

**COMMENTS ON THE DRAFT REPORT OF THE COMMITTEE ON LEGAL AFFAIRS AND  
THE INTERNAL MARKET OF THE EUROPEAN PARLIAMENT  
2000/0115 (COD) REV, DATED 26 MARCH 2001  
- RAPPORTEUR: STEFANO ZAPPALÀ –  
ON THE REVISION OF THE EU DIRECTIVES ON THE AWARD OF PUBLIC SUPPLY,  
SERVICE AND WORKS CONTRACTS COM(2000) 275**

UNICE welcomes the opportunity to comment on the draft report of the Committee on Legal Affairs and the Internal Market ("the Report"). European industry strongly supports the rapporteur's proposition that the EU Public Procurement Directives ("the Directives") should not be overburdened with formal requirements. Yet, in contrast with that aim, several of the proposals in the Report would have the effect of overloading the Directives with inappropriate detail, typically on issues which are well outside the remit of the legislation.

Therefore, in order to achieve the rapporteur's aim and to avoid endangering fair competition, transparency and practicability in public procurement, amendments to the Report are necessary. These modifications are set out below.

This paper begins by addressing the themes highlighted in the Explanatory Statement at the end of the Report (and commenting on the specific proposals on these points within the main body of the Report). It then turns to points raised elsewhere in the Report. A schedule of the affected amendments is set out at the end of each section.

## **A Comments on themes in the Explanatory Statement of the Report**

### **A1 Differentiation between "intellectual" and "executive" services**

Various amendments (see the end of this section and references in the text) propose distinguishing, for the purposes of regulating public procurement, between "intellectual" and "executive" services - and then imposing procurement strategies on contracting authorities regarding the treatment of those services which are defined as "intellectual". This includes outlawing the packaging of "intellectual" and "executive" services into single contracts and imposing various restrictions on how "intellectual" services contracts could be let.

UNICE strongly recommends that these amendments should be deleted. It is not the role of the Directives to dictate procurement strategies to member states and contracting authorities in this way. In particular, these bodies should be free to determine their own views on how to package contracts and the mix of factors that determine the most economically advantageous offer. The Directives then play a crucial role in ensuring these criteria are applied fairly and transparently during the procurement process. Notably:

- ?? It would add further complexity to the rules if a distinction were to be made between "intellectual" and "executive" services. However true it may be that different services have different characteristics, and that contracting authorities will focus on different factors depending on the nature of the purchase, this extra layer of definitions does not serve a useful purpose in terms of regulating procurement (**amendments 3, 7**).

- ?? The Directives should have no role in dictating whether or not contracting authorities award single contracts which combine "intellectual" and "executive" services. Contracting authorities should be completely free to choose when to award "design and build" contracts and when to separate out these phases. Different approaches will be suited to different circumstances, but it is not the role of the Directives to make this judgement on behalf of contracting authorities. Effective use of "design and build" contracting is already delivering projects to time and budget at good value for money. Many industries have no history of such separation and would be appalled at any suggestion that they should be forced to do so (**amendments 4, 7, 13, 17**).
- ?? There should be no specific prohibition on the use of subcontracting, negotiation and frameworks for "intellectual" services as these procurement methods can bring real advantages if used appropriately. Where the services to be subcontracted form an important part of the contract, the identity of the subcontractors should, of course, be declared. Whether or not the phases are separated, it is quite normal to subcontract specialist "intellectual" services (**amendments 4, 14, 16**).
- ?? The Directives should not impose a particular weighting for aesthetic and functional aspects on the award criteria used by contracting authorities. Even if authorities may in practice wish to base decisions primarily on qualitative or aesthetic factors for "intellectual" services, it is not the role of the Directives to dictate that they should do so. UNICE opposes any requirement to regulate the weightings of one area over another. There are also dangers that such mandatory weightings for aesthetic and functional criteria would be misused as a pretext for favouring specific national or local bidders above others (**amendments 2, 31**).

