

Brussels, January 2025

EFBWW position on the revision of the EU public procurement directives

The revision of the public procurement directives in 2014 did not fulfil the expectations neither reached the goals of ensuring the best possible procurement outcomes in terms of value for money, simplifying public procurement rules, facilitating the participation of SMEs and considering strategic procurement – i.e. pursuing social, environmental and innovative aspects.

The contrary is the case. The study commissioned by the European Parliament 'The social impact of public procurement. Can the EU do more?' and the report of the European Court of Auditors, both from 2023, revealed that price remains the most important criterion - its application even increased over the last 10 years - and that there is little consideration for strategic procurement including environmental, social or innovative aspects.

The outcomes of the European Parliament study highlighted clearly the shortcomings of the Public Procurement Directive 2014/24/EU in the context of social responsible public procurement:

- The **horizontal social clause** (Art. 18(2)), in its narrow interpretation and application by Member States, is only upholding **minimum requirements** stemming from social and labour laws, but not the application of collective agreements. In many Member States the clause was not even transposed in line with the Directive.
- Lack of clarity about which authority is responsible for **enforcing** the horizontal social clause. Contracting authorities delegate the responsibility to other authorities (e.g. labour inspectorates, employment agencies) without assuring quality and effectiveness.
- Legal ambiguity on what are 'appropriate measures' to ensure application of the horizontal social clause.
- Legal ambiguity on the term 'applicable collective agreements' depending on national law and practice.
- Contract award must be linked to the 'subject matter' of the contract, i.e. selection
 criteria, award criteria and contract performance conditions cannot take into account
 general company policies such as social responsible performance, but must relate to
 the duration and the specific tasks of the contract.

Public authorities that claim they would favour social responsible procurement, refer to legal uncertainty and fear for legal claims and court cases because of discrimination and unfair competition, as the main reasons not to apply social criteria or criteria other than price. Smaller, local public entities often do not have the necessary expertise in-house for more complex tenders. Austerity and budget cuts are another reason why public authorities prefer to choose the lowest price.

In his report on the future of the Single Market (April 2024), commissioned by the Council and the Commission Enrico Letta, former Italian Prime Minister, confirms that "further development of the Single Market can only be successful if it includes a genuine social dimension that ensures social justice and cohesion". Letta highlights the potential of public procurement as a driver to realise EU strategic goals, including social progress. He states that "public procurement must ensure that contracts foster the creation of high-quality jobs, characterised by fair wages and conditions underpinned by collective agreements. To uphold social and environmental standards, stricter verification of economic operators is necessary. This includes actions like rejecting unusually low bids, disqualifying non-compliant companies from bidding, conducting on-site inspections."

The EU Council, Commission and European social partners call in the <u>La Hulpe-Declaration</u> on the <u>European Pillar of Social Rights</u> (April 2024) "for sustainable public procurement, including to promote collective bargaining. In this light, the directives on public procurement could be evaluated and, if needed, further steps could be taken".

Von der Leyen confirmed in her <u>Political guidelines for the next European Commission 2024–2029</u> and in her <u>Mission Letter to Stephane Séjourné</u> to revise and modernise the public procurement rules by supporting and strengthening strategic sectors in the EU along with security of supply for vital technologies, products and services.

The construction sector is one of the EU's strategic sectors – economically and ecologically: It plays a vital role in the EU economy employing approximately 13 million workers in 3 million companies in the EU. It is the EU's biggest industrial employer and is contributing around 5.5% to the gross value added. Investment in construction projects triggers a multiplier effect by fostering the demand and growth of associated industries and stimulating economic activity. However, the built environment has a significant impact on the European ecosystem. Buildings in the EU are responsible for 40% of our energy consumption and 36% of greenhouse gas emissions¹. Future renovations for improving energy efficiency in buildings therefore have a key role to play in achieving the ambitious goal of carbon-neutrality by 2050, set out in the European Green Deal. Beyond its role in renovations, the construction sector as such needs to transition to recourse efficiency, circularity and innovative construction processes. Because greenhouse gas emissions from material extraction, manufacturing of construction products, as well as construction and renovation of buildings are estimated at 5-12% of total national GHG emissions. The construction sector is also responsible for over 35% of the EU's total waste generation.²

The construction sector is characterised by a high level of fragmentation related to a very mobile workforce, with a high reliance on posted workers and subcontracting chains and is dominated by SMEs. This **fragmentation** creates numerous challenges, including a heightened risk of **fraud, social dumping and labour crime**. In addition the sector suffers of considerable **labour shortages** in all EU countries due to a general lack of attractiveness. Fragmentation and labour shortages are significant barriers for the sector towards a green and digital transition.

Letta refers specifically to the construction sector when pointing to problems with public procurement and the importance of progressive public procurement rules. In respect of occupational health and safety, Letta states, that "strict procurement guidelines must

¹ EU Commission, News (2020)

² EU Commission, DG Internal Market, Industry, Entrepreneurship and SMEs

prioritise contractors with exemplary safety records and require compliance with the highest **occupational health and safety** standards. It is also essential to include social responsibility clauses that ensure respect for workers' rights, trade union involvement and the protection of collective agreements". He points to the fact that a fifth (22.5%) of all fatal **accidents at work** in the EU occurred in the construction sector.

