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Considérations sociales dans le cadre des marchés publics

Un choix politique !

"Mieux vaut prévenir que guérir"

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Mise en œuvre et application de la Directive de l'UE relative à la passation des marchés publics de travaux, de fournitures et de services, en mettant l'accent sur les aspects sociaux et des conditions équitables pour tous

1. Avant-propos

Pendant de nombreuses années, je me suis demandé pourquoi il est si difficile de mettre en œuvre et d'appliquer une règle de bon sens, à propos de laquelle tout le monde convient qu'il s'agit de "la bonne chose à faire". Chacun reconnaît que tous nos pouvoirs publics devraient dépenser notre argent à bon escient et de manière éthiquement correcte.

Syndicats et organisations du commerce équitable et de l'environnement demandent continuellement que, outre fournir un service ou produit de haute qualité, notre argent (1) soutienne le développement de normes élevées en matière de politiques publiques sociales, (2) contribue à une économie sociale de marché équitable et (3) élève les normes sociales.

Les directives de l'UE sur les marchés publics (2014/24/UE; 2014/25/UE; 2014/23/UE) ont clairement pris en compte nos trois demandes et ont introduit quelques améliorations sociales majeures dans la législation actuelle de l'UE sur la passation des marchés publics.

Lorsque nous considérons que les dépenses publiques totales de l'UE sur des biens, travaux et services (à l'exclusion des services publics) s'élevaient à 1786.61 milliards en 2013, quelque chose de positif pourrait très certainement être fait. Malheureusement, la législation de l'UE doit d'abord être mise en œuvre, puis appliquée dans la pratique ultérieurement. Dans cette immense zone grise, nos États membres et les autorités publiques ont une énorme marge d'appréciation sur la façon dont ils souhaitent mettre en œuvre et appliquer les "normes sociales" nouvellement adoptées. Même si certaines "normes sociales" sont gravées dans la pierre, leur application réelle reste un choix politique.

Avec ce manuel, la Fédération européenne des travailleurs du bâtiment et du bois tente de soutenir ses membres affiliés dans les différents États membres avec la mise en œuvre et l'application des Directives sur la passation des marchés publics récemment adoptées. Pour ce faire, nous avons jusqu'en avril 2016 pour traduire les nouvelles règles en droit national.

Ce manuel contient deux parties. La première est consacrée à une évaluation de la législation et de la jurisprudence actuelles de l'UE, et indique les lignes dans lesquelles nous pouvons mettre en œuvre et appliquer des "normes sociales" dans le cadre de la passation de marchés publics. La seconde est un aperçu de différentes meilleures pratiques, qui pourraient être utilisées comme des options possibles au niveau national.

Sans le soutien actif des experts nommés et des personnes de contact des syndicats nationaux du secteur de la construction désignées, la collecte de meilleures pratiques visant à mettre en évidence la mise en œuvre effective de normes sociales au sein de la législation nationale sur la passation des marchés publics n'aurait jamais été possible.

Le travail méticuleux consistant à recueillir et trier systématiquement l'essentiel des informations recueillies sur les meilleures pratiques dans un manuel lisible a été effectué par Mme Susanne Wixforth et M. Jan Cremers, auxquels nous sommes très reconnaissants d'avoir assuré cette tâche difficile.

Enfin, nous témoignons notre reconnaissance aux membres du groupe de pilotage, qui ont ajouté leur expérience et ont guidé et surveillé l'ensemble du projet.

Ce manuel est le résultat d'un projet de la Fédération européenne des travailleurs du bâtiment et du bois financé par la Commission européenne.

Werner Buelen
Project manager

2. Introduction

La passation des marchés publics est souvent considérée comme une affaire purement juridique, dominée par de grands cabinets d'avocats et des considérations juridiques complexes. Le but du projet était donc de fournir aux syndicats un guide pratique pour le processus de mise en œuvre de la nouvelle Directive[1] européenne relative à la passation des marchés publics. L'accent a été mis sur les meilleures pratiques, car elles offrent un bon aperçu de ce qui est légalement possible dans les principes directeurs encore primordiaux de la Directive, à savoir la transparence et la non-discrimination. Il convient également de noter que sans prévention, contrôle et application, les principes consacrés juridiquement ne sont pas équivalents à la réalité. Par conséquent, des meilleures pratiques en matière de listes noires et blanches ainsi que d'autres mécanismes de contrôle innovants ont été inclus à titre d'outil important en vue de réaliser les bonnes intentions dans la réalité quotidienne des travailleurs du secteur de la construction.

Le secteur de la construction se caractérise par la structure complexe des chantiers temporaires ou mobiles, les chaînes compliquées de sous-traitance combinées à une incidence élevée d'accidents du travail ainsi que de fraude sociale, qui doit et peut être améliorée par le biais de la législation sur la passation des marchés publics. Également particulier, le fait que le rôle du législateur est triple : en tant que législateur, en tant que client et en tant que partenaire dans des négociations tripartites pouvant définir le cadre des conditions de travail.

Par conséquent, la passation des marchés publics constitue un domaine très important de l'action politique en matière de considérations sociales, relatives à la santé et à la sécurité sociale. En outre, la crise financière et économique fait peser de nouvelles tâches sur les pouvoirs adjudicateurs :

> Tout d'abord, ils doivent s'engager en tant que pionniers concernant les questions de travail, de santé et de sécurité. Les travaux publics dans le bâtiment et les infrastructures représentent quelques-unes des parts les plus importantes des dépenses publiques. Les marchés publics relevant directement du champ d'application des Directives européennes représentent de 422 milliards d'euros par an, soit 2,6% du PIB de l'UE (chiffres 2013). Avec la crise financière et économique continue, la passation des marchés publics constitue la principale force motrice pour le secteur de la construction. Par conséquent, les syndicats attendent que les pouvoirs adjudicateurs attribuent les marchés publics à l'offre économiquement la plus avantageuse, et non à l'entrepreneur le moins cher.
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> Deuxièmement, en ces temps de taux de chômage des jeunes extrêmement élevés atteignant 50%, les pouvoirs adjudicateurs doivent offrir des opportunités aux jeunes en définissant l'apprentissage en tant que partie des critères d'exécution du marché.
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> Troisièmement, le secteur de la construction s'est révélé particulièrement ouvert aux pratiques de dumping social et de règle du jeu non équitables. La responsabilité des conventions collectives et des entrepreneurs généraux est donc atténuée par les chaînes de sous-traitance.

[1] Directive 2014/24/UE du Parlement européen et du Conseil du 26 février 2014 sur la passation des marchés publics et abrogeant la Directive 2004/18/CE, ainsi que les directives 2014/23/UE et 2014/25/UE.

La nouvelle Directive de l'UE relative à la passation des marchés publics offre une marge de manœuvre pour réaliser ces tâches politiques devant être remplies par les pouvoirs adjudicateurs. Mais bien souvent, les gouvernements nationaux préfèrent choisir la solution de facilité et opter pour un minimum d'adaptation de la législation nationale en ce qui concerne la transposition de la Directive. Les syndicats sont invités à s'opposer fermement à ces tendances et à se saisir de l'occasion en formulant des normes de qualité relatives aux questions du travail, de la santé et de la sécurité devant être appliquées par des procédures de passation de marchés publics, et en les moulant dans la mesure du possible dans une législation contraignante.

Les syndicats sont en faveur de la **transparence** (ce sont des règles claires et contrôlables) et de la **force exécutoire**, et donc réticents à la responsabilité sociale des entreprises, aux accords-cadres ou à tous autres arrangements non contraignants. Les principes proposés par les syndicats au cours du processus de mise en œuvre national devraient être les suivants :

- la prise en compte des aspects sociaux lors de la mise en œuvre et de l'application des directives de l'UE est une obligation politique devant être prise en compte, et pas seulement une question juridique ;
- l'application de normes sociales dans les appels d'offres publics doit être exemplaire, veiller à ce que l'argent public soit dépensé à bon escient, et requérir que des normes sociales, d'éducation, de santé et de sécurité soient effectivement appliquées sur le lieu de travail ;
- la stipulation de l'obligation de respecter les aspects sociaux est non seulement dans l'intérêt des syndicats, mais aussi celui des entreprises qui se conforment à ces obligations. Le droit de la passation des marchés publics constitue donc un instrument pour établir des règles équitables en vue d'éviter la distorsion ou la concurrence ;
- la lutte contre le dumping social constitue également un objectif politique afin de réduire les coûts post-contractuels supportés par la société dans son ensemble. Le pouvoir adjudicateur doit adopter un rôle de premier plan, en particulier en ce qui concerne :
  - le respect et la prise en compte des conventions collectives,
  - la mise en place d'un système sain de relations industrielles à tous les niveaux et
  - l'utilisation de la passation des marchés publics comme levier pour assurer que les jeunes travailleurs bénéficient de l'opportunité d'une formation de haute qualité.