**UNICE recommends the deletion of:**

amendment 2 [recital 30]	amendment 13 [article 28 (a) new]
amendment 3 [article 1 (2), 2 <sup>nd</sup> paragraph]	amendment 14 [article 29(3)]
amendment 4 [article 1 (3), 3 <sup>rd</sup> paragraph]	amendment 16 [article 32 (3a) new]
amendment 7 [article. 8 (a) new]	amendment 17 [article 33 1 <sup>st</sup> paragraph]
amendment 12 [article 26, last amendment]	amendment 27 [article 49(3)(h)]
	amendment 31 [article 53 (3) new]

**A2 Small and Medium sized Undertakings (SMEs)**

UNICE strongly supports the rapporteur in urging all participants in the legislative procedure not to overburden the Directives. This is particularly important for SMEs. UNICE is, however, concerned that some proposals presented in the Report would by their nature or complexity conflict with this aim. They would also be in conflict with core principals of EU law on public procurement, especially transparency, non-discrimination and market openness in the Internal Market. Indeed, UNICE's approach in this paper would particularly help SMEs by keeping the legal structure as simple, workable and fair as possible.

UNICE encourages the rapporteur to ask the European Parliament to adopt a resolution calling for the Commission to develop a programme defining instruments aimed at giving SMEs better access to public contracts. By way of example, framework agreements should not be used in such a way as to exclude SMEs; furthermore, the use of social criteria can disadvantage SMEs (see section A3 *infra*).

**A3 Social and environmental criteria**

UNICE recognises that social policy plays an important role in promoting a high level of employment and social protection in the EU and EEA. It understands that these issues are rightly high on the agenda of various European Parliamentary Committees. Compliance with social and labour requirements is already subject to the existing comprehensive array of social and labour law, both national and European. By

contrast, it is not the role of the Directives to enforce social and labour law or to promote social and labour policies; to use them for that purpose would risk impairing the vital importance of the Directives well-established principles upon which the proper functioning of the public procurement market depends.

The Report draws on the European Court of Justice case, dated 26 September 2000 (C 228/98, Nord-Pas-de Calais), in its justification for developing the procurement rules as a social policy tool. This case simply indicated that mentioning a particular social condition as an award condition was not necessarily illegal. The judgement thus cannot form a basis for introducing the prescription of social aspects into the Directives **(amendment 1)**.

Irrespective of the current legal position, UNICE is deeply concerned about proposals which would require or allow contracting authorities explicitly to ask for the fulfilment of social conditions with regard to the production process or the provision of works or services **(amendments 29, 30)**. Using the Directives in this way would be flawed in principle; it would fail in practice.

UNICE has previously published a position paper describing in detail the problems of trying to use public procurement as a tool to further the pursuit of social policy; the paper is attached as Annexe 1

UNICE is seriously concerned that:

- ?? The procurement rules are already complex, so adding yet more detail would only confuse those who have to work within the regime.
- ?? This is not an effective way of achieving social goals, which have their own policy instruments that are far better suited to the purpose.
- ?? The inclusion of social aspects would undermine the principle that public procurement has to be performed in a way to achieve fairness and *best value for taxpayers' money*. This means that procurement decisions should be taken solely according to quality and price factors and the reliability of the supplier (basing decisions either on most economically advantageous offer or lowest price, as permitted in the Directives). In particular, taking into account social criteria, such as measures to combat long term unemployment, would almost certainly create opportunities to manipulate the tender; for example, to misuse criteria in order to favour specific bidders.
- ?? Even provisions which allow "non-discriminatory" prescription of social criteria would cause serious problems: complex examinations would become necessary in order to check whether the prescription of specific social aspects might be discriminatory. This would deter economic operators from taking part in the public procurement market, especially where such examinations would need to be carried out within the already short deadlines for submitting a tender. It would be especially burdensome for SMEs who might be forced to withdraw from the internal market for public procurement in Europe.
- ?? Social and labour law already carries its own sanctions and enforcement mechanisms. Requiring contracting authorities to monitor, "police" or enforce social policies and legislation through their contracts would place a heavy and wholly inappropriate burden on them. Even marginal infringements of social and labour law by economic operators might automatically be considered as a violation of procurement law. If competitors were to use this uncertainty in litigation it could lead to lengthy delