy consumption. In total 10 regional organisations in the Liège region participate. A unique helpdesk has been created. Important earmarks are the social responsible procurement of the different sites and the recreation of jobs. The trade unions back up this project and participate in the working group that looks after sustainable and socially responsible procurement (for instance, with long-term employment perspectives).

Belgium

Key point/background – Prioritise social responsible procurement
The (regional or national) government formulates a policy that prioritises social issues in procedures and provisions.

Description of the measure in discussion/already in place
The council of the Brussels region formulated already in 1998 the obligation to include social and employment concerns in the procurement regulation (for projects of 750,000 euro and beyond). It created an intermediary office (Actiris). Actiris is engaged as a coordinator that has the task to promote and control the use of social clauses in the procurement of works and services.
Between 2008 and 2013, thirty educational and informative campaigns have been launched for tendering authorities in order to promote social clauses. A helpdesk was financed to assist with eventual barriers in the formulation of social and sustained conditions. In participating communities the future procurement plans were assessed with a view of tracing possibilities for responsible procurement. The regional authority installed also an Alliance for Employment – Environment – Sustainable construction. An assessment of the functioning of the helpdesk led to an update of the circular that illustrated and explained the possibility to work with social clauses.

Denmark

Key point/background - Fight against social dumping, fair wage.
In June 2014 a Circular on Labour Clauses in Public contracts was presented. The circular states that all central authorities (ministries, executive agencies etc.) must apply labour clauses in accordance with ILO Convention no. 94 ensuring that employees of enterprises that provide services to public authorities and contracting entities are granted common pay and working conditions.

Description of the measure already in place (since July 1, 2014)
More specifically, the circular states that the contracting authority must set requirements in the contract to ensure that workers employed by contractors and sub-contractors who contribute to the performance of the contract receive due payment (including special allowances), hours of work and other working conditions which are not less favourable than those established for work of the same character under a collective agreement, contracted by the most representative organisations of workers and employers in Denmark in the trade or industry concerned and being applicable throughout the Danish territory.

The contract must include provisions that specify the documentation requirements to be met by the contractor. Furthermore the contracting authority is obliged to carry out the necessary control of whether the contractor and any sub-contractors comply with the labour clause.
A part of the Circular recommends that also all local councils and regional authorities apply labour clauses in construction and civil engineering contracts. This is also reflected in the agreement of 3rd June 2014 between the government and the municipalities (LGDK) regarding the finances for 2015, where it says that "The government and Local Government Denmark (LGDK) … agree that labour clauses must be expanded to all local supply contracts regarding construction work…".
The Circular has resulted in a more positive climate as to labour clauses in connection with public clients, and since last summer many local governments have introduced such clauses – both labour and training clauses.

Denmark

Key point/background – Labour Clauses, enforcement control

The Danish trade unions in BAT are working closely with local governments and the public authorities in order to prevent social dumping. We try to influence the decision makers where ever we can and have representatives in several governmental working groups regarding social dumping.

For some time BAT has been pushing for the implementation of the circular on Labour Clauses that was presented in June 2014. It continuously tests the ability of the clauses to enforce fair wage and working conditions and prevent social dumping. For the time being the challenge now is the enforcement of the clauses and the control of the demands in the clauses. BAT´s assessment is that this part is totally up to the unions.

Description of the measure in discussion/already in place

The Danish construction unions in BAT have initiated a project focusing on the building projects with construction costs of more than 65 mio. Euro. The project consists amongst others to contact the clients in order to start a dialogue and a corporation regarding a forthcoming building project. BAT offers support regarding a range of issues, e.g. input regarding labour clauses, information about bidding companies, exchange of information regarding legal cases and incidents with contractors and subcontractors. It also provides information for foreign companies regarding the Danish model.
BAT has a website that focus on exchange of information among all the local unions in Denmark. Here we can tell good stories regarding the contact to clients, health and safety, successful ways of organising etc. We have plans about expanding with experience regarding foreign companies that may benefit others. It is an easy way to get in contact with colleagues around the country (http://batkartellet.dk/Overblik-og-inspiration.asp)

At another website BAT has collected information about labour clauses for the benefit of politicians, local unions, public authorities etc. Here the best examples of labour clauses around the country can be found (http://arbejdsklausuler.dk/)

France

Key point/background – Joint liability of client contractors and subcontractors; alarm mechanism concerning the sleeping facilities at the site

Articles 4 and 5 of the law of 10.7.2014 impose an alarm obligation on the building contractor ("maitre d´ouvrage") and the contracting authority.

Description of the measure in discussion/already in place

Both, client contractor and the building contractor have to immediately inform the labour inspectorate if they get aware of the breach of rules concerning the workers´ sleeping facilities, thus breaching "the human dignity" as defined in the Penalty Code. The administrative authority imposes on the client contractor and all subcontractors the obligation "to achieve a result". The addressees of this injunction are jointly liable. In case of non-compliance the administrative authority is in charge of providing decent sleeping facilities at the expense of the client contractor and subcontractors.

Ireland

Key point/background – Social clauses project group; Grangegorman Development and Developed Schools Build Programme; enhancement of apprenticeship; reintegration of unemployed

Irish public procurement policy tends to be more concerned about 'levelling the playing field' for small and medium size enterprises ("SMEs"). The vast majority of the government guidance documents encourage the use of social clauses which promote the participation of SMEs in tender competitions. By contrast, the State has been reluctant, to date, to use public procurement to prevent social dumping and to ensure compliance with sub-contractors rights.

Prior to the establishment of the OGP (Office of Government Procurement), public procurement policy did not encourage the inclusion of social clauses in public contracts.

Description of the measure in discussion/already in place

Within six months of its establishment, the OGP created a "Social Clauses Project Group". The aim of the pilot project is to identify public contracts where social clauses could be deployed to contribute to employment or training opportunities for long term unemployed. The project is concentrating on examining the use of social clauses in contracts where employers are likely to be employing additional workers to deliver the contract. The project is in particular reviewing the use of social clauses in two current contracts: Grangegorman Development (The Grangegorman Development Agency is a statutory agency established in 2006 by the Irish Government under the Grangegorman Development Agency Act 2005 to redevelop the former St. Brendan's Hospital grounds in Dublin City Centre) and Developed Schools Build Programme. In the Developed Schools Build Programme, the social clauses included in the Public Works contracts require that:

- "10% of the aggregate time worked on site to have been undertaken by individuals who have been registered on a national unemployment register within the EU for a continuous period of at least 12 months immediately prior to their employment on the project,
- 2.5% of the aggregate time worked on site to have been undertaken by individuals who are employed under a registered scheme of apprenticeship or other similar national, accredited training or educational work placement arrangement. The Department of Social Protection, through its Intreo offices, is providing support to the contractors in meeting their obligations under the contract by providing suitable candidates to match the skills requirements from those long-term unemployed construction workers (Government Speech, 17th October 2014 by Minister Simon Harris, Second Stage Speech – Social Clauses in Public Procurement Bill 2013; available at: http://www.per.gov.ie/minister-simon-harris-td-second-stage-speech-social-clauses-in-public-procurement-bill-2013/).

Early results indicate that approximately 48 long term unemployed people have been hired across fifteen sites out of a total workforce of 440.

Ireland

Key point/background – Joint liability; Health and Safety

The Safety, Health and Welfare at Work Act 2005 places responsibility on all stakeholders (employers, temporary work agencies, contractors, designers, suppliers) for the protection of health and safety at the workplace.

Description of the measure in discussion/already in place

The employer-employee relationship arises if an employee is working in the capacity of an employee, regardless of whose employee he or she is and if he or she is under an employer´s direction and control. The employer´s duty of care cannot be passed to another party in order to discharge it. Thus, when a worker is dispatched by his or her employer to work for another party (including an independent subcontractor) the general employer´s care to the workers remains. The same accounts if a subcontractor comes onto the employer´s property and negligently causes injury or loss to the employer´s workers, the general employer retains liability.