The Strategic Analysis Report on the construction sector of the European Labour Authority (ELA) (2023) and the Commission report on the application and implementation of the revised Posting of Workers Directive (2024) determine that complex subcontracting chains are often used to cut labour costs. Fraudulent companies exploit cross-border subcontracting to engage in wage competition, social dumping, undeclared work and worker exploitation. These companies often use complex subcontracting arrangements to obscure employment relationships, evade tax and social security obligations, escape liability and avoid scrutiny from labour inspections. Subcontracted firms can vanish without paying workers after months of labour. Many of these companies are labour-only suppliers or letterbox firms with no genuine business operations. Both reports recognize limiting subcontracting chains and banning agencies as a good practice. Also Letta asserts in his report that unregulated subcontracting is a detrimental business model and amounts to almost 40% of all activities. He states that "it is imperative to regulate subcontracting practices to prevent exploitation and abuse. Unchecked subcontracting chains can lead to the erosion of labour standards, social dumping, and the undermining of fair competition. In addition, they can lead to violation of the applicable health and safety obligations".

In order to meet environmental and economic targets, Europe needs **reliable and sustainable construction companies**. Exploitation, abuse, fraud, bonded labour and social dumping are criminal practices and we urge von der Leyen to add these criminal offences to her fight against organised crime in businesses which she announced in her political guidelines. Furthermore, she announced the Quality Jobs Roadmap which she wants to develop together with the social partners. We understand that the roadmaps' objectives are fair wages, good working conditions, training and fair job transitions for workers and self-employed people, notably by increasing collective bargaining coverage.

Public sector procurement constitutes a substantial market for the construction sector in many EU countries, e.g. 20% in Italy, 31% in Hungary, 38% in the UK and 25% in Austria. Thus, socially responsible public procurement can be the key for green and digital innovation by improving employment and working conditions in the construction sector.

The EFBWW will engage in the announced revision process of the EU public procurement framework. With our affiliates we will pursue the following goals:

 Limit subcontracting, requirements for joint and several liability flanked by clear due diligence reporting and direct jobs

Direct jobs should be the norm. Subcontracting should be limited to one or two sublayers, only in case of specialised works. Public procurement rules must require that only companies with sufficient own staffing to carry out the project are eligible to win public contracts. In case of subcontracting for specialised works, public contracting authorities must authorise subcontracting, and companies must disclose the names of subcontractors.

In contract performance clauses main contractors must conduct thorough due diligence on all subcontractors, ensuring compliance with labour laws and collective agreements. Full joint and several liability, including dissuasive sanctions, must apply across the entire subcontracting and supply chain in all public contracts. Equal treatment shall be guaranteed for all workers in the subcontracting chain.

National examples show that contracting authorities can go even further to promote direct jobs by imposing mandatory application of **employment contracts** with the main contractor (not civil law contracts) for the workers working under a public contract.

Abolish the "lowest price option" and exclude abnormally low tenders from the bidding process

The application of the price-quality ratio is not mandatory in the current public procurement directives. Member States may apply it. In case of abnormally low tenders, public authorities are required to request explanations from the economic operator. However, they are not obliged to request explanations specifically linked to the horizontal social clause (Art. 18(2) of Directive 2014/24/EU).

We can see that the lowest price option jeopardizes quality, social and environmental standards. Awarding contracts on this basis frequently results in social fraud, breaches of regulations, extremely poor-quality works/services and unfair competition while ultimately driving up costs considerably either during performance of the contract or after it has been completed.

In consequence it must be mandatory to apply strict criteria to identify what is considered an abnormally low tender and, thus, what must be rejected and excluded from the bidding process, whatever the underlying reasons are, including social considerations.

The lowest-price criterion needs to be abolished and replaced by the principle of the 'most economically advantageous tender' assuring a 'best price-quality ratio'.

Legally sound and mandatory social criteria

The horizontal social clause in Art. 18(2) of Directive 2014/24/EU is considered mandatory, but failed to be realized. Legal ambiguity and lack of clarity led to circumvention of this principle in national transposition of the Directive. Furthermore, in its narrow interpretation and application, the clause is only upholding minimum requirements such as respect of social and labour laws, but not the application of collective agreements.

Another detrimental element to social public procurement is the fact that the contract award must be linked to the subject matter of the contract and is non-discriminatory. In concrete terms, selection criteria, award criteria and contract performance conditions cannot take into account general company policies such as social responsible performance, but must relate only to the duration and the specific tasks of the contract.

We call for mandatory social criteria **independent of the subject matter** principle and the provision that **social clauses cannot be considered a discriminatory** measure in public contracts.

• Prequalification of companies

Pre-procurement (ex-ante) strategies should be prioritised to prevent non-compliance in the first place. **Accreditation systems** are a possibility to determine companies' technical, financial capacity but also professional integrity³ prior to the tender process.