3. Évaluation juridique de la nouvelle directive européenne sur les marchés publics

(**Directive européenne 2014/24/UE du 26 février 2014 sur la passation des marchés publics et abrogeant la directive 2004/18/CE**)

Les biens, services et travaux attribués dans le cadre de marchés publics constituent une partie importante du produit intérieur brut (PIB) national en Europe. En moyenne, la part correspond à près d'un cinquième (19,7% en 2010) du PIB total de l'UE, variant de 10,5% du PIB à Chypre à 30,6% aux Pays-Bas[2]. Plus de 250 000 pouvoirs adjudicateurs en Europe se consacrent à la passation de marchés publics. Une grande partie de ces biens, services et travaux restent en dessous des seuils de l'UE[3]. Dans le cas de passations ne relevant pas des règles de passation des marchés de l'UE, il appartient aux pouvoirs adjudicateurs eux-mêmes de juger si la passation des marchés peut être d'un quelconque intérêt pour les acteurs économiques dans d'autres États membres. Si ce n'est pas le cas, le droit communautaire ne sera pas applicable. Mais, en général, tous les travaux et projets majeurs devront composer avec le nouveau régime qui entrera en vigueur en avril 2016. Il est prévu que dans le cadre des nouvelles règles de passation des marchés, les possibilités de s'attaquer aux questions sociales soient élargies. Les pouvoirs adjudicateurs pourront tenir compte d'aspects sociaux parmi d'autres critères afin de déterminer quelle est l'offre la plus prometteuse, et le prix ne sera plus le facteur déterminant central. Dans 'l'ancienne' Directive (2004/18/CE), la notion de l'offre économiquement la plus avantageuse avait déjà été présentée en tant qu'alternative au plus bas prix. Cependant, l'intégration de considérations sociales était principalement limitée au stade de l'exécution d'un marché. Dans la nouvelle Directive, le concept de l'offre économiquement la plus avantageuse (MEAT) est élaboré de manière beaucoup plus détaillée et permet l'inclusion de critères de qualité dans le cahier des charges, les conditions du marché et la procédure d'attribution.

L'inclusion de clauses sociales dans les marchés publics peut obliger les acheteurs et les fournisseurs publics à protéger les personnes vulnérables, soutenir les personnes défavorisées, développer l'économie sociale, protéger l'environnement et promouvoir d'autres objectifs sociaux et avantages communautaires au cours d'un projet en tant que condition de l'attribution du marché. Mais sans conception correcte, cette politique échouera. Par conséquent, la transposition doit être soigneusement suivie, et des mesures concrètes doivent être évaluées et contrôlées depuis la pré- jusqu'à la post-passation des marchés. Les initiatives doivent être bien préparées. Dans l'intervalle, les États membres ont lancé les préparatifs de la transposition, et certaines initiatives sont prometteuses. Mais il y a aussi les premiers signes d'États membres optant pour une transposition simple et sans ambition. Cela est souvent dû à la résistance des pouvoirs adjudicateurs. Ils préfèrent les procédures simples : opter pour le modèle du prix le plus bas signifie moins de probabilité de poursuites judiciaires, comme c'est le cas pour le choix de l'option économiquement la plus avantageuse.

Ceci pourrait résulter, par exemple, dans la non-application de clauses sociales, laissant ainsi de l'espace pour que le prix le plus bas soit maintenu en tant que critère d'attribution de base. Les incitations potentielles visant à contribuer à stimuler la passation des marchés verts et sociaux seraient

[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 euros pour tous les contrats de service, tous les concours de design, les marchés de services subventionnés, tous les marchés de fournitures par les pouvoirs adjudicateurs de niveau inférieur, et 5 186 000 euros pour tous les marchés de travaux, les marchés de concessions de travaux, les marchés de travaux subventionnés par les autorités du gouvernement central

perdues, même si les obstacles juridiques à l'adoption de critères sociaux et de critères visant à promouvoir la durabilité dans les procédures de passation des marchés publics ont été en théorie supprimés. Le rapport du Portugal[4] montre par exemple que le gouvernement est très réticent à inclure des considérations sociales significatives dans la procédure de passation des marchés, en se référant uniquement à la recommandation que "lorsque c'est possible, les spécifications techniques doivent être définies de manière à inclure les caractéristiques des biens à acquérir ou des constructions à réaliser, d'une manière telle que leur utilisation par des personnes souffrant de handicaps ou tout autre utilisateur soit autorisée." Il est conclu que les procédures doivent être jugées très négatives, en particulier en ce qui concerne les droits sociaux et les conditions de travail des travailleurs. La concentration sur des critères d'attribution économiques implique que pendant l'exécution du marché, l'opérateur économique exercera une pression sur les sous-traitants afin de respecter les coûts prévus. Bien souvent, cela est réalisé en minimisant les dépenses en équipements sociaux (surpeuplement des sites de couchage, absence de cantines, etc.), équipements de sécurité et services de santé. Souvent, les travailleurs doivent eux-mêmes acheter l'équipement de sécurité et payer l'hébergement. L'attribution au plus bas prix implique souvent le transfert des coûts vers le bas de la pyramide contractuelle. Les pratiques de sous-traitance aggravent encore le problème en raison d'une invisibilité et d'une désinvolture accrues.

Par conséquent, dans le cadre de la procédure de transformation en cours des nouvelles directives de l'UE en matière de passation des marchés, il est impératif que les syndicats expliquent clairement à leur gouvernement national que l'attribution au prix le plus bas plutôt que d'évaluer les avantages plus larges à travers la vie du marché et les avantages à long terme dans les résultats finaux aboutit au bout du compte à un prix beaucoup plus élevé pour le budget public. Opter pour le prix le plus bas ne porte pas seulement atteinte à la qualité des emplois et des prix, mais est souvent mis en danger par la forte probabilité de faillite du soumissionnaire ou de ses sous-traitants, avec des coûts subséquents élevés à la clé. Les organisations syndicales danoises, par exemple, ont récemment examiné les économies de coûts de 15 à 20% réalisées par l'externalisation des services de soins locaux. Les syndicats ont constaté que la différence provenait du déploiement de personnel disposant d'un faible niveau de formation et de travailleurs à temps partiel, en les privant du paiement des heures supplémentaires. En conclusion, la réduction des coûts au détriment des travailleurs et la réduction de la qualité des services fournissaient clairement uniquement une économie théorique.

Comme le montre le rapport d'Irlande[5], en termes de respect des normes du travail, les règles de passation des marchés publics irlandais imposent également très peu d'obligations sur les soumissionnaires et très peu d'obligations sur les pouvoirs adjudicateurs publics. Ceci est un domaine dans lequel directives ministérielles, mécanismes juridiques non contraignants (circulaires, recommandations, etc.) et discrétion administrative jouent un rôle important. Il semble ne pas y avoir de données systématiques sur la mesure dans laquelle les clauses types sont utilisées et, surtout, mises en œuvre. Les clauses de conformité sont de nature contractuelle (plutôt que législative) ; en conséquence, toute sanction consécutive à cette violation doit similairement être prévue contractuellement (et sera soumise aux principes généraux du droit des contrats, y compris l'interprétation et, si nécessaire, l'arbitrage par les tribunaux). Encore une fois, on constate un manque

[4] Fourni par Bruno Monteiro – Instituto de Sociologia - Universidade do Porto

[5] Rapport fourni par le Prof. Michael Doherty, Maynooth University Department of Law, Maynooth University, Co. Kildare, Irlande.

flagrant d'informations fiables sur le fait de savoir si de telles clauses de pénalité sont (couramment) prévues et/ou mises en œuvre.

Ceci est confirmé par les statistiques de l'autorité nationale en charge de l'inspection du travail d'Irlande (NERA), qui pointe un problème de conformité significatif et continu en ce qui concerne les chantiers de travaux publics. Dans la première moitié des années 2010, par exemple, la NERA a effectué 191 inspections dans le secteur de la construction et a constaté un taux de conformité au droit du travail de seulement 43 pour cent[6]. On estime que les acheteurs publics ont tendance à les considérer comme des exercices consistant à cocher des cases, et aucun réel effort n'est effectué en termes de mise en œuvre[7]. Le problème, bien que général, est semble-t-il particulièrement aigu dans le secteur de la construction.

Tout d'abord, au stade de l'attribution, les informateurs étaient d'avis que les autorités publiques sont concernées presque exclusivement par le prix, et n'entreprennent pas de véritables contrôles sur la façon dont le soumissionnaire a l'intention de tenir compte de ses obligations en matière de droit du travail. Ce problème s'est intensifié ces dernières années, étant donné le climat économique difficile.

Deuxièmement, comme les clauses du droit du travail types sont de nature contractuelle, il semble y avoir une grande réticence de la part des pouvoirs adjudicateurs publics à invoquer des clauses de retenue de paiement, de peur de se laisser entraîner dans des procédures juridiques coûteuses.

Troisièmement, un certain nombre de questions générales se posent par rapport à l'application. Les autorités en charge de l'application dépendent fortement de la réception d'informations concernant les cas de non-conformité suspectés. En conséquence, là où ils ont une présence, les syndicats jouent un rôle important en assurant que les mesures soient appliquées. Cependant, comme dans la plupart des États membres de l'UE, la densité syndicale en Irlande a diminué au cours des dernières années, et les syndicats ont une présence (le cas échéant) relativement limitée dans de nombreux secteurs. Une baisse de la capacité des syndicats à remplir leur rôle traditionnel de 'maintien de l'ordre' met une pression supplémentaire sur les ressources des autorités de contrôle de l'État. Pour ces dernières, poursuivre un fournisseur de services à l'étranger, en particulier un qui ne se trouve dans la juridiction que pour une période de temps limitée, est difficile sur le plan logistique et nécessite de nombreuses ressources. Même si une action peut être engagée, exécuter des décisions contre des entreprises établies à l'étranger reste problématique.

Ainsi, il semble que, bien que la pratique de passation des marchés publics en Irlande soit d'inclure des clauses de respect du droit du travail dans les contrats publics, la mesure dans laquelle celles-ci sont efficaces dans l'application des normes de travail est discutable.

La question est donc de savoir si les nouvelles règles permettent de garantir l'incorporation de clauses sociales dans les contrats de marché public et la maximisation des avantages sociaux et de la valeur par le biais du processus de passation des marchés. Selon la CES, la directive comporte plusieurs dimensions positives :

[6] Les chiffres ne se rapportent pas exclusivement à des sites de travaux publics, mais selon le représentant de la NERA, la grande majorité des inspections ont été effectuées sur de tels sites. http://www.employmentrights.ie/en/media/NERA%20Quarterly%20Update%20-%20June%202010.pdf.