Ireland

Key point/background – Joint liability; Health and Safety

For the time being, Ireland chose the option to make use of 'model' contracts (with labour law compliance clauses) which is not a lega*l* obligation imposed on public procurers, but rather is Government policy and advised as best practice (Circular 1/11 from the Department of Public Expenditure and Reform, Circular 1/11: Model Tender and Contract Documents for Public Service and Supplies Contracts (http://www.procurement.ie/sites/default/files/PER%20%20Circular%201%20of%202011-1.pdf) makes it clear that the new suite of standardised documents for public procurement is provided as an aid to contracting authorities and, whilst their use is recommended as good practice, the documents and explanatory notes (including the Circular itself) are not intended to confer rights on third parties. However, this set of model contract could serve as a basis for further legal steps into the direction of mandatory compliance.

Description of the measure in discussion/already in place

A suite of 'Standard Forms of Contracts' were launched in 2011 (See the website of the National Procurement Service; www.procurement.ie). In essence, the new public contracts contain model labour law compliance clauses, which make it the responsibility of the principal contractor to ensure that all its representatives and subcontractors:

- Comply with appropriate rates of pay and conditions of employment;
- Apply the terms of any applicable Registered Employment Agreement for the sector;
- Make appropriate deductions from payments to workers required by law;
- Keep proper records (including time sheets, leave records, wage deductions, wage books and copies of pay slips) and produce these records for inspection and copying by any persons authorised by the client;
- Respect the right under law of workers to be members of trade unions;
- Observe, in relation to the employment of workers on the site, the Safety, Health and Welfare at Work Act 2005 and all labour legislation, codes of practice and legally binding determinations of the Labour Court.

The contracts provide that where non-compliance occurs, contracting authorities can take whatever corrective action is considered necessary and appropriate, within the terms of the contract, including the proportionate withholding of payments to ensure compliance. Contracting authorities may also provide in their contracts for random checks of the records of contractors and subcontractors to assess compliance with the requirements of labour law, as appropriate. The construction contracts require mandatory checks to be completed in cases where the contract sum is expected to exceed €30 million; and the duration of the work is expected to exceed 18 months (Guidance Note for Public Works Contracts, published on 30.4.2007 by the National Public Procurement Policy Unit of the Department of Finance).

It should be emphasised, however, that the use of these 'model' contracts (with labour law compliance clauses) is not a legal obligation imposed on public procurers, but rather is Government policy and advised as best practice. Circular 1/11 from the Department of Public Expenditure and Reform makes it clear that the new suite of standardised documents for public procurement is provided as an aid to contracting authorities and, whilst their use is recommended as good practice, the documents and explanatory notes (including the Circular itself) are not intended to confer rights on third parties.

Undertakings tendering for public contracts for services, therefore, in line with the EU Directives, must supply a statement confirming that they have 'taken account' of their obligations relating to employment protection and working conditions (Circular 1/11: Model Tender and Contract Documents for Public Service and Supplies Contracts: (http://www.procurement.ie/sites/default/files/PER%20%20Circular%201%20of%202011-1.pdf)

However, how compliance with labour law requirements is to be monitored is not stated.
Contracting authorities may prescribe special conditions relating to the performance of a public contract that is to be awarded, provided that those conditions are compatible with EU Law and are specified in the relevant contract; in particular, those conditions may deal with social and environmental matters (Circular 1/11: Model Tender and Contract Documents for Public Service and Supplies Contracts: (http://www.procurement.ie/sites/default/files/PER%20%20Circular%201%20of%202011-1.pdf).

Italy

Key point/background – Health and safety; identification card
Italian law prescribes specific obligations for the client and the contracting authority or to improve health and safety conditions of the workers. Both are responsible for the coordination and implementation of prevention and protection measures.

Description of the measure in discussion/already in place
The client contractor is in charge of all preliminary checks on the reliability of the contracting undertaking and of its compliance with its obligations for workplace safety. All employers involved in the subcontracting chain must cooperate in the activities informing each other.
To this end, the client contractor is required to prepare the single document of the follow-up risks assessment (DUVRI), which lists all measures taken to combat the risk of interference to be adjusted in the light of the development of the ongoing works. The DUVRI has to be attached to the contract agreement. The client contractor and subcontractor must then equip workers executing the contract with a special identification card.

Lithuania

Key point/background – Social considerations
A working group composed of 21 members has been established by the Ministry of Economy of Lithuania on 18 April 2014. The Lithuanian Trade Union Solidarumas is represented in this group by its vice-president. It has the task to submit proposals for the implementation of the EU Public Procurement Directives into Lithuanian Law.

Description of the measure being discussed
According to the draft Law on Public procurement, the principal award criteria shall be the most economically advantageous, rather than the lowest price.

According to the group´s opinion, the lowest price does not represent the most desirable result from a societal perspective as it often brings about social dumping at the expense of workers, hence the lowest price is not considered to be a socially responsible policy.

Moreover, the draft foresees the obligation of the contracting authority to check if the due minimum wage is paid and if part of the salary is paid “under the desk”.
The Lithuanian Trade Union "Solidarumas" organised a round table discussion on social economy on 24 April 2014 in Vilnius in cooperation with the European Economic and Social Committee and the Ministry of Social Security and Labour. The main purpose of this conference was to initiate a discussion and dissemination of information on social enterprises, social economy and social entrepreneurship, and encourage involvement of social partners in Lithuania.

Netherlands

Key point/background - Contracting of ‘social return on investment’; apprenticeship and unemployed workers

A case in the city of Dordrecht that started in the late 1990 shows how local authorities can work with social criteria. By the end of the 1990s the city had an unemployment rate that was substantially higher than the national average. The local government decided for a program that was called ‘social return on investment’ (SROI). Key principle in all procurement procedures (exceeding 50,000 euro) became that bidders had to spend at least 5% of the tender price for the creation of apprenticeship places or the contracting of unemployed. At the beginning this principle was legally challenged by one contractor, but the arbitration council for the building sector backed up the local community policy.

Description of the measure in discussion/already in place

Since then the city has used the SROI-principle (on average 40-50 projects a year). From 2000-2010, the principle has been also used in larger projects of urban development and social housing. Part of these projects were based on private capital, with no or just a minority participation of the community. The local community decided to impose the same principle to private property developers. Over the years, this initiative has created a large impact. The unemployed are contracted by institutes specialised in training or reintegration for a period of two years. These institutes provide the contractor with staff. Their payment is based on the collective agreement for the construction sector. In one project it was estimated that with this approach an additional 350 unemployed (for a period 5 to 6 years) could be engaged.

The SROI-method has become popular all over the country and has expanded from the tenders for construction and infrastructure sectors to other tenders. In fact, a whole new ‘industry’ of offices specialised in assisting in SROI-methods came into being. The success of the SROI-approach was completed with an official statement of the central government in 2011. As of 1 July 2011, the government ordered the application of a 5% social return on investment in all governmental tenders (works and services) beyond a threshold of 250,000 euro.