This type of approval gives the contracting authorities the necessary confidence for the proper execution of the works. The accreditation can be valid for a certain period and can be renewed upon sound control.

National examples with effective accreditation systems or similar ex-ante procedures are those where both social partner organisations are involved in setting, controlling and monitoring the criteria.

Grounds for excluding companies from tender processes

The public procurement directives give public authorities the possibility to exclude an economic operator from participating in a public procurement procedure when it can demonstrate a violation of horizontal social clause (Art. 18(2) of Directive 2014/24/EU). But again, this is only an option offered to public authorities. We advocate for sound **exclusion criteria on social and employment aspects** and for the need to go beyond the horizontal clause (e.g. social fraud and social dumping, non-application of collective agreements, etc.).

Furthermore, the directive 2014/24/EU includes self-cleaning provisions which allow companies to produce a self-declaration as evidence to confirm that they are not in violation of Art 18(2). Unfortunately, this led to abuse and manipulation of documents aimed to prove the companies integrity. We therefore propose an **abolishment of the 'self-cleaning'** mechanism.

To facilitate exclusions from tender procedures, Member States should be able to publicly **blacklist** companies which have been convicted of noncompliance with social and environmental standards. The obligation for procuring entities to ensure such exclusion of contractors and subcontractors who engage in dumping and abusive practices should be clearly made clear.

Control, monitoring and sanction mechanisms

The public procurement directives should clarify that the public authority remains responsible for enforcing the horizontal social clause. Contracting authorities should be required to introduce efficient and effective control systems and sanction mechanisms.

Labour inspections and other enforcement authorities are best placed to monitor and control the application of social standards. Minimum standards for labour inspections should be based on ILO Convention No. 81 securing necessary competences and resources to carry out inspections, in full respect for the autonomy of social partners when they are entrusted with the control and enforcement of wages and other working conditions.

³ Criteria of professional integrity should encompass fair and decent working conditions, clean records on social and employment aspects, respect of collective agreements, etc. Decent work goes beyond minimum standards by continuously improving quality of work including health and safety measures, training, etc.

Public tenders for large construction projects should promote the use of **digital enforcement tools such as social ID-cards** and digital **company registers** with the aim to facilitate transparency of subcontracting chains and the companies involved and to improve the efficiency and effectiveness of controls and real time enforcement during inspections.

In large public cross-border contracts the **European Labour Authority (ELA)** has the potential to coordinate control and monitoring procedures in close dialogue with the national inspection services, enforcement authorities, and sectoral social partners, and, also to apply sanctions. Therefore we call for a stronger mandate for ELA with the focus of cross-border enforcement, dedicating more resources to actions that support national enforcement authorities and sectoral social partners.

• Mandatory application of collective agreements

The public procurement directives give not enough legal certainty about how to ensure compliance with the obligations established by collective agreements.

We call for a clarification of the horizontal social clause (Art. 18/2) of Directive 2014/24/EU, by explicitly stating that collective agreements need to be **exempt from** the link to the subject matter and can never be considered a discriminatory measure in public contracts.

Furthermore, legal certainty for applicable collective agreements can be fostered with reference to the revised Posting of Workers Directive (2018) and Article 2 of the ILO Convention No. 94. This would help to resolve issues around the hierarchy/application of collective agreements.

National examples show that the contracting authority can stipulate in the call for tender the specific collective agreement to be applied by the contractor or can include pay clauses, such as **procurement-specific wages** as a contract performance condition.

If an economic operator is not able to show compliance with the relevant collective agreement, it should not be allowed to participate in the tender procedure.

Strong local communities and skilled workforce for the future

The green and digital transformation will be severely impacted if the construction sector does not overcome the **labour shortages** and becomes more attractive, especially for young people and women. The construction sector is operating regionally and is characterised by a high share of SMEs. Public procurement can strengthen local communities by stimulating economic activity, offering local and quality jobs and fostering a **demographic balance**. In her political guidelines von der Leyen affirms the importance of strengthened regional cohesion and growth by addressing regional and social disparities and ensuring that all citizens have an effective 'right/freedom to stay' in the place they call home. Contracting authorities should have the right to **limit**

⁴ Enrico Letta introduces in his report the policy of "freedom to stay" and Commission Ursula von der Leyen uses the term "right to stay" in her political guidelines. Both terms refer to the reciprocal concept of labour mobility and the right of all EU citizens to move freely within the EU. Letta acknowledges that labour mobility is creating problems in the sending countries and regions through brain drain, depopulation and consequently aggravating economic and social imbalances.

tendering to a (national) region and the current threshold should be increased to limit cross-border tenders.

Well developed and quality **apprenticeship** programmes as well as **further qualification** schemes for experienced employees are key for investing in **workforce skilled for the future** and should be a mandatory social clauses in public procurement. Contracting authorities should have the responsibility to oblige companies to engage in apprenticeship and further qualification programmes – either "in house" or in cooperation with other companies.