[7] En effet, les directives pour les pouvoirs adjudicateurs publiées sur le site web national de passation des marchés publics ne font absolument aucune référence au respect du droit du travail; http://www.procurement.ie/sites/default/files/Public-Procurement-Checklist.pdf

- Elle crée une plateforme plus solide pour les exigences clés pressantes, telles que respect des conventions collectives, conditions de travail et de paiement, conformité avec les outils de santé et de sécurité, formation des travailleurs, possibilités d'apprentissage et autres critères sociaux.
- Elle élargit la possibilité d'inclure des critères durables et d'autres aspects sociétaux de la politique.
- Elle peut mettre fin à la fixation sur l'offre la moins chère du fait que l'utilisation obligatoire du critère de coût le plus bas a été considérablement réduite.
- Elle est une fenêtre d'opportunité pour une future politique de passation des marchés qui contribue à l'utilisation des deniers publics pour promouvoir un développement économique et social cohérent, un emploi de qualité ainsi que des services, biens et travaux de qualité. [8]
- Elle est une tentative d'améliorer la transparence dans les chaînes de sous-traitance.
- Elle est un moyen de lutter contre le dumping social.

La Directive fixe des objectifs en ce qui concerne les considérations sociales. Toutefois, beaucoup dépend de la transposition en droit national. Il est donc important de réfléchir non seulement à la façon de définir et de garantir/promouvoir les considérations sociales[9], mais aussi à la façon d'améliorer le contrôle de l'application et du respect des salaires minimaux.

3.1. Opportunités de considérations sociales

En 2011, la Commission européenne avait déjà tenté de clarifier la manière dont les aspects sociaux peuvent trouver leur chemin dans les marchés publics par la publication d'un Guide sur les marchés publics socialement responsables[10]. Le guide propose un outil pour aider les pouvoirs publics à acheter des biens et services d'une manière socialement responsable, en conformité avec les règles de l'UE. Il souligne également la contribution que la passation des marchés publics peut apporter pour stimuler une plus grande inclusion sociale. Bien que le titre semble prometteur, au bout du compte, les bonnes intentions de la Commission européenne "pour orienter le marché dans une direction socialement plus responsable et contribuer ainsi d'une manière plus générale au développement durable", restent capturées dans les limites strictes du lien obligatoire avec le sujet du marché public ainsi que du dogme de la concurrence entre les États membres, qui inclut la concurrence des salaires, limitant ainsi l'applicabilité des conventions collectives.

Par conséquent, l'Art 18.2 de la nouvelle Directive vise à garantir le respect des conditions de travail qui sont d'application sur le lieu de travail, qu'elles soient contenues dans la loi et/ou des conventions collectives. Si elles sont appliquées correctement, les nouvelles règles devraient garantir l'application des conventions collectives du lieu de travail à la suite d'une procédure de passation de marché public. L'obligation d'assurer que les opérateurs économiques se conforment aux conditions de travail applicables incombe aux États membres, et non aux autorités locales, régionales ou nationales de

[8] À l'annexe 14 une liste est fournie de «services sociaux spécifiques et d'autres« qui valent plus de 750 000 euros. La directive prévoit un régime plus léger pour ces services.
[9] *New EU framework on public procurement – ETUC key points for the transposition of Directive 2014/24/EU*, ETUC, Brussels, October 2014.
[10] European Commission (2011) *Buying Social: a guide to taking account of social considerations*, Brussels.

passation de marchés publics. Le passage de la passation presque ‘obligatoire’ au prix le plus bas à une utilisation optionnelle de clauses sociales dans la procédure d'attribution pose également un défi aux syndicats et ONG qui ont fait pression pour l'élargissement des règles de passation des marchés publics; maintenant, c’est à eux de garder le doigt sur le pouls. Les gouvernements locaux, régionaux et nationaux n’ont plus la possibilité de se retrancher derrière le dogme de l'offre la plus basse.

L'utilisation de travailleurs détachés dans un contexte de marchés publics peut avoir des conséquences pour le type de conventions collectives qui peuvent être imposées à l'entreprise, en fonction de la transposition nationale de la Directive sur le détachement des travailleurs. Mais un marché public qui n’implique pas l'utilisation de travailleurs détachés doit être exécuté clairement en conformité avec l’ensemble du droit du travail et des conventions collectives du lieu de travail.

La question est aussi de savoir où les considérations sociales peuvent figurer ; est-ce à tous les stades de la passation des marchés, ou bien des stades sont-ils exclus, par exemple les spécifications techniques ou les conditions de passation de marchés ? La Directive ne fait aucune référence à l'Art. 18.2 à ce stade particulier. Une autorité publique peut toujours assurer le respect des conditions de travail applicables en fixant des conditions pour l'exécution des marchés. Cependant, vu que l’Art. 18.2 est clairement obligatoire et que son respect doit être contrôlé à plusieurs reprises dans les étapes suivantes de la procédure, il serait logique que les lois de transposition incluent également une référence à des considérations sociales obligatoires dès le stade des spécifications techniques, vu que le non-respect des spécifications techniques constitue un critère d’exclusion. Cela signifie que le soumissionnaire ne peut pas compenser le manquement en offrant d'autres "goodies", comme par exemple une durée plus longue pour les garanties.

Les conditions d'exécution du contrat peuvent notamment porter sur des considérations sociales, sans la nécessité d'avoir un lien avec l'objet du marché. Conformément au Considérant 99, elles peuvent favoriser, entre autres, la formation professionnelle sur le site ou la lutte contre le chômage. Un autre critère important est la qualité du personnel, y compris son organisation, ses qualifications et son expérience, la qualité du personnel pouvant avoir un impact significatif sur le niveau d'exécution du contrat (Art 67.2 (b) et Considérant 94). Elles peuvent, par exemple, impliquer l'obligation au cours de l'exécution du contrat de mettre en œuvre des mesures de formation pour les chômeurs ou les jeunes, ou de respecter en substance les conventions fondamentales de l'Organisation internationale du Travail (OIT). L'apprentissage est un outil important pour atteindre les objectifs de la stratégie Europe 2020 pour une croissance intelligente, durable et inclusive. Il contrôle la formation adéquate des jeunes travailleurs quant à la qualité du travail, les compétences techniques, les normes de travail et la prévention des risques. Par conséquent, il devrait constituer un aspect important lors de l'attribution d'un marché public, afin de se conformer à son important rôle socio-politique consistant à fournir à la jeune génération des emplois adéquats. Cette possibilité a toujours été ouverte aux marchés publics, mais a été renforcée par la nouvelle Directive en introduisant la notion de “meilleur rapport qualité-prix”. Les pouvoirs adjudicateurs devraient être encouragés à choisir des critères d'attribution qui leur permettent d'obtenir des travaux de haute qualité (Considérant 92), y compris l'organisation, les qualifications et l'expérience du personnel affecté à l'exécution du contrat en question. Au vu du taux de chômage inacceptablement élevé dans l'UE, en particulier en ce qui concerne la jeune génération, la politique de passation des marchés publics est cruciale pour soutenir les entrepreneurs qui offrent des apprentissages. Cette option a été choisie par exemple en Norvège et en Autriche, où l'offre de places d'apprentissages au sein de la société initiatrice constitue un critère d'attribution, respectivement une condition d'exécution du marché au moment de choisir la meilleure offre.

Cependant, ces bons exemples ne doivent pas détourner du problème, à savoir comment le respect de ces obligations légales doit être vérifié, et comment les pouvoirs adjudicateurs seront en mesure de les contrôler. Le fait que ceci n'est pas impossible est illustré par une autre meilleure pratique en Autriche, où la "loi sur les salaires et l'anti-dumping social" a été mise en place en vue de fournir des contrôles rigides de sites de construction, de connecter les différentes autorités impliquées, d'accroître l'information des travailleurs concernant la violation des conventions collectives, et d'appliquer des sanctions considérables.

Enfin, la notion de "coût du cycle de vie (Art. 68)" a été récemment introduite dans la Directive. L'application du concept de cycle de vie dans la construction – du berceau à la tombe, ou de la planche à dessin à l'exécution – a toujours eu un très fort lien direct avec la santé et la sécurité (liées au site et au produit) pour tous les utilisateurs (les travailleurs dans toute la chaîne de production, le public et l'utilisateur final). Bien que la notion de coût du cycle de vie ne puisse probablement pas être utilisée pour la protection sociale et la promotion d'un salaire décent, l'aspect de la santé des travailleurs pourrait constituer un champ opérationnel pour l'activité syndicale.

3.2. Labels et certifications

Les labels de qualité sont une marque ou un modèle d'authentification permettant au consommateur d'identifier un produit ou un service répondant à certains critères de qualité. Cet aspect pourrait être important pour les syndicats du fait que les critères sociaux capturent le marché (par exemple, eco-bau, Design für Alle). Il est distinct de la responsabilité sociale des entreprises, qui est un engagement volontaire d'une société à inclure des préoccupations sociales dans sa conduite, et du bilan social, qui est une photographie ex-post d'une activité de développement durable d'une entreprise. Dans son arrêt "Max Havelaar", la CJCE a estimé qu'un acheteur public ne peut pas se référer à des labels spécifiques afin d'attribuer un certain nombre de points supplémentaires lors du choix de l'offre économiquement la plus avantageuse. La CJCE a confirmé l'objet de la doctrine du marché. Par conséquent, ce concept ne pourrait pas couvrir la spécification de critères pertinents pour le cycle de production (un type particulier d'emballage, par exemple), ce qui serait utile dans le commerce, mais étranger à l'objet du marché. En fin de compte, l'Art. 43 de la nouvelle Directive propose un système facultatif permettant à un label spécifique d'être requis comme preuve du fait que les services ou les fournitures en question sont conformes aux caractéristiques sociales requises. Ainsi, le cadre étroit de la CJCE a été annulé par le législateur. Toutefois, les exigences de label doivent toujours être liées à l'objet du marché, établies dans une procédure ouverte et transparente avec toutes les parties prenantes, et fixées par un tiers. Bien que la codification des conditions de recevabilité des labels sociaux puisse être la bienvenue en principe, son application se révélera difficile, car les conditions sont strictes et l'application facultative.