Norway

Key point/background – Health and safety measures

Local and regional measures introduced in public procurement are plentiful. One of the most talked of is a model which has been introduced in Skien municipality. The mayor of Skien stated the following when asked to justify this comprehensive regulatory framework:
"We could no longer sit still and observe such serious social dumping, work site crime and black market development at construction sites of municipal contracts. We have had too many scandals"

Description of the measure in discussion/already in place

Skien has taken advantage of all legal possibilities offered by legislation and regulations to stop social dumping and crime on work sites of public contracts. The model serves as an example for different measures introduced at local level all over Norway. The following obligations are put on contractors:

- Work is to be performed by the contractor and his employees or subcontractors and its employees. A contractor has to prove by documents that a majority of his workers have a certificate of completed apprenticeship.
- The main contractor demands a written justification for the necessity of the use of self- employed, subcontractors and hired-in work force
- Norwegian is the main language on all work sites on public contracts. This means that at least one person of each work team has to speak Norwegian in order to ensure the technical quality and security of the working place.
- The contracting authority does not allow the employment of more than one level under the main contractor in the contract chain
- The company has to be a training company and all major contracting partners have to employ apprentices
- All workers are registered in all public records, also foreign workers
- Wages and other pecuniary benefits shall be paid out to a Norwegian bank account
- Documentation is required that no worker is granted wages and working conditions less favorable than what follows from a national collective agreement or what is the norm for the specific place and occupation
- In breach of the regulation, where self-cleaning is not possible, the contract may be terminated and the company will be banned for two years from public procurement contracts or works for the municipality.

Norway

Key point/background – Compulsory vocational training - Registered training companies

The obvious motivation for the subsequently described measure is to secure access to apprenticeships in industry, which in turn strengthens skill training in Norway, which in turn strengthens the competitive position. Even more important for the trade unions, the results of such legislation improve the trustworthiness and standing of the companies. To become a training company requires to prove training competence within the company. Having apprentices implies regular evaluations in a timely manner. All experience shows that companies, which employ apprentices, are more reliable companies within a socio-economic aspect.

Description of the measure in discussion/already in place

Current national legislation comprises a provision, which opens the possibility to oblige a contracting company taking part in a public procurement procedure to be an approved/registered training company according to the Education Act.

In Norway, precondition to become a skilled worker is the accomplishment of two years of school education and two years as an apprentice in a training company. To be able to provide such education, a company has to prove that it is capable of securing the necessary vocational content. As a consequence, it then becomes a certified company.

So far, the request to employ apprentices on construction sites within the context of a public contract and the application of the legislation on approved training companies has been voluntary for local and regional authorities.

However, the government announced its intention to make the relevant legislation compulsory. This means that any company wishing to bid for a public procurement contract has to be approved as a training company according to the law.

Moreover, the government aims at introducing legislation to secure that any contracting company winning a public bid employs apprentices on site if the construction work or service refers to a branch in need of apprenticeships.

Poland

Key point/background - Inclusion of social aspects
To provide contracting authority with a tool for socially responsible public procurement the criterion of social aspects was explicitly included into the legal provisions. However, practice shows that Article 91.2 is only the first tool to raise awareness of this aspect by contracting authorities. A lot of action has to be undertaken by trade unions in order to bring this provision to life.

Description of the measure already in place (since October 19, 2014)
According to article 91.2 of the Public Procurement Act, contract award criteria shall be the price or the price and other criteria linked to the subject matter of a contract, in particular quality, functionality, technical parameters, environmental aspects, social aspects, innovative aspects, service, period of contract performance and operating costs.

Poland

Key point/background - Minimum salary, safety and health conditions
During construction, especially if work is carried on for long time periods, the minimum requirements for safety and health, the minimum wage and different tax rates may increase. Therefore the contracting authority is obliged to adapt and pay its open debts accordingly.

Description of the measure already in place (since October 19, 2014)
According to article 142.5 of the Public Procurement Act, a contract concluded for a period longer than 12 months shall contain provisions for a suitable modification of remuneration rates payable to the economic operator, in case of change in:
1) the rate of tax on goods and services,
2) the amount of minimum wage determined under Art. 2 para. 3-5 of the Act of 10
October 2002 on minimum wages,
3) the rules on social insurance or health insurance or the rate of social security or health
insurance contributions,
if these changes will affect the cost of contract performance by the economic operator. This legal provision was stipulated in order to ensure that price increases will not be rolled over to the workers as the weakest part of the chain and that they profit from eventual wage increases.

Sweden

Key point/background – fight against regional unemployment; Örebrö
The area of Örebrö is characterised by a high unemployment rate. Therefore, when in 2013 it came to the renovation and reconstruction of regional infrastructure, it introduced social considerations to be respected when awarding public procurement contracts.

Description of the measure in discussion/already in place
These social criteria comprised: The proof of an effort of regional employment of 15%. One third of the involved workers should come from the sub-regional area and at least 50 to 80 persons should have regular employment at the contractor´s or sub-contractor´s level.
Moreover, further award points were foreseen for the employment of long-term unemployed people and the development of the workers, trainees as well as other forms of education on the job.

Sweden

Key point/background – centralised procurement company setting social criteria, Göteborg
Goteborg Municipality has established a procurement company that manages the process of stipulating social criteria for public procurement contracts. Its task is to support the municipal administration and companies in procurement procedures.
Since 2014, 7 municipal companies in Göteborg included social criteria in 25 procedures which resulted in 40 new jobs.

Description of the measure in discussion/already in place
The procurement company established a control system that verifies that the supplier paid taxes and has not been involved in tax fraud. Moreover, the contract performance is monitored by regular inspections and on-site visits.

Sweden

Key point/background – fight against regional unemployment; Göteborg
In order to prevent increasing unfair competition by not complying with legal provisions aiming at the workers´ protection, Sweden has introduced stricter obligations on persons hiring workers.

Description of the measure in discussion/already in place
The temporary work agency is obliged to assess the work environment at the construction site. The hirer has to assume the same responsibility as for his own workers, that is to say he has to undertake the same safety measures for the agency workers as he would have done for his own employees. This responsibility applies regardless of the length of the assignment.

UK

Key point/background – Social covenant (apprenticeship, approved labour supply companies, principle of direct employment)
UK plans the construction of a new reactor at the nuclear power station Hinkley Point. As the construction and the involved feed-in tariffs guaranteed for 30 years to the private company operating the power station was not undisputed, the client company and its contractors agreed with a covenant including several social considerations.

Description of the measure in discussion/already in place
The client and its contractors are committed to a fair and transparent recruitment policy. All parties to this agreement will actively ensure that the engagement of labour is based on the individuals´ ability to meet the needs of the project and to undertake the work for which they are being recruited. Contractors are expected to be thorough and rigorous in making selection decisions (e.g. by holding competence-based interviews). Contractors should provide unsuccessful candidates with the reasons for their non-selection. Successful candidates are offered training support for the acquisition of the necessary skills. The delivery of the skills development programme will be monitored with the engagement of the accredited Union representatives. Moreover, the primary contractors and the trade union will develop a plan for the employment of a significant number of traditional and adult apprentices to improve regional socio-economic benefit. The commitment amounts to at least 500 persons.

The client contractor committed himself to the principle of direct employment, which means employment under an employment contract with the associated income tax.

In case of recurrence to a labour supply company, these workers must also be employed under the terms and conditions of the social covenant. The labour supply company must be drawn from a list of supply companies approved by the competent body (JPB) and their engagement must be agreed by the JPB in advance of them coming onto site. No payroll companies or other organisations with an equivalent purpose are to be used on the construction site.

Finally, all parties agree that it is unlawful and unacceptable for any party to use or make any reference to any form of blacklist.

UK

Key point/background – Contract notices that refer to living wage payments

Public sector employers have taken a variety of approaches to inserting living wage considerations into contract notices when services are put out for tender. An accreditation process has been put into place by Living Wage Foundation. It requires the employer to submit a written plan to the foundation which sets out how they intend to implement the living wage among their contractors. If the employer satisfies the criteria set out by Living Wage Foundation, he qualifies for a "living wage employer".
The branches of the trade union UNISON can request a copy of the plan and if not satisfied with the employer´s progress in complying with the plan, a complaint can be sent to the Living Wage Foundation.