Les certificats constituent certainement une possibilité d'imposer des contrôles ex-ante afin de garantir les normes de qualité dans le secteur de la construction. Toutefois, il convient d'être attentif à qui établit les normes. Est-ce le secteur à réglementer qui est habilité à le faire ? Dans ce cas, il est évident que de telles règles ne seront pas satisfaisantes en matière de santé, de mesures professionnelles et de sécurité pour les travailleurs, mais essayeront plutôt de minimiser les coûts en minimisant les normes requises. Si les normes sont établies par une institution publique, si les syndicats

ou représentants de travailleurs expatriés ont une position au sein de la procédure établissant des certificats, elles peuvent alors jouer un rôle important et servir d'outil dans le cahier des charges et la procédure d'attribution, ainsi que pour les conditions d'exécution du marché. Relèvent également de cette gamme l'établissement de listes courtes énumérant les sociétés satisfaisant à des critères de qualité spécifiques, tels que prévus par l'autorité publique compétente, ainsi que l'instrument des cartes d'identité sociale. Celles-ci sont "des outils individualisés de certification des travailleurs, qui contiennent des données électroniques visibles et stockées en toute sécurité et ont pour but d'attester que l'employeur du salarié et/ou le salarié lui-même ont satisfait aux exigences sociales spécifiques et/ou d'une autre nature (par exemple, l'expérience professionnelle et/ou les qualifications, la formation à la sécurité et à la santé au travail, à la protection sociale et aux questions de sécurité, ...)." [11]

3.3. Directives - arrangements non statutaires

Bien que les arrangements non statutaires semblent à première vue ne pas être les moyens de parvenir à une passation de marchés de "meilleure qualité", ils peuvent être un point de départ pour établir des règles contraignantes. Souvent, des arrangements (par exemple, les "clauses sociales" dans les conventions collectives de travail en Finlande ou les Pays-Bas, ou "Towards 2016" en Irlande) entre les syndicats et les entreprises d'un secteur spécifique ont pour objectif d'améliorer la qualité de la formation et de la sécurité sur le site de construction, qui est ensuite étendue à l'ensemble du territoire d'un État membre. En outre, si d'importants acheteurs publics conseillent à leurs entités acheteuses de respecter certains critères sociaux, un effet considérable est atteint en nommant et dénonçant.

Ainsi, dans le cas des marchés publics, des directives élaborées par les autorités et les entrepreneurs peuvent être un point de départ là où la structure fédérale ou l'absence de centrale d'achat ne permet pas de prendre des mesures législatives contraignantes. Dans ce cas, des directives peuvent apporter un soutien spécifique aux pouvoirs adjudicateurs, et la non-application pourrait conduire à deux conséquences :

1. Nécessité de justification : Si le pouvoir adjudicateur n'applique pas les directives relatives à la qualité, il doit expliquer pourquoi il a refusé de le faire
2. Nommer et dénoncer : Les syndicats pourraient publier l'écart par rapport aux normes de qualité figurant dans les directives et établir une liste blanche et une liste noire – les entrepreneurs qui ont appliqué les directives, et ceux qui ont refusé de le faire.

[11] Cartes d'identité sociale dans l'Industrie européenne de la construction, Janvier 2015, FETBB, Rapport final

3.4. Exclusion des soumissionnaires qui ne respectent pas les conditions de travail applicables.

L'Art. 56 de la Directive précise que les autorités peuvent décider de ne pas attribuer un marché à un soumissionnaire ayant présenté l'offre économiquement la plus avantageuse lorsque l'offre ne répond pas à l'Art. 18.2. Ainsi, on peut conclure que la révision offre aux États membres de l'UE la possibilité de définir des motifs obligatoires d'exclusion de fournisseurs de concours pour des marchés, y compris lorsqu'un soumissionnaire ne respecte pas la législation du travail (outre la fiscalité). Les modifications permettent aux autorités publiques de placer effectivement des entreprises sur une liste noire et de les empêcher de soumissionner pour des marchés publics. L'utilisation du mot 'peut' plutôt que 'doit' dans l'Art. 56 est en apparente contradiction avec l'esprit de l'Art. 18.2, qui est clairement obligatoire. Les lois de transposition pourraient utilement préciser que les autorités publiques n'ont pas le choix en la matière : un soumissionnaire ne respectant pas le droit du travail applicable ou la convention collective du lieu de travail ne peut pas se voir attribuer le contrat. En outre, l'Art 18.2 impose l'obligation aux États membres de prendre des mesures appropriées. Celles-ci devraient inclure des mesures d'application appropriées afin d'assurer l'application effective de l'Art. 18.2. Dans ce contexte, le Considérant 39 donne d'autres indications : les obligations pertinentes pourraient être reflétées dans les clauses du contrat, y compris celles garantissant le respect des conventions collectives. Le non-respect des obligations en question pourrait être considéré comme une faute grave de l'opérateur économique concerné, pouvant entraîner son exclusion de la procédure de passation de marché public.

Les motifs d'exclusion sont en outre définis à l'Art. 57: il confère à l'autorité publique la faculté d'empêcher un opérateur économique de participer à une procédure de passation de marché public si elle peut démontrer, par tout moyen approprié, une violation de l'Art. 18.2 soit avant, soit pendant la procédure. En outre, les États membres doivent fixer le délai pendant lequel l'exclusion des procédures publiques est valide. Si la période d'exclusion n'est pas définie de manière différente par un jugement, l'exclusion ne peut excéder trois ans à compter de la date de la violation.

Par conséquent, les critères fixés dans l'Art. 18.2 doivent être considérés comme des principes tout aussi importants que les principes directeurs du droit des marchés publics, qui sont la transparence, l'égalité de traitement et l'adéquation.

L'Art. 59 introduit une procédure simplifiée : l'utilisation d'un European Single Procurement Document (ESPD), constitué d'une auto-déclaration mise à jour par l'opérateur économique à titre de preuve préliminaire. Il est extrêmement important d'être attentif à cette disposition lors de la transposition. L'abus de ces documents est relativement facile, et une vérification adéquate par l'autorité publique ou par un tiers fiable est impérative. Par conséquent, il pourrait être judicieux d'imposer une obligation légale d'examen approfondi au pouvoir adjudicateur.

Une des questions clés liées à l'exclusion est la nécessité de la preuve. Est-elle justifiée si, par exemple, les entreprises ont montré des manquements importants ou persistants lors de l'exécution de marchés publics passés et si ces manquements ont conduit à la résiliation anticipée d'un contrat préalable, à des dommages-intérêts ou d'autres sanctions ? Et cette preuve doit-elle nécessairement être basée sur des expériences sur le propre territoire national, ou bien des abus en matière de recrutement professionnel transfrontalier et des infractions dans d'autres pays sont-ils suffisants ? Par exemple, est-il possible pour l'Allemagne d'exclure un soumissionnaire sur la base d'un rapport négatif de

l'inspection du travail luxembourgeoise ? Une entreprise qui a été portée devant les tribunaux par les syndicats en France pour non-respect des conditions de travail peut-elle être exclue en Belgique sur la base du verdict? [12] Il est clairement nécessaire de définir le type de manquements, les éléments de preuve nécessaires et les compétences des autorités. En outre, il faudrait envisager d'introduire une obligation d'information légale pour le pouvoir adjudicateur, afin de vérifier si le soumissionnaire a enfreint les lois sur la sécurité sociale, le dumping social ou d'autres lois, si des bases de données pertinentes devaient exister dans l'État membre.

3.5. Prix le plus bas ou offre économiquement la plus avantageuse

Fixer le prix plus bas en tant que critère d'attribution principale peut ne pas être un problème si les critères de spécification et les conditions du marché comprennent déjà des aspects concernant le travail et la santé. Définir ces aspects au niveau de la spécification présente l'avantage qu'ils ne sont pas liés à l'objet du marché, mais à l'entreprise cliente. En outre, s'ils ne sont pas remplis, ils constituent des motifs obligatoires d'exclusion du processus de soumission. En vertu de l'Art. 57, les entrepreneurs clients peuvent également être exclus s'ils ont violé des dispositions de normes sociales reconnues sur plan international ou national. En outre, une déclaration d'engagement à respecter les normes fondamentales du travail de l'OIT peut être demandée comme condition d'exécution du marché.

La Directive, cependant, ouvre également la voie à l'application obligatoire de MEAT. Dans ce contexte, elle introduit la notion de meilleur rapport qualité-prix (Art. 67.2). Ce concept est utilisé en tant que notion primordiale en référence à ce que le pouvoir adjudicateur considère comme la meilleure solution parmi celles proposées. L'un des objectifs de la réforme annoncée par la Commission européenne était de trouver un équilibre entre la nécessité de tenir compte des besoins sociaux et environnementaux et d'éviter les obstacles à l'ouverture du marché unique. Pour cette dernière raison, la Commission européenne n'a malheureusement pas inclus de chapitre spécial sur les clauses sociales obligatoires, et donc, l'attribution d'un marché sur la base d'une évaluation 'coût ou prix seulement' n'a pas été exclue. Toutefois, cela ne devrait pas empêcher les syndicats de demander leur intégration dans la législation nationale, vu que le seul critère du coût conduit à une pression à la baisse sur les conditions de travail et la qualité du service. Bien que le prix ou le coût soit un élément obligatoire (Art. 67) qui doit être évalué par les pouvoirs adjudicateurs, ils peuvent inclure un meilleur rapport qualité-prix, ce qui implique des critères qualitatifs supplémentaires, tels qu'indiqués dans l'Art. 67.2. Considérants 97 et 99 de la Directive, qui précisent la portée de l'Art. 67 comme suit: "Afin que les considérations sociales et environnementales soient mieux prises en compte dans les procédures de passation de marché, il convient que les pouvoirs adjudicateurs soient autorisés à appliquer des critères d'attribution ou des conditions d'exécution de marché liés aux travaux, produits ou services … y compris les facteurs intervenant dans le processus spécifique de production, de fourniture ou de commercialisation et ses conditions, desdits travaux… . "Cela peut inclure ... "des mesures visant à

[12] Un exemple notoire est Atlanco-Rimec. Ce sous-traitant a fait l'objet de plusieurs décisions judiciaires et administratives ; ces verdicts peuvent-ils être utilisés dans d'autres circonscriptions pour exclure la société ? (voir également la partie Meilleures pratiques du manuel)

protéger la santé du personnel participant au processus de production, ... ”et ... "ces critères ou conditions pourraient porter ... sur la mise en œuvre de mesures de formation pour les jeunes ... ”.

Ainsi, les États membres ont la possibilité de décider d'introduire l'application obligatoire du principe MEAT dans la procédure d'attribution, et quels critères sociaux ils introduisent. Dans la procédure de mise en œuvre nationale, les États membres pourraient être enclins à proposer une application optionnelle de MEAT, en faisant valoir que cela pourrait provoquer des hausses de prix. Dans ce raisonnement, une option est proposée par la nouvelle disposition de l'Art. 67.3, qui permet des dispositions contraignantes dans la législation sectorielle. Cette option est en discussion en Autriche, à savoir introduire l'application obligatoire sectorielle de MEAT pour le secteur de la construction. Dans ce contexte, il faut garder à l'esprit que le respect du droit du travail et des conventions collectives du lieu de travail ne peut pas être considéré comme un critère à pondérer dans le cadre d'un meilleur rapport qualité-prix. Il constitue une obligation distincte.

3.6. Offres anormalement basses

L'expérience a prouvé que dans un contexte transfrontalier, au moins certaines entreprises (et travailleurs) sont disposées à effectuer des travaux pour des salaires et selon des normes de travail nettement inférieurs aux normes nationales, notamment dans les secteurs de la construction, de l'agriculture, du nettoyage et d'autres catégories de services.[13] Sous la bannière de la ‘libre prestation des services’, cela peut conduire à des offres anormalement basses en matière de passation des marchés publics. Plusieurs pays ont tenté de résoudre ce problème.

La Directive 2004 contenait la notion qu’un pouvoir adjudicateur peut demander une explication à une offre ‘anormalement basse’ pour toute une série de raisons, y compris une demande que le soumissionnaire démontre la conformité avec les dispositions relatives à la protection de l'emploi et aux conditions de travail en vigueur à l'endroit où le travail doit être exécuté. Afin d'améliorer l'application de la rémunération et d’autres clauses sociales, par exemple, la plupart des lois régionales allemandes relatives à la passation des marchés contenaient des dispositions détaillées sur ces droits, et parfois même une obligation des pouvoirs adjudicateurs de surveiller les entreprises contractantes, en particulier dans le cas d'une ‘offre anormalement basse’, généralement définie comme une offre d’au moins 10% inférieure à l’offre la plus basse suivante.[14]

Dans certains pays, la politique générale consiste à se contenter de surveiller les conditions de travail en cas d'offres anormalement basses, en particulier dans les pays qui n’ont pas ratifié Convention de l'OIT. Dans une telle situation, seule une référence très générale existe dans la réglementation de la passation des marchés publics, selon laquelle les conditions de travail des entreprises sous-traitantes doivent être prises en considération en cas d'offre anormalement basse.[15] Cependant, au fil des

[13] Cremers J. (2011) In search of cheap labour in Europe, CLR/International Books, Bruxelles/Utrecht
[14] Voir Schulten et al (2012)
[15] La loi estonienne sur la passation des marchés publics de 2007 détermine que ‘si le pouvoir adjudicateur constate que la valeur d'une offre est anormalement basse', le pouvoir adjudicateur doit demander des informations sur les dispositions en vigueur sur le lieu d'exécution du marché public, qui régissent la protection

années, encore trop d'autorités publiques, surtout en raison de leurs contraintes financières, mais aussi à cause de la lourde procédure et du manque de personnel compétent, ont simplement suivi et continuent vouloir suivre l'approche la moins coûteuse, et ne se soucient que peu des critères d'attribution sociaux.

Cette situation s'est-elle améliorée avec les nouvelles règles ? Le libellé de la Directive prévoit une exclusion des offres anormalement basses pouvant se rapporter à la conformité avec les obligations prévues à l'Art. 18.2 ou à la conformité avec les obligations prévues à l'Art. 71 (sur la sous-traitance). Tout d'abord, il convient de répondre à la question de savoir dans quelle mesure les pouvoirs adjudicateurs sont tenus de vérifier les conditions de travail en cas d'offres anormalement basses. L'Art. 69 prévoit en fait qu'en cas d'offres anormalement basses, les pouvoirs publics sont tenus de demander des explications au soumissionnaire avant de rejeter une offre. Comme la CES l'a correctement souligné, les pouvoirs publics ne sont pas tenus de demander des explications spécifiquement liées au respect de l'Art. 18.2. La CES est d'avis que c'est une lacune, à laquelle il faut remédier dans les lois de transposition. En cas d'offres anormalement basses, les pouvoirs publics doivent systématiquement demander des explications en matière de respect de l'Art. 18.2 (CES 2014). L'Art. 69 fait également référence à la coopération entre les États membres, par le biais de l'échange d'informations. Cependant, en ce qui concerne les conditions de travail, ceci semble être limité aux situations de détachement et, par conséquent, ne supprime pas les questions liées aux expériences générales de violations, telles que mentionnées au chapitre 3.4.

3.7. Sous-traitance et externalisation de travailleurs – détachement, agences de travail, autres moyens d'outsourcing

Durant la dernière décennie, suffisamment de preuves ont été recueillies pour conclure que l'utilisation de chaînes de sous-traitance constitue l'un des principaux canaux pour le contournement des conditions de travail et de la législation du travail applicables. Le rapporteur du Parlement européen Marc Tarabella a conçu le concept de "processus de production socialement durable", le définissant comme un processus assurant le respect de la santé et de la sécurité des travailleurs et des normes sociales. Il a donc proposé de limiter la sous-traitance en cascade en imposant une limite de trois sous-traitants consécutifs et en introduisant le principe de la responsabilité à travers toute la chaîne de sous-traitance pour le respect des droits fondamentaux, de la santé et de la sécurité des travailleurs et des lois du travail en vigueur. Dans cet esprit, certains progrès ont été accomplis, même si aucune limitation obligatoire ne figure dans la nouvelle Directive.

Les États membres sont invités à utiliser l'espace de manœuvre nouvellement ouvert en établissant des mesures appropriées pour contrôler autant que possible le respect des normes sociales. L'Art. 71 se réfère à l'observation des dispositions de l'Art. 18.2 en cas de sous-traitance. Les obligations visées s'appliquent également aux sous-traitants. Il y a déjà eu beaucoup de critiques à l'égard de la formulation vague de cet article. À première vue, les nouvelles règles établissent le principe d'égalité

des employés et des conditions de travail' (cité dans Schulten et al, 2012). Le Royaume-Uni, la Lettonie et la Lituanie ont des dispositions similaires.

de traitement sur le lieu de travail. Toutefois, celle-ci semble limitée aux travailleurs nationaux. On ne sait pas ce qui doit être observé dans le cas d'entreprises utilisant des travailleurs détachés. Se fonder sur la CJCE dans une situation où le législateur n'a pas jugé la question d'une manière claire et transparente n'est pas très prometteur. Dans des décisions antérieures (Rüffert), la CJCE a jugé qu'un pouvoir public imposant un taux de rémunération dans une convention collective qui n'est pas universellement ou généralement applicable agirait contre la Directive et le Traité sur les travailleurs détachés. Du point de vue de la CJCE, une prescription obligatoire constitue une 'barrière' pour la libre prestation de services. La CES conclut à juste titre que 'Si l'interprétation de la CJCE de la Directive 96/71/CE était logique pour être appliquée strictement, toute une partie de la nouvelle législation sur les marchés publics pourrait être écartée dans certains États membres. Cela soulèverait même d'autres questions quant à la légitimité de la CJCE en tant que co-législateur. À l'entrée en vigueur de la nouvelle Directive sur la passation des marchés publics, il faut se demander si une autre affaire Rüffert serait encore possible (CES, 2014).

Par conséquent, l'utilisation de travailleurs détachés doit être examinée avec soin dans le cadre de la passation des marchés publics. La simple auto-déclaration d'un sous-traitant ne doit pas être suffisante. La Directive sur l'application de la Directive 96/71/CE précise les circonstances dans lesquelles le détachement peut être utilisé. Les entreprises 'boîtes aux lettres' sans véritable lieu d'établissement dans le pays d'origine et les entreprises qui utilisent des travailleurs détachés sur une base permanente ne peuvent prétendre se fonder sur les dispositions de la Directive 96/71/CE. La conséquence doit être que les travailleurs sont traités comme des travailleurs nationaux. L'Art. 71.6 précise que les motifs d'exclusion s'appliquent aux sous-traitants et définissent ces mesures de manière plus détaillée : le régime de responsabilité peut être stipulé pour les sous-traitants également. En cas de violation des normes du travail de l'OIT et d'autres normes conformément à l'annexe X de la Directive, l'entrepreneur client peut être tenu par la loi de remplacer ces sous-traitants. Ces dispositions peuvent être étendues aux fournisseurs. Autrement dit, si un fournisseur, lors de l'exécution d'un contrat de livraison, viole des normes telles qu'énumérées à l'Art. 18.2, cela peut être un motif d'exclusion obligatoire si cela est défini comme tel dans la législation nationale. En fait, et de plus, l'observation de ces pratiques et d'expériences comparables d'abus dans d'autres États membres doit être un motif suffisant pour l'exclusion de candidats.