Description of the measure in discussion/already in place

The contract of London Borough (LB) of Camden for architectural, construction, engineering and inspection services stipulates that bidders need to be aware that, should they be short-listed, they will be asked to propose solutions to deliver the social, economic and environmental benefits specified in the invitation to tender and to pay the National or London Living Wage to employees including their sub-contractors working on LB Camden contracts in accordance with the criteria established by the Living Wage Foundation.

5.7. Exclusion grounds

Austria

Key point/background – Lack of confirmation of payment of social security contributions

Strong exclusion grounds are a good measure to control the compliance with the most important legislative provisions referring to social aspects. To this end, normally an in depth assessment is necessary, a self-declaration by the client contractor and sub-contractors is not sufficient.

Description of the measure in discussion/already in place

Draft Section 19 indent 1 of the Federal Act on Public Procurement stipulates that contracting authorities are only allowed to assign the contract to authorised, qualified and reliable (sub)contractors. Reasons for exclusion are, among others: serious professional misconduct, especially non-compliance with tax, labour and social law. The bidders have to prove that they have fulfilled their obligation to pay the social security contributions in their home state by presenting a confirmation of the social security bodies or by an affidavit. The contracting authority has to obtain this information from the central Administrative Penalty Register of the Federal Ministry of Finance. This screening relates to the entire subcontracting chain. The subcontracting of the entire construction work is illegal and subcontracting is only permitted when the subcontractor also holds the legally required authorisation, qualification and reliability. The consequences for a tenderer who does not comply with these provisions are extensive: The exclusion of a tenderer is justified if his quote is based on a calculation for staff costs which is not in line with the regulations which apply in Austria regarding for example the payment for overtime.

Finland

Key point/background – Exclusion of companies from bidding process

The protection of workers´ rights in subcontracting chains is foreseen in the "Liability Act". The Act is seen as a means to combat undeclared work. Within this context, the social partners proposed to amend the existing rules by excluding a company from public procurement procedures, which has seriously neglected the below mentioned liability , and to increase resources for monitoring and control.

Description of the measure in discussion/already in place

The client contractor has the obligation to undertake an in depth assessment on the reliability of a candidate subcontractor or temporary work agency before concluding a contract with them. This check includes also the information on the applicable collective agreement, as well as the fulfilment of obligations with regard to social security and fiscal law. This liability is also valid in case that the subcontractor is a foreign company. In case of breach of this obligation to check, a negligence fee is imposed amounting from 1600 euro up to 16 000 euro.

France

Key point/background – Combat of unfair competition

Article 14 of the Law of 10.7.2014 foresees that any company which wants to participate in public procurement procedures in France has to provide the proof that it concluded an insurance contract covering the relevant risks. This is seen as a measure to fight unfair competition caused by companies that do not conclude such a contract to cover their 10 years´ responsibility after completion of construction works.

Description of the measure in discussion/already in place

Any bidder has to provide the proof that it concluded a 10 years´ insurance contract. The 10 years´ responsibility coverage by the insurance must be provided during the awarding procedure. In case the projected bidder cannot provide this proof he has to be discarded.

France

Key point/background – Preclusion for future procurement procedures for a certain time span
Article 10 of the Law of 10.7.2014 foresees the temporary exclusion for a company that has been held liable for the breach of certain legal provisions relating amongst others to bogus working contracts.

Description of the measure in discussion/already in place
In case of a breach relating to bogus working contracts, temporary employment, employment of illegal workers or of foreign workers without work permit by administrative act, the administrative authority may establish a temporary exclusion from public procurement procedures not exceeding 6 months. The timespan has to be fixed according to the gravity of the breach.

Latvia

Key point/background - Exclusion ground – employment of illegal workers
In the construction sector the practice of shadow economy including payment under the table and unregistered employment is widespread. Black economy in Latvia amounts to around 23% and in construction it amounts to approximately 48%, of which a big part is to be attributed to the construction sector. Public authorities, however, shall not show any tolerance for economic operators who are active in the hidden economy or who are practicing any illegal activities.

Description of the measure already in place
According to Public procurement law (article 39) 2) b), an economic operator can qualify as candidate for public procurement tender only after having submitted an extract from the police penalty register to the contracting authority, confirming that in the last year before the contract award the relevant company did not make use of unregistered employment.

5.8. Control

Austria

Key point/background – Interconnection of data banks

In Austria, some data-banks about different violations of provisions relating to working conditions in the construction sector exist. Besides the general register concerning administrative penalties and the register relating to convictions according to the Foreign Employment Act, two further evidences have been established: the register relating to wage and social dumping convictions (Lohn- und Sozialdumping-Verwaltungsstrafevidenz (LSStE; § 7l AVRAG) and the registration office of the Construction Workers' Holiday and Severance Pay Fund (BUAK, Bauarbeiter-Urlaubskasse). The latter has been assigned by law the task to collect all data of foreign and local construction companies maintaining construction sites on the Austrian territory. This data bank offers the possibility to provide all declarations regarding official registration, payment performance and employment structure of the workers on a concrete construction site on a daily basis.

Description of the measure in discussion/already in place

Within the ongoing discussion as to the recast of the Austrian Public Procurement Act, it has been proposed to impose a legal three-fold obligation on the contracting authority:

1.) Pre-qualification confirmation – ex-ante: The qualification of the bidder including his subcontractors is only assumed if – in addition to the confirmation of payment of social security contributions and of absence of convictions according to the LSStE - the BUAK confirms that all obligations have been fulfilled by the bidder. In case that the bidder cannot provide such confirmation, the company has to be excluded from the tendering procedure.

2.) Contract performance – request of registration confirmation: The contracting authority shall inquire every three months at the BUAK, if the registration of all workers has been effected by the client contractor for the relevant construction site. In case of non-compliance, the contracting authority has to undertake administrative and civil proceedings.

3.) Request of registration and payment confirmation prior to the payment of works´ compensation: Only after confirmation by BUAK that all wages have been paid, the contracting authority shall be allowed to pay the agreed fee to the client contractor.

Austria

Key point/background - On-site access control and principle of building contractor

Vienna Lines is a publicly owned company, 50% it is owned by the City of Vienna, 50% by the Federal Government. Its competence is the construction of new subway lines and its extensions. Its annual investment put to tender amounts to 700 million Euro. When executing constructions, Vienna Lines acts as building contractor and does not employ a general contractor. Thus, responsibility is not watered down.

Description of the measure in discussion/already in place

The design and management remains with Vienna Lines during the whole construction process. For each construction section, a project team is appointed which is responsible for the supervision of quality, costs and construction time on site. All sub-contractors employed are checked, they have to fulfil all technical and economic specifications as set out in the tender. If a new sub-contractor is proposed, he has to apply for a permit by Vienna Lines. Moreover, Vienna Lines checks if the sub-contractor has been condemned for illegal employment of foreign persons or wage dumping.

By daily site inspections, Vienna Lines project team can identify illegal sub-contractors.

Belgium

Key point/background – Establishment of a data bank; cross-border control

With the enlargement of the European Union and the establishment of a huge internal market of cross border workers without harmonised working conditions, Belgium decided to introduce flanking measures to secure as much as possible a level playing field for workers from which ever jurisdiction they are sent to work. They aim at finding a balance between the free movement of services and the obligation to guarantee posted workers a minimum level of social protection by means of efficient enforcement measures. Apart from a new cooperation agreement for the inspections services and a joint and several liability for principal contractors and clients, it also provides for the introduction of LIMOSA (http://fr.workpocket.be/1/3/declaration-obligatoire-limosa/), a computerised system on cross-border employment.

Description of the measure in discussion/already in place

The use of LIMOSA is twofold:

First, it comprises a general ex-ante registration obligation for posted workers, self-employed persons and trainees. The registration can be undertaken electronically prior to the employment at the National Social Security Office by the employer, who will receive an electronic receipt as proof of registration. In order to improve the enforcement of this obligation, not only the employers, but also the end users and clients must control the compliance with the registration obligation. The company for whom the posted workers shall carry out a job must also electronically register the identification details of the posted worker or self-employed as well as of the posted worker´s employer. Only having complied with this task, the user is able to release himself from joint liability.

Second, it is a central registry containing information for the benefit of the inspection services and other governmental services and hence a useful tool to be further developed for control purposes.

Moreover, it is proposed to use LIMOSA for further purposes, especially with regard to the control of compliance with minimum wages. If the contractor or subcontractor does not pay the minimum wage, the fellow contractor is obliged to withhold an amount and to transfer it to the Federal Public Service Employment. The observation of the procedure could be effected by existing entities, which are the National Social Security Office, the social inspectorate or the PDOK (Employers´ Service for the Organisation and Control of the Social Security Schemes).

Belgium

Key point/background - Individual on-site registration

The construction sector is confronted with a huge number of fraud cases. Unreliable market players are infiltrating the construction market in such a way that it becomes disrupted and reliable undertakings are confronted with a level of unfair competition which makes it nearly impossible for them to survive.

Description of the measure in discussion/already in place

An agreement of the social partners proposes an obligation of individual registration to achieve a traceable identification of all persons working on the construction site. This should be combined with a withholding obligation and the liability for wages. Any person present at the site needs to be in possession of a badge, which at the same time serves as a pre-condition for entry onto the site. Thus, the badge should allow to determine who has worked when on the site. In case that the badge is not used, the contractor is threatened by a penalty.

France/Netherlands

Key point/background – Coordinated control actions; Labour Agency Atlanco-Rimec

Three years after the European Federation of Building and Woodworkers launched a forceful campaign against Irish temporary work agency Atlanco Rimec to protest against its exploitation of thousands of foreign workers from various Eastern European countries, the first results are visible.

Description of the measure in discussion/already in place

On 14 March 2015, the French construction company Bouygues, as the main contractor of Atlanco Rimec, was summoned to pay damages of €150,000 and pay back €22 million to the French social security and tax authorities. The judgement in the first instance referred to the deliberate creation of complex, cross-border structures with the aim of illegally employing some 500 Polish and Romanian workers over a period of several years. This social fraud took place at a construction site in Flamanville.

On 18 March 2015, an interlocutory judgment in the Netherlands ordered Atlanco to pay €500,000 to a blocked account as an advance on the final claim. Atlanco must also make all the requested documents available immediately and comply with the collective labour agreement for the Dutch construction sector. The final Judgement is expected in June 2015. The sentence was handed down in respect of the illegal posting of 180 Portuguese and 25 Polish workers to a Dutch construction site, Avenue 2 in Maastricht. In its defence, Atlanco attempted to apply pressure by trying to have Dutch union leaders held personally accountable for 'damaging the image of Atlanco'. This claim was dismissed.

Although this is an example for successful cross-border cooperation, sadly enough, Atlanco Rimec's social fraud is just the tip of the iceberg. Every day, thousands of workers are exploited as cheap labour, with no form of social protection.

Ireland

Key point/background - In depth assessment of specification criteria

Recent guidelines on facilitating SME participation in public procurement set out, as one of the guiding principles, that contracting authorities should allow tenderers at the time of tendering only to declare that they have the relevant and proportionate capacity (as specified in the contracting authority's tender documentation) necessary to undertake the contract (Circular 10/10 Facilitating SME Participation in Public Procurement: http://www.procurement.ie/publications/circular-1010-facilitating-sme-participation-public-procurement).

Description of the measure in discussion/already in place

When suppliers have passed this first stage and have been shortlisted to the tender award stage, the contracting authority should seek verification or evidence of the tenderer´s financial and technical capacity to fulfil the contract. Suppliers will be requested to provide the necessary documentation, such as bank statements, audited accounts, proof of professional indemnity, etc. If a contracting authority is using the one-step Open Procedure, only the selected winning tenderer will be requested to provide their financial and professional information.

Although labour law compliance is not yet mentioned here - tax compliance is emphasised- this can be a starting point of assessment of social and labour criteria within the implementation of the new EU directives.

Ireland

Key point/background - Data sharing, joint liability and exclusion

Labour inspectorate statistics point to a significant continuing compliance problem in relation to public works sites. In the first half of 2010, for example, the Labour Inspectorate (NERA) carried out 191 inspections in the construction sector and found a labour law compliance rate of just 43 per cent.[19] It is felt that public procurers tend to see these as 'box ticking' exercises and no real effort is made at enforcement.[20] The problem, it seems, whilst general, is particularly acute in the construction sector. At the awarding stage, the informants were of the view that public authorities are concerned almost exclusively with price and undertake no real checks on how the tenderer intends to account for its labour law obligations. This problem has intensified in recent years given the harsh economic climate. Thus, it appears that, although Irish public procurement practice is to include labour law compliance clauses in public contracts, the extent to which these are effective in enforcing labour standards is questionable.

Description of the measure in discussion/already in place

The Irish Congress of Trade Unions therefore has suggested that companies must be required to demonstrate their track record and monitored for continued compliance, and enforcement mechanisms must be strengthened and included in contracts.

It also proposed the exclusion of companies that consistently breach legal obligations including employment rights obligations from tendering for public procurement contracts.

In that regard, a provision for data sharing between those responsible for public procurement contracts and Revenue, Social Protection, the Health and Safety Authority and the Labour Inspectorate (NERA) should be included as part of the transposition process.

An additional tool within this context is the provision for a system of joint and several liability throughout the subcontracting chain as the only effective way to ensure compliance

Sweden

Key point/background – Compliance control with working conditions

The Swedish trade unions hold the opinion that the new directive implies an obligation of the purchaser to take measures in order to ensure that the supplier respects labour legislation and the conditions of the collective agreements that normally apply to the current work at the place where the work is performed. This means that the contracting company is obliged to either abide by collective agreements or otherwise shows that it offers at least equivalent levels of wages and employment conditions. As to works performed outside Sweden, which in practice concerns mainly supply contracts, the contracting authority is obliged to undertake measures to ensure that ILO core conventions are respected and that labour regulations and collective agreements are in force, where the work is applied. Today, the situation has gone so far that trustworthy companies abiding by collective agreements are not participating in public procurement procedures, because of unfair competition practices of other companies that for example have no costs for contractual pensions for their employees. It is absolutely unacceptable that society contributes to those wages and employment conditions and that employees are dismissed without retirement insurance and other benefits.

Description of the measure in discussion/already in place

Where a collective agreement with a Swedish trade union exists, the contracting authority may assume that the trade union as well as its members at the work-site exercise the control on working conditions. If the supplier (the awarded company) already has signed a collective agreement with a Swedish trade union, the latter will have access to the workplace and therefore can control the working conditions. The right to exercise control over working conditions in favor of trade unions derives from the collective agreement with the

[19] The figures do not relate solely to public works sites, but according to the NERA representative, the vast majority of inspections were carried out at such sites. http://www.employmentrights.ie/en/media/NERA%20Quarterly%20Update%20-%20June%202010.pdf.

[20] Indeed, the guidelines for contracting authorities published on the national public procurement website make no reference at all to labour law compliance; http://www.procurement.ie/sites/default/files/Public-Procurement-Checklist.pdf

supplier. With regard to the stipulations of the new EU-Directive, in future, the contracting authority has to undertake action against the supplier in case of violation of agreed working conditions. This is already the case now, if the competent trade union officially reports such breaches.

When no collective agreement between a Swedish trade union and the contracting company or supplier exists, the exigencies as to control by the contracting authority increase. The contracting authority has to seek the appropriate documentation to verify that the conditions as set by collective agreements are met. When the work is done abroad, an effective control is naturally more difficult to achieve. It can be achieved by joint actions between the trade unions of the two countries as has been successfully done in the Atlanco-Rimec case.

However, in Sweden itself the problem remains that a "two class society of workers" exists: If works are performed by posted staff, pursuant to the Laval judgement, only the minimum conditions stipulated in the Posted Workers Directive apply on them. Should domestic workers perform the works, it goes without saying that all provisions as set in collective agreements have to be applied. From this derives an inacceptable discrimination of workers depending on the origin of their employer. This problem derives from the fact that in Sweden most of the provisions referring to working conditions are set in individual collective agreements which are not binding all over the territory. Therefore, the Swedish trade unions demand that at the occasion of the implementation of the new EU-Directive, the legislator should clearly stipulate that the contracting authority has to ensure that the suppliers are applying working conditions according to those stipulated in collective agreement. By such legislation, the provisions become binding all over the territory, thus satisfying the pre-conditions of the Laval-judgement.

Switzerland

Key point/background – Two level control mechanism

In order to prevent unfair competition based on circumvention of compliance with minimum working conditions as well as minimum wages, efficient control mechanisms have to be established.
This is envisaged to be done in Switzerland by a mandatory two-level control.

Description of the measure in discussion/already in place

The client company has to be obliged to undertake regular controls relating to the compliance of all relevant legal provisions on the location of the contract performance.
The contracting authorities have to ask regularly for appropriate proves of compliance and to undertake on-site controls.
In case the companies do not undertake their control obligations themselves, they have to convey these obligations to an equally represented control entity or the competent authority ("Tripartite Commission", art. 7 Entsendegesetz and art. 360 Obligationenrecht). The federal government and each canton established such a "tripartite commission", which is composed of an equal number of employers´ and employees´ representatives as well as representatives of the state.
In order to allow the control entity to fulfil its tasks, the contracting authority has to refer all necessary information and provide all documents. The bidder has to prove the compliance with workers´ protection provisions and working conditions. The control authorities regularly refer their results and measures undertaken to the contracting authority. Should any violations occur, they have to be reported in the negative list.

UK

Key point/background – Gangmasters Licensing Authority (GLA)

The introduction of one liaison office on the basis of article 4 of the Posting of Workers Directive as one single contact point for cooperation between the competent authorities of the various Member States is held as an important first step to improve the tracing of infringements of minimum labour standards.

Description of the measure in discussion/already in place

The GLA is considered to be a best practice itself. The GLA maintains compliance with the licensing standards of the Gangmasters Licensing Act through a proactive enforcement approach, involving an exchange of information with government departments and inspection of companies, interviews with workers and the client contractors. Information to undertake this approach is received from trade unions, exploited workers etc. Were the non-compliance relates to the activities of a licensed labour provider, the appropriate solution will normally be to issue additional licence conditions. For more extreme non-compliance licence revocation may be considered by GLA. In the most severe cases, and for identified unlicensed labour providers and labour users using unlicensed providers, prosecution will normally be the consequence, followed by a criminal investigation. Should other offences be discovered by the GLA investigation, including a labour provider operating without a licence (GLA offence), but also operating false records in relation to his workforce (false accounting, no GLA offence), GLA investigates all offences and refers the case to Defra Legal, the Procurator Fiscal or Public Prosecution Service (NI) to consider bringing charges for both, the GLA and non-GLA offences. As an example for cross-border cooperation, the case of poorly treated Bulgarian workers posted to the UK should be mentioned. The GLA identified bogus posted workers, who were employed by licensed and unlicensed Bulgarian recruitment agencies, together with the Bulgarian competent authority. This good practice was made part of a formal agreement between Bulgarian and UK authorities. The GLA bases its work on this partnership approach which allows it to discover instances of cross-border exploitation of migrant workers from other EU and third countries.

5.9. Role of trade unions

Netherlands

Key point/background – Agreement with the client (and/or the main contractor)

The trade unions have developed a strategy that focuses on negotiations in the preparatory stage of a project with the aim to conclude agreements on social issues, so-called 'covenants'. In these covenants the client (and/or the main contractor) and the trade unions settle rules and prescriptions with regard to compliance with collective agreements and labour legislation.

Description of the measure in discussion/already in place

Given the broad range of potential clients (local or regional governments, large contractors in utilities, like RWE, the national railways or the airports) the covenants cover a wide spectrum of different issues. Through negotiations the effort is made to come to tailor-made agreements. With local authorities (for instance the city of Rotterdam) the agreements usually cover all projects with the authority as main or partial customer. Most often the employers´ side is also included in the talks or as signatory. Examples of the issues covered are:

- Compliance with sector specific collective agreements and pay provisions in the whole chain of (sub)contracting,
- Respect for general labour legislation and in particular compliance with health and safety and other relevant legislation,
- Fight against practices with bogus self-employed or the use of fake subcontractors,
- Monitoring and close examination of abnormal low tenders,
- Restriction of the use of temporary workers; for instance only through registered recruitment agencies,
- More attention to the inclusion of vulnerable groups on the labour market and a stronger focus on (re)training.

The monitoring of the respect for the agreed rules is very often included in the agreement. This can be either done by specific rights for trade union officers (information rights, site visits, publications and office hours on site), or by the office installed by the social partners in construction that facilitates the implementation of the collectively agreed working conditions (Technisch Bureau Bouwnijverheid - TBB). The TBB has the right to visit the sites and contractors have the duty to cooperate with the office.

Portugal

Key point/background – Quadripartite commission

According to the most important construction trade union («Sindicato da Construção de Portugal», «SCP»), in principal, the characterization of the public procurement procedures is highly negative, especially regarding the workers' social rights and working conditions. The priority on the lowest price implies that subsequently the contracting company will put financial pressure on the subcontractors in order to meet with the planned costs by cutting expenditure in social facilities (overcrowding of sleeping sites, absence of canteens, etc.), security equipment, and health services. In some cases the workers must buy themselves the security equipment and pay for the accommodation. The priority on costs means that often the lowest tender «wins»: This implies the transfer of costs down alongside the «contractual pyramid». The subcontracting practices make the situation even worse since it promotes a higher invisibility and casualness.

Description of the measure in discussion/already in place

The trade union therefore put forward proposals aiming at a change in the construction panorama in Portugal within the context of the implementation of the new EU-Procurement Directives, pointing to the need of improving the control of transparency, enforcement and fulfilment of public contracts. In that sense, in particular three measures are suggested:

(a) the constitution of «quadripartite commissions», with members of the trade-union, the public work inspection service, the local municipality of the construction site, and the employer's association;

(b) to impose on the companies that want to apply for a public contract the pre-requirement of employing at least 50% of the necessary workforce for the accomplishment of the contracted construction; and
(c) a preliminary inspection that only enables the work to start when all the accommodations and social facilities for workers are in accordance with the number of workers and the legal regulations.

Spain

Key point/background – Improvement of safety, TPC (Tarjeta Profesional de la Construcción; professional construction card)

In the construction sector, questions of compliance with health and safety issues and its control is of utmost importance. The general construction industry agreement (CGSC), undertaken between the trade union and the industry, provides for mechanisms related to health and safety and includes trade unions into the control procedures.