En outre, la tendance à atténuer la responsabilité contractuelle de l'entrepreneur principal en utilisant une chaîne de sous-traitants indéfiniment longue doit être arrêtée par l'introduction d'une limite légale. Cela pourrait se faire par exemple en limitant la chaîne au niveau sous-sous-traitant. En outre, le soumissionnaire doit être tenu d'exécuter les tâches essentielles du métier, d'informer le pouvoir adjudicateur de tout sous-traitant et de lui demander son accord. En outre, la responsabilité de l'entrepreneur principal doit être clairement définie par la loi. Cela signifie qu'en cas de défaut ou de mauvaise exécution, l'entrepreneur principal doit être tenu responsable. Cependant, la responsabilité est prévue de manière très différente dans les États membres. Ainsi, même si à première vue, des obligations juridiques strictes semblent être en vigueur, elles s'avèrent ne pas être valides au deuxième examen. Tel est le cas par exemple en Autriche, où la responsabilité se termine avec la faillite du sous-traitant. Sans l'existence de fonds de soutien (en Autriche, l'Insolvenz-Entgeldfonds), les travailleurs des sous-traitants resteraient tout simplement impayés pour leur travail. Ainsi, il est très important de suivre le conseil de Marc Tarabella, à savoir établir une responsabilité de l'entrepreneur principal, indépendamment de la situation économique des sous-traitants, ce qui signifie une responsabilité sans faute ou responsabilité stricte.

3.8. Prospective

Depuis la création de la Communauté économique européenne, en 1957, les principes fondamentaux de la libre circulation des biens, des personnes, des services et des capitaux ont représenté les principaux piliers de la création d'un marché unique à l'échelle européenne. L'approche de la Communauté était donc essentiellement économique, même si les six États fondateurs de la Communauté n'ont pas négligé les aspects sociaux pour l'avenir : l'idée était qu'un système dual, la Communauté économique européenne se chargeant de la création d'un marché unique, et les États membres gardant leurs différents systèmes sociaux nationaux et systèmes de négociation collective ou de salaires minimaux, améliorerait mutuellement le développement économique et le modèle social en Europe. Cependant, cette idée ne s'est pas réalisée, et a été écartée par l'élargissement de l'UE, la libéralisation des marchés, l'augmentation des travailleurs migrants et l'industrie agissant à l'échelle mondiale. Ces évolutions montrent des impacts négatifs croissants sur les conditions de travail et salariales dans le secteur de la construction. En outre, la libéralisation va de pair avec la suppression de la paperasserie et la substitution par des instruments intelligents. Auto-régulation et auto-nettoyage sont les maigres nouveaux instruments proposés au niveau de l'UE.

Ces tendances doivent être fortement contestées par les syndicats, en particulier dans le secteur de la construction avec ses particularités, telles que le niveau élevé de mobilité, sa nature intensive en travail, le processus de production spécifique et complexe, les nombreux lieux de travail, le nombre élevé d'accidents et de formes de fraude sociale. Par conséquent, un contrôle efficace du respect des obligations de sécurité sociale, des conditions de travail et de paiement, de la conformité avec les outils de santé et de sécurité, la formation des travailleurs et l'apprentissage est impératif.

Au vu des restrictions budgétaires persistantes et de la pression économique transférée aux pouvoirs adjudicateurs, une conclusion pourrait être la nécessité d'installer un organisme de contrôle chargé d'étudier l'exécution du marché de deux partenaires contractuels : le pouvoir adjudicateur et l'entrepreneur client, y compris tous les sous-traitants. Il pourrait être un régulateur ou un procureur de passation des marchés publics. Afin d'appliquer la nouvelle orientation envisagée sur les aspects sociaux, de santé et de sécurité dans les procédures de passation de marchés publics, l'inclusion des syndicats en tant que représentants de travailleurs expatriés doit être considérée comme un objectif commun important au niveau de l'UE.[16]

[16] L'accord national du Royaume-Uni entre les syndicats et le secteur de la construction pourrait servir de point de départ ou de bon exemple : http://www.njceci.org.uk/national-agreement/

4. La Cour de justice européenne et les aspects sociaux dans la passation des marchés publics - aperçu

4.1 Introduction

Les règles et procédures à appliquer pour la passation des marchés publics ont joué un rôle plus important que jamais depuis le projet de marché intérieur initié à la mi-1980 dans la Communauté économique européenne (à l'époque). Le but de la réglementation des marchés publics était d'ouvrir à la concurrence les projets financés publiquement sur l'ensemble du marché intérieur. La Commission européenne a lancé un paquet législatif composé de Directives pour les travaux publics, les services et les concessions. Les règles de passation des marchés publics devaient créer un environnement juridique garantissant simultanément l'accès pour toutes les entreprises européennes à des marchés publics et des dépenses publiques efficaces.

Les règles étaient censées avoir un impact important sur la performance économique globale de l'UE. Au début des années 1990, la Commission européenne a présenté l'élaboration de la législation sur la passation des marchés comme une simple 'affaire technique' qui ne devrait pas être 'polluée' par des préoccupations sociales ou environnementales. La version officielle est que le droit de l'UE était neutre sur la question des considérations sociales dans la passation des marchés publics tant que les principes généraux de transparence, de non-discrimination et d'égalité de traitement étaient respectés. Le raisonnement dominant était que le moyen le plus efficace de dépenser l'argent du contribuable en apportant le meilleur bénéfice à la communauté était de rechercher l'offre la moins chère. En conséquence, la passation des marchés publics a été pendant un certain temps dominée par ce dogme étroit du plus bas prix, sans tenir compte de l'effet pour les travailleurs ou l'environnement.

En revanche, les pouvoirs adjudicateurs qui voulaient appliquer des critères sociaux ou environnementaux étaient et sont encore confrontés à une lourde procédure. Souvent, la procédure d'attribution a été déclarée nulle par la CJCE. Cependant, comme la grande majorité des projets publics sont réalisés par du travail rémunéré et que les coûts pour les salaires et autres conditions de travail doivent être calculés au moment de soumissionner pour les marchés publics, il existe des liens étroits entre les droits des travailleurs et les projets de passation de marchés publics. En outre, plusieurs États membres ont une longue tradition de promotion de différents objectifs de politique sociale (Ahlberg et Bruun, 2012).

Les Directives en tant que telles sont basées sur des articles et principes liés au marché intérieur ainsi que sur la jurisprudence. Au fil des années, la Cour de Justice européenne (CJCE) a fixé la façon dont les articles des traités européens et les principes de liberté économique du marché intérieur doivent être interprétés dans le domaine des marchés publics. Dans certains cas, la CJCE a accepté la notion de considérations sociales dans les procédures de passation de marchés. Par exemple, dans l'affaire **Commission européenne contre France** (C-225/98), la CJCE a accepté que la capacité du soumissionnaire à lutter contre le chômage puisse être utilisée en tant que critère d'attribution supplémentaire, même s'il n'était pas lié à l'objet du contrat.

Mais dans d'autres cas, notamment ceux liés à l'affectation des travailleurs, la Commission européenne et la CJCE ont démontré (à partir des années 1980 et suivantes) qu'elles voulaient restreindre la façon dont certains États membres travaillaient avec des objectifs de politique sociale (ou environnementales) obligatoires en matière de passation des marchés. Certains des arrêts de la CJCE

atténuaient la législation sociale applicable et les possibilités de contrôler le respect du marché par les États membres, notamment la compétence des États membres de formuler des normes et dispositions de travail obligatoires devant être respectées par toutes les entreprises et pour tous ceux effectuant un travail rémunéré sur le territoire.

En outre, certaines parties du cadre réglementaire national (des normes et conditions de travail), basées sur la législation du travail et la négociation collective, ont été unilatéralement exclues par la CJCE. Dans les cas d'infraction où les droits des travailleurs étaient contestés, la CJCE semble accorder peu d'importance aux conditions de travail prévues qui sont inscrites dans les systèmes nationaux pour les relations industrielles, même lorsque les soumissionnaires étaient traités de manière égale. Les arrêts de la CJCE sur le détachement (notamment dans les **affaires Luxembourg et Rüffert**) ont créé une situation où les fournisseurs de services nationaux devaient se conformer à des règles obligatoires qui sont des dispositions impératives de la loi nationale, tandis que les fournisseurs de services étrangers ne devaient pas respecter ces obligations. La Confédération européenne des syndicats (CES) a conclu en 2008 que le jugement Rüffert ignorait la Directive sur les marchés publics de 2004, qui autorisait expressément des clauses sociales.

Le jugement n'avait pas reconnu les droits des États membres et des autorités publiques d'utiliser les instruments de passation de marchés publics pour contrer la concurrence déloyale concernant les conditions de travail des travailleurs des prestataires de services transfrontaliers, car ceux-ci avaient été jugés incompatibles avec la Directive sur le détachement. Il n'avait pas non plus reconnu les droits des syndicats de réclamer l'égalité des salaires et des conditions de travail et le respect des normes convenues collectivement applicables au lieu de travail pour les travailleurs détachés, de manière égale pour tous les soumissionnaires et indépendamment de la nationalité, au-delà des normes minimales reconnues par la Directive sur le détachement.