Description of the measure in discussion/already in place

The measure is twofold: Firstly, the "TPC" (Tarjeta Profesional de la Construcción; professional construction card) was introduced, which includes basic training in occupational risk prevention and also requires a specific training for any employment in the construction sector in addition to the basic skills. Workers active in the construction sector and unemployed, who have worked in the sector over the last five years can take the TPC. FLC (Fundación Laboral de la Construcción) is the responsible entity for the release of the TPC and for the selection of the companies, which can provide the necessary training for the TPC.
The FLC is a bipartite organism composed of employers (CNC) and trade unions (MCA-UGT and CCOO construcción y servicios), which are signatories for the 5th General Construction Industry Agreement, the most important collective agreement.
Secondly, trade unions together with employers´ representatives concluded agreements with various public authorities for joint monitoring to follow-up the execution of all types of public works with a view to secure the compliance with occupational safety and health issues.
There are to be distinguished two different types of agreements:

a) The agreements between Trade Union, employers´ associations and Building Ministry concern the possibility of the trade union to visit the major infrastructure projects (roads, bridges, airports, railway works) to check safety and health conditions.
b) The agreements between trade unions, employers´ associations and autonomous regions and city councils concern the right to visit civil works, i.e. construction sites of public housing and underground works.

Sweden

Key point/background – Negotiation and right to veto of trade unions

The Co-Determination Act provides that trade unions have the right to negotiate and to veto the employer´s plan to engage a certain (unreliable) contractor. This is based on the consideration that increased social and economic responsibilities of employers for employees bear also the risk that employers will try to evade the application of labour law and collective agreements by using other forms of contracts in order to evade their obligations. As ex-post control and legal disputes often prove to fall on stony ground, the government decided to opt for the trade union´s right to negotiate and veto which could help to prevent contract practices which aim at cutting workers´ rights.

Description of the measure in discussion/already in place

Section 38 (3) of the Co-Determination Act assigns trade unions the right to ask the employer for information about the envisaged subcontractor and the conditions under which his employees work, their education as to work environment issues, wages, tax conditions etc., which trade unions deem to be necessary to judge whether the future contractor is likely to fulfil his duties.

This way, the employer is automatically obliged to undertake an assessment of the envisaged contractor.

In sectors characterised by subcontracting, social partners developed simplified information procedures as an alternative to those foreseen by legislation, which can be implied on the condition that the employer is registered for income tax and VAT, as well as a company and that he is bound by a collective agreement. Having carried out this assessment, the employer establishes a list of the contractors he wants to use in future. In the absence of trade union´s dissent, the employer is then free to contract the companies of his list.

This negotiation and selection procedure is a useful tool to induce the employer to select reliable contractors, mostly such bound by collective agreements (if he wants to avoid the more burdensome procedure foreseen by law). To further simplify the procedure, the Swedish Construction Federation has elaborated standard contract conditions (UW 2004) for all works to be subcontracted in the construction sector.

Moreover, the client contractor often prefers to select subcontractors bound by collective agreement, because they are less likely to be exposed to industrial action.
Further to this information procedure, the Co-Determination Act stipulates a veto right in public procurement procedures covering all situations where the employer plans to engage workers without a permanent contract with his company. However, the trade union can veto against a tenderer only in such cases for which exclusion is foreseen in the EU-Directive. Moreover, the right to veto only applies if the employer is bound by a collective agreement covering the work performed and only at the level of client and first contractor.

Switzerland

Key point/background – Right of trade union to file law suits
In order to enforce the correct application of law it is useful and necessary to involve the parties concerned. Often, the individual workers are put under pressure and are generally in a weak condition to file law suits against the company for which they work and hope to further be employed. Therefore, it is necessary to enable the trade union to take action.

Description of the measure in discussion/already in place
In order to avoid that bids are awarded to client companies that proved to not comply with the relevant legal provisions relating to working conditions, such bidders must be discarded. The relevant legal legitimation to request such exclusion shall be established in favour of employees´ organisations for any public procurement award (whichever amount).

UK

Key point/background – Olympic Games Memorandum of Agreement
In the UK, alongside the outsourcing of orders to the private sector, a two-tier workforce emerged. In the absence of legally binding provisions, trade unions campaigned and negotiated the introduction of codes of practices from 2001 onwards to reverse this trend. The practice was reaffirmed an extended by the central government.

Description of the measure in discussion/already in place
These efforts culminated in the Olympic Games Memorandum of Agreement seeking to ensure direct employment and to guarantee minimum rates according to the collective agreements. The social partners and clients signed a Memorandum of Agreement which recognises the relevant collective agreements. This Agreement was regulated by the client (Olympic Delivery Authority), who was empowered to undertake a monitoring coordinating role, whilst the partners of the agreement were to periodically review the progress, identify areas of concern and agree on solutions. The Memorandum applied to all subcontractors.

UK

Key point/background – Inclusion of trade unions to control contract performance

In 2012, trade unions and employer representatives concluded the National Agreement for the Engineering Construction Industry (NAECI Agreement, http://www.njceci.org.uk/national-agreement/) for the time period 2013-2015.

The key objective of the NAECI is to continue to supply a modern, robust national employment relations structure in the construction sector that

- Enables the UK engineering construction industry employers and clients to remain competitive
- Provides attractive terms and conditions and greater security of employment for a competent, motivated , productive and competitive industry workforce and
- Establishes a sound foundation for further improvements to industry productivity, resourcing and employment relations.

Description of the measure in discussion/already in place

The NAECI agreement comprises detailed provisions on

- Continuous education and training measures to improve workers´ and apprentices skills
- Safety issues set out in a separate booklet setting out detailed provisions on current industry good practice for employers, employees, trade unions and safety representatives
- Payment including pension, welfare benefits and bereavement leave, and working hours according to the sector specific collective agreements

Key element of the agreement are

a) NAECI being funded on the principle of direct employment
b) The establishment of two control mechanisms:
   Shop Stewards and statutory Trades Union Site Safety Representatives can request detailed documentation on the issues regulated under the agreement and access to the site
c) A dispute settlement by a formal, written grievance procedure (internal resolution)
d) On site meeting and dispute adjudication panel (external resolution)

The NAECI thus provides a sound basis for public procurement procedures: It ensures that client contractors and sub-contractors being signatories to this agreement will abide by the principle labour, health and safety issues and pay the minimum wages foreseen in the UK. It grants trade unions´ representatives the right to access to the construction sites. Therefore, they have the possibility to control the working conditions, supported by various dispute settlement procedures.

5.10. Outsourcing of workers

Finland

Key point/background – Posted workers and role of trade unions

So far, the majority of the posted workers in Finland have been Estonians and the most common sector where they work has been the construction sector.

In order to avoid social dumping and discriminatory treatment, several control mechanisms have been established.

Description of the measure in discussion/already in place

In the construction sector, every person, either Finnish or foreign, shall have a Finnish tax number and shall be registered to the public tax number register before starting work at site in Finland. If a worker´s tax number does not figure in the tax number register, the worker cannot start to work in Finland. According to the Finnish Occupational Safety and Health Act (738/2002), any person working at a construction site has to wear an identification card. The data content of the card is prescribed in the Act. Also, the worker´s tax number has to be printed on the identification car.

In order to support information exchange with other Member States, a Liaison Office was established. Additionally, in spring 2011, the IMI system has been put into operation. It is used if a posting company does not have a representative in Finland or if the representative neglects his obligations.

Finnish social partners do not have a role in the IMI information exchange process. However, in practice finish OSH (Labour) inspectors might need advice from social partners when IMI request relate to collective agreements. This is connected with the Finnish Employment Contracts Act (55/2001), according to which the regional occupational, safety and health authorities must act in close cooperation with the social partners in particular when supervising the observance of collective agreements. In addition, regular (2 to 4 times a year) meetings are held between the occupational, safety and health administration, the Confederation of Finnish Construction Industries and the Finnish Construction Trade Union, focussing on the combat of grey economy.