4.2 Bref résumé

Les décisions de la Cour de justice européenne concernant les clauses sociales dans les marchés publics au fil des années ont eu un impact décisif sur la révision des Directives sur la passation des marchés, et ont façonné la loi telle qu'elle est interprétée par les juridictions nationales. Dans cet aperçu, nous allons résumer quelques-uns des arrêts et autres mesures législatives les plus pertinents de la Commission européenne et de la CJCE.

Une des premières affaires, encore sous l'ancien régime de la Directive 71/305/CEE du Conseil, avec un impact sérieux sur les questions de passation des marchés et sociales, fut l'**affaire Beentjes** (C-31/87), dont le jugement fut rendu en 1988. La procédure est issue d'une affaire nationale d'un soumissionnaire contre l'État néerlandais. En bref, la CJCE a jugé qu'un critère social d'exécution du marché, qui requérait que l'entrepreneur emploie des chômeurs de longue durée, pouvait être utilisé dans le processus d'attribution d'un marché public s'il est conforme à toutes les dispositions pertinentes du droit communautaire. La CJCE a déclaré que 'la condition relative à **l'emploi de chômeurs de longue durée** est compatible avec la directive si elle n'a pas d'effet discriminatoire direct ou indirect sur les soumissionnaires d'autres États membres de la Communauté. Une condition supplémentaire spécifique de ce genre doit être mentionnée dans l'avis de marché'.

La position de la CJCE dans l'affaire Beentjes a été répétée dans l'**affaire Nord-Pas-de-Calais** (C-225/98). Il est important de souligner qu'il s'agissait d'une affaire de la Commission européenne contre l'État français. La Commission européenne a tenté de neutraliser le résultat Beentjes, qui s'était avéré positif pour les considérations sociales. La région adjudicatrice avait inclus dans son avis de marché une référence à la capacité des entrepreneurs à **combattre le chômage local** en tant que critère d'attribution. La Commission européenne a fait valoir que, bien que les questions liées à l'emploi pouvaient être considérées comme une condition d'exécution du marché, elles ne pouvaient pas être considérées comme un critère d'attribution. La CJCE a rejeté l'argument, car la Commission européenne ne pouvait pas démontrer que le critère était discriminatoire ou qu'il n'avait pas été publié dans l'avis de marché. Selon la CJCE, les pouvoirs adjudicateurs pouvaient utiliser un tel critère d'attribution à condition qu'il soit compatible avec les principes fondamentaux du droit communautaire, et en particulier, le principe de non-discrimination.

Il convient de noter que les deux affaires portaient essentiellement sur des **conditions générales de 'politique sociale'**, et non sur des conditions de travail ou d'autres dispositions relatives aux droits des travailleurs. L'arrêt de la CJCE ne disait pas qu'une prescription des conditions de travail était compatible avec la directive. Les conclusions que la Commission européenne a adoptées sur la base ces affaires étaient aussi intrinsèquement contradictoires. Selon la communication interprétative de la Commission européenne, les considérations sociales dans les marchés publics ne peuvent être appliquées qu'en tant que second type de critères d'attribution, lesquels sont non décisifs, mais peuvent être utilisés pour décider lorsque des offres sont égales par ailleurs. [17]

L'arrêt d'une autre affaire intéressante a été rendu en 2002. Dans l'intervalle, en se référant aux Directives révisées au début des années 1990 (notamment la directive 92/50). Dans **l'affaire Concordia Bus Finland contre Helsingin** (C-513/99), la Cour de justice a reconnu que le pouvoir adjudicateur avait le droit d'inclure des considérations environnementales dans ses critères d'attribution. La pertinence était double : d'une part, la CJCE a reconnu que **les critères d'attribution ne doivent pas nécessairement être purement économiques**, et d'autre part, la CJCE a conclu que 'la Directive 92/50 n'exclut pas la possibilité pour le pouvoir adjudicateur d'utiliser des critères relatifs à la préservation de l'environnement lors de l'évaluation de l'offre économiquement la plus avantageuse', tant que les critères adoptés pour déterminer l'offre économiquement la plus avantageuse sont appliqués en conformité avec toutes les règles de procédure prévues par la Directive 92/50, en particulier les règles relatives à la publicité. L'importance de l'arrêt va même au-delà des conséquences directes pour l'affaire. La CJCE a formulé en fait **un cadre de référence pour les pouvoirs adjudicateurs** ; ces critères écologiques peuvent être pris en compte lorsque **les critères sont liés à l'objet du marché** ; ne confèrent pas une liberté de choix illimitée au pouvoir adjudicateur ; sont expressément mentionnés dans le cahier des charges ou l'avis d'appel d'offres ; et se conforment à tous les principes fondamentaux du droit communautaire, en particulier le principe de non-discrimination.

Dans une affaire de 2003 (**Wienstrom contre l'Autriche**, C-448/01), le raisonnement suivant a été appliqué : la Directive 92/50 ne saurait être interprétée en ce sens que chacun des **critères d'attribution** retenus par le pouvoir adjudicateur pour identifier l'offre économiquement la plus avantageuse **ne doit pas nécessairement être de nature purement économique**. Mais la CJCE a conclu à une infraction comme le critère d'attribution n'était pas accompagné d'exigences permettant de vérifier de manière effective les informations fournies par les soumissionnaires. Ainsi, la CJCE a conclu

[17] Communication interprétative de la Commission concernant le droit communautaire applicable aux marchés publics et les possibilités d'intégrer des aspects sociaux dans lesdits marchés, COM/2001/0566 final.

que la procédure de passation était incompatible avec les principes du droit communautaire dans le domaine du droit des marchés publics.

Dans **l'affaire Lianakis** (C-532/06), la Cour de justice a précisé que les critères de sélection et les critères d'attribution devaient être clairement distingués. Par souci de transparence et d'égalité de traitement, tous les éléments pris en compte par le pouvoir adjudicateur lors de l'identification de **l'offre économiquement la plus avantageuse** et leur importance relative doivent être clairement publiés à l'avance. Cela signifie, cependant, que la marge d'interprétation des pouvoirs adjudicateurs sera réduite et ne soutient pas les pouvoirs adjudicateurs pour donner la priorité aux appels d'offres qui sont plus 'sociaux' que d'autres, si elle n'a pas encore défini les critères pertinents à l'avance et de manière suffisamment détaillée.

Afin d'alléger le fardeau des pouvoirs adjudicateurs locaux consistant à savoir comment établir des critères d'attribution et attribuer des quotas, les pouvoirs adjudicateurs ont commencé à se référer à des **labels** au lieu d'utiliser des spécifications techniques pour décrire l'objet du marché. La CJCE a admis pour **l'affaire Max Havelaar** (C-368/10), en principe, que les **critères sociaux ou environnementaux** – dans ce cas, des produits issus de l'agriculture biologique – **pouvaient être favorisés**. Appliquée à un marché de la construction, cette décision signifie qu'une entreprise dont le produit satisfait aux spécifications techniques ne doit pas avoir de label écologique. Il doit simplement être possible de prouver que le produit répond à ces spécifications techniques. Gardant à l'esprit le large éventail de labels nationaux et européens, l'implication de cette décision est double : a) les acheteurs publics sont autorisés à introduire des critères sociaux et b) les exigences administratives pour les entreprises sont limitées, car elles ne doivent pas acquérir des labels spécifiques, mais doivent seulement prouver qu'elles remplissent les conditions requises.

La prise de conscience de la nécessité pour les pouvoirs adjudicateurs de prendre les devants en ce qui concerne les aspects sociaux a augmenté parmi les entrepreneurs au niveau fédéral et local. Ainsi, la Rhénanie-du-Nord-Westphalie a stipulé que des **salaires minimaux** doivent être appliqués dans tous les contrats de marchés publics. La ville de Dortmund a interprété cette disposition de manière à ce que tout sous-traitant, indépendamment de son établissement et lieu de prestation de services, doit payer les salaires minimaux allemands.

Dans ce cas, la **Staatsdruckerei allemande** avait externalisé l'objet principal du contrat à une entreprise polonaise. La CJCE a décidé que, dans un tel cas, les salaires minimaux allemands ne sont pas applicables. Du point de vue du droit international, il semble logique que la juridiction d'un État membre se termine aux frontières de son territoire. Cependant, la CJCE ne s'est pas référée à cet argument, mais aux principes du marché intérieur. Un raisonnement qui glisse à une argumentation plutôt cynique lorsque la CJCE statue que la législation nationale va au-delà de ce qui est nécessaire pour assurer que l'objectif de protection des travailleurs soit atteint, en ... « imposant un salaire minimal fixe qui correspond à celui requis pour assurer une rémunération convenable aux travailleurs en Allemagne au regard du coût de la vie dans ce pays, mais qui est sans rapport avec le coût de la vie prévalant dans l'État membre dans lequel les prestations relatives au marché public en cause seront effectuées (dans ce cas, la Pologne), et priverait dès lors les sous-traitants établis dans un autre État membre de retirer un avantage concurrentiel des différences entre les taux de salaire respectifs. »

La leçon à tirer de cette affaire est double : premièrement, la CJCE continue à souligner la prédominance de la concurrence entre les États membres sur tous les autres principes. Deuxièmement, pour éviter ce genre d'ingérence par le co-législateur de l'UE, les pouvoirs adjudicateurs devraient être tenus d'obliger l'entrepreneur principal à entreprendre lui-même la

totalité ou la majeure partie de l'objet du marché. En outre, la chaîne des sous-traitants devrait être limitée légalement.

Ces mesures permettraient d'éviter une concurrence déloyale qui pèse sur les travailleurs et sur la base salariale.