France

Key point/background – Law Relating to the posting of workers

The law **n°2014-790 (loi n°2014-790 du 10 juillet 2014) is the relevant piece of legislation regarding posted workers. It aims at reinforcing the controls and sanctions against companies that make use of posted workers in an abusive way.**

Description of the measure in discussion/already in place

The new element introduced into the legislation is the “joint liability”, allowing to declare responsible the client contractor for the abusive actions undertaken by one of his subcontractors. These comprise the employment of illegal workers, non-payment or partial payment of wages as wells as the use of letter-box companies located in other Member States with a view to employ French workers in France under the status of posted workers.

Ireland

Key point/background – Towards 2016

In order to combat bogus self-employment, agency work and so on, a number of labour law compliance measures were agreed by the social partners in “Towards 2016” mainly in response to two major disputes in 2005. The first involved the Irish subsidiary of a Turkish company, Gama Construction Ireland Ltd, which exploited Turkish workers posted to Ireland to work on public works contracts. The second concerned Irish Ferries, which reflagged its vessels to Cyprus and sought to replace its Irish workers with temporary agency workers, primarily from Latvia and were to be paid less than half the Irish minimum wage. These two cases brought the problem of posted workers and migrant agency work onto national stage.

Description of the measure in discussion/already in place

By consequence, a new labour inspectorate was established, the national Employment Rights Authority NERA), with the special task to undertake regular controls on construction sites.

NERA was established to secure compliance with employment rights legislation and to foster a culture of compliance in Ireland through five main functions:

- Information
- Inspection
- Enforcement
- Prosecution
- Protection of young persons in employment

a) Inspection

Inspectors, duly appointed and authorised by the Minister for Jobs, Enterprise & Innovation, visit employers, carry out inspections of records and speak to relevant persons as part of their role of ensuring compliance with employment-related legislation. Any breaches of legislation identified will be explained and discussed with the employer, and he/she will be given a set time period within which to rectify these and to provide proof to the inspector that the issues have been resolved. Failure to comply with the legislation can result in prosecution and the NERA has a prosecution unit.

b) Enforcement Services Unit

The Enforcement Services Unit can seek to have a determination of the Labour Court or the Employment Appeals Tribunal enforced through the Courts Service in certain specific circumstances. Generally where such an award is made in favour of an employee, the employer has six weeks to implement it. If the employer fails to do so within this period, the employee or the employee's trade union may make an application to the Courts for an order directing the employer to carry out the determination. Where they are not in a position to do so, they can refer the matter to the Enforcement Services Unit, which may in certain circumstances, make an application to the Courts for an order on their behalf.

c) Protection of young persons

NERA also has rights in the protection of young persons in employment.

Norway

Key point/background – Trade union´s right of co-determination in case of outsourcing

In a number of collective agreements specific rights of co-determination were set for cases of hiring workers for a fixed term/specific task as well as hiring for labour with a view to give the employees´ representatives the opportunity to exchange views with the management. The agreements are complemented by law in order to combat social dumping especially by hired labour and involving subcontractors who do not pay the minimum wages.

Description of the measure in discussion/already in place

The basis of these agreements is to be found in the 2005 Act on working environment, working time and dismissal protection. This law leaves only a narrow scope for lawful hiring for a fixed term or specific task, including agency work. Thus, outsourcing of a work is only lawful if warranted by the nature of the work and if the requested works differs from the work ordinarily performed in the undertaking. Moreover, if the hiring of workers exceeds 10% of the hirer´s employees or if its duration exceeds one year, an agreement is required with the employees´ representatives. Thus, the control of outsourcing beyond a certain limit is laid into the hands of trade unions´ representatives at the work place.

Further to this narrow scope left by legislation, based on collective agreements, the employer is required to inform and consult with workers´ representatives before making a relevant decision, to provide information on terms and conditions of the workers concerned. The client undertaking is obliged to ensure that the (sub)contractors are in line with the Posting Directive. The representatives have the right for information concerning the lodging and residence conditions for workers of a foreign (sub)contractor when staying in Norway.

Sweden

Key point/background – Certificate for compliance with ethical and professional standards

The social partners elaborated a private authorisation for such temporary work agencies that commit themselves to uphold high ethical and professional standards as employers and companies. In combination with the possibility to appoint a coordinator to improve work environment, this initiative based on private agreement proved to be efficient.

Description of the measure in discussion/already in place

The employer´s responsibility for the workers´ health and safety is one of the subject matters of the authorisation programme all companies have to participate in. Within this authorisation programme the client has to undertake all necessary precautions to protect the agency worker from health damages of accidents as well as to provide safety equipment. The agency and agency´s safety delegate are entitled to visit the client at any time during the assignment to check whether the work environment is acceptable. In the negative case, the agency is entitled to immediately withdraw the workers and terminate the contract after consultation with the client´s safety delegate.

Moreover, the "Work Environment Act" allows the appointment of a coordinator at construction sites whose task is to prevent the risks that can arise due to the specific risk that various companies with different skills work at the same site.

UK

Key point/background – Combat of false self-employment

The UK government announced that it would tackle the use of employment intermediaries facilitating false self-employment to avoid employment taxes, hence the introduction of new legislation in July 2014. The Finance Act 2014 includes this specific legislation relating to "On Shore Employment Intermediaries: False self-employment".

Description of the measure in discussion/already in place

The new legislation provides that agency workers of the employment business will be taxed as employees if they are subject to a right of direction, supervision and control by the client.

Under the new legislation the responsibility falls upon Employment Businesses to prove if a worker is employed or self-employed and will be liable for up to 6 years of unpaid tax and national insurance if a seemly self-employed worker is subsequently found not to be truly self-employed.

Chronologic list of judgements referred to in the text:

European Court of Justice rulings	
C-31/87 – Gebroeders BeentjesBV vs the Netherlands	Social criterion of contract performance relating to the employment of long-term unemployed persons is compatible
C-225/98 – European Commission vs France; Nord-Pas-de-Calais	Combat of local unemployment is admissible as an award criterion
C-513/99 - Concordia Bus Finland versus Helsingin (Finland)	Frame of reference for contracting authorities: quality criteria may be taken into account when the criteria are linked to the subject-matter of the contract
C-448/01 - Wienstrom vs Austria	Award criteria must not be purely economical
C-341/05 – Un Partneri Ltd v Svenska Byggnadsarbetareförbundet ;Sweden	Preclusion of application of more favourable conditions of non-binding collective agreements than those set by national law
C-438/05 - International Transport Workers Federation v Viking Line ABP; Sweden	Preclusion of application of more favourable conditions of non-binding collective agreements than those set by national law
C-346/06 – Dierk Rüffert vs Niedersachsen (Germany)	The obligation to pay wages set by regional collective agreements for posted workers is not admissible
C-532/06 – Lianakis, preliminary ruling (Greece)	Need to stipulate from the very outset the weighing of award and sub-criteria
C-368/10 – European Commission vs Netherlands; Max Havelaar	Economic and technical specification, contract conditions, award criteria - sustainability criteria in the form of quality labels are admissible
C-549/13 - BundesdruckereiGmBH vs Stadt Dortmund (Germany)	Minimum wages - applicability
C-396/13 - Satakunnan käräjäoikeus (Finnland); reference for a preliminary ruling	Mandatory pay clauses – posted workers
C 413/13 – Dutch union FNV KIEM (Netherlands); reference for a preliminary ruling	Collective agreements are applicable to „bogus self – employed workers“
C-115/14 – Regio Post GmbH vs Stadt Landau (Germany)	Pay clauses – posted workers

European Federation
of Building
and Woodworkers

European Federation of Building

and Woodworkers (EFBWW)

B – 1000 Brussels

Tel.: +32/2/227 10 40

Fax: +32/2/219 82 28

E-mail: info@efbh.be

www.efbww.org