4.3 L'impact de "l'externalisation des travailleurs" - emploi externe : arrêts sur le détachement, externalisation, internalisation (recrutement de main d'œuvre), agences de travail

Les règles en matière de détachement ont fait l'objet d'une série d'arrêts de la CJCE. Le résultat de ces affaires a démontré que la CJCE et la Commission européenne travaillent en vue d'une interprétation étroite et restrictive de la Directive sur le détachement, avec des conséquences importantes pour les procédures de passation des marchés publics.

Les États membres ont choisi une approche différente de la mesure dans laquelle l'internalisation/externalisation peut être utilisée par les pouvoirs adjudicateurs. La Belgique, par exemple, a réglementé les travailleurs intérimaires de manière à ce qu'ils doivent être accrédités et recevoir une formation minimale. En Norvège et en Autriche, le législateur a mis en place la disposition légale selon laquelle sous-traitance et contrats de travail temporaires sont considérés comme identiques. Ainsi, le niveau admissible de "travail externalisé" est automatiquement réduit. Cependant, l'expérience montre que dans certains États membres, la limitation de la chaîne de travaux externalisés ne suffit pas pour relâcher la pression salariale. Par exemple, au Royaume-Uni, l'entrepreneur client applique normalement les conditions du marché, y compris l'obligation pour les sous-traitants de payer la sanction pour non-respect des conditions légales obligatoires, bien qu'il soit le partenaire le plus faible de la chaîne.

Dans plusieurs affaires (comme en témoignent les affaires Rüffert et Laval), l'interprétation de la CJCE de la disposition du Traité sur la libre circulation des services limite la possibilité de fixer des normes de travail par le biais de mécanismes tels que la négociation collective et les clauses sociales dans les contrats de marchés publics (Van Hoek et Houwerzijl 2011). Ces arrêts de la CJCE interfèrent donc directement avec la possibilité de prescrire des dispositions obligatoires en matière de conditions de travail. La question clé est de savoir ce qu'être compatible avec le droit communautaire (ou de l'UE) signifie pour les critères sociaux. La neutralité suggérée signifie d'après Laval et Rüffert que dans le cas où un contrat est effectué par des travailleurs détachés d'un autre pays, le pouvoir adjudicateur ne peut pas rendre la participation à un marché public 'conditionnelle au respect des termes et conditions dans tout type de convention collective', une restriction qui ne s'applique pas si le travail est réalisé par des travailleurs employés par des entreprises locales (Ahlberg & Bruun, 2012).

La CJCE est également claire dans **l'affaire** d'infraction engagée par la **Commission européenne contre le Grand-Duché de Luxembourg**. Selon la CJCE, la liste des prescriptions de la Directive sur le détachement en matière d'emploi et de conditions de travail est exhaustive plutôt qu'un ensemble minimum de droits. Dans le Considérant 32 de l'affaire Luxembourg, la CJCE déclare que le champ d'application des règles obligatoires supplémentaires dans le droit national est limité à celles 'qui, par

leur nature et leur objectif, répondent aux exigences impératives de l'intérêt public' (CJCE affaire C-319/06). Selon la CJCE, il ne revient pas aux États membres de déterminer unilatéralement la politique publique qui justifie des règles obligatoires supplémentaires au-delà des dispositions minimales énumérées dans la Directive. Cette restriction de la CJCE signifie, en termes pratiques, qu'un **niveau de protection plus élevé que le minimum tel que stipulé dans la directive sur le détachement**[18] ne peut pas être imposé aux entreprises étrangères avec leurs travailleurs détachés. Comme expliqué précédemment, les arrêts de la CJCE créent une situation dans laquelle les prestataires de services étrangers ne doivent pas se conformer à des règles obligatoires qui sont des dispositions impératives du droit national, et qui doivent donc être respectées par les prestataires de services nationaux.

Cet alignement juridique du co-législateur de l'UE est inacceptable du point de vue syndical, car il sape la bonne volonté des pouvoirs adjudicateurs et de la législation nationale visant à lutter contre des conditions de travail inégales : d'une part, les travailleurs auxquels les conventions collectives locales s'appliquent, de l'autre, ceux d'autres pays de l'UE qui peuvent être compensés par des salaires inférieurs. Il est clair qu'une telle interprétation du marché commun, qui colle à la doctrine de la "pénétration des marchés", va augmenter les tensions sociales. La conclusion de la CJCE dans l'affaire Bundesdruckerei contre Stadt Dortmund (C549/13) semble être l'aboutissement cynique de la doctrine du marché: "En imposant un salaire minimal fixe ... et priverait dès lors les sous-traitants établis dans un autre État membre de retirer un avantage concurrentiel des différences entre les taux de salaires respectifs, cette législation nationale va au-delà de ce qui est nécessaire pour assurer que l'objectif de la protection des travailleurs soit atteint."

Une **affaire** similaire (C-115/2014) est toujours pendante devant la Cour de justice européenne pour décision préjudicielle. La société postale **RegioPost GmbH** a déposé plainte contre la ville de Landau en raison de l'application obligatoire des salaires minimaux conformément à la loi relative à l'obligation d'appliquer les taux fixés par les conventions collectives (Landestariftreuegesetz Rheinland-Pfalz). Ce tarif s'élève à 8,70 €. Dans la perspective de l'affaire Rüffert, le tribunal de Coblence a signifié à la CJCE qu'il estimait que ce tarif minimum est contraire au droit de l'UE, car représentant un verrouillage du marché pour les entreprises d'autres États membres ayant des niveaux de salaires inférieurs. Comme la loi en question stipule des tarifs minimaux uniquement pour les marchés publics et non pour les privés, il n'y a pas de salaire minimal généralement applicable. Une décision est attendue dans le courant de cette année. Cependant, il faut garder à l'esprit que, premièrement, la mesure en question est réglée par la loi conformément à l'Art. 3 Paragraphe 1 de la Directive sur le détachement, en étant donc une mesure d'État et pas seulement une convention collective. Deuxièmement, le salaire minimal obligatoire de 8,5 euros, tel que défini par la loi fédérale, doit être appliqué à compter du 1.1.2015. Ainsi, au moins à partir de ce moment-là, les pré-conditions telles que prévues à l'Art. 3 Paragraphe 1 de la directive sur le détachement sont remplies.

Le récent arrêt rendu dans une affaire de référence C-413/13 donne un nouvel espoir : "les faux travailleurs indépendants". Avec cet arrêt, la CJCE permet que les salaires minimaux et les conditions d'emploi fixés dans une convention collective soient applicables aux "**faux travailleurs indépendants**". L'arrêt découle d'une **affaire** portée par le **syndicat néerlandais FNV KIEM**, qui a contesté la classification des musiciens free-lance comme des "entreprises" commerciales individuelles. Conformément à la loi néerlandaise sur la concurrence, les syndicats n'étaient pas habilités à négocier collectivement avec leurs employeurs pour les honoraires des travailleurs indépendants. La convention

[18] Considération 17: „considérant que les règles impératives de protection minimale en vigueur dans le pays d'accueil ne doivent pas empêcher l'application des conditions de travail et d'emploi plus favorables aux travailleurs."

collective de travail néerlandaise prévoit des honoraires minimaux non seulement pour les substituts embauchés en vertu d'un contrat de travail, mais aussi pour les substituts qui exercent leurs activités en vertu d'un contrat de service, qui ne sont pas considérés comme des "employés" aux fins de l'accord (substituts indépendants). L'arrêt de la CJCE détermine que les **faux indépendants**, en d'autres termes, les fournisseurs de services, dans une situation comparable à celle des travailleurs, peuvent **jouir des droits des travailleurs fixés dans une convention collective**.

Une dernière affaire devant être mentionnée ici est une **affaire finlandaise de travailleurs polonais** sous-payés (Sähköalojen Ammattiliitto ry contre Elektrobudowa Spółka Akcyjna, C-396/13). Dans le verdict final, la CJCE a souligné que les termes et conditions d'emploi garantis aux travailleurs détachés doivent être définis par la loi de l'État membre d'accueil (aussi longtemps que ces conditions sont déclarées 'universellement applicables, contraignantes et transparentes'). Dans cette affaire, le sous-traitant étranger soutenait que les syndicats dans le pays d'accueil avaient qualité pour agir devant le tribunal, étant donné que la relation de travail était basée sur le droit du pays d'origine. Ainsi, la CJCE devait se prononcer sur la question de savoir si le droit à un recours effectif, consacré par la Charte des droits fondamentaux, pouvait être bloqué par la réglementation du pays d'origine (qui interdit la cession de créances issues des relations d'emploi). La CJCE a conclu que le **syndicat dans le pays hôte était admissible**, vu que sa position était régie par le droit procédural finlandais et que la Directive sur le détachement des travailleurs indique clairement que les questions concernant **les taux de salaire minimaux sont régies**, quel que soit le droit applicable à la relation d'emploi, **par la loi du pays d'accueil**. Par ce verdict, une **entreprise peut être portée devant les tribunaux dans le pays d'accueil**, ce qui pourrait avoir des conséquences directes pour les futurs appels d'offres dans ce même pays.

Cependant, l'utilisation même de travailleurs détachés doit être examinée attentivement. La nouvelle Directive sur l'application de la Directive 96/71/CE précise les circonstances dans lesquelles le détachement peut être utilisé. Les sociétés sans véritable lieu d'établissement dans le pays d'origine (les sociétés boîtes aux lettres) et les sociétés qui utilisent des travailleurs détachés sur une base permanente ne peuvent prétendre s'appuyer sur la disposition de la Directive (Directive 2014/67/UE). Comme le Considérant 37 de la nouvelle Directive donne une importance disproportionnée à la doctrine "d'introduction sur le marché" appliquée par la CJCE, il semble sage de ne pas transposer cette disposition en législation nationale.

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 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, 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.

[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

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 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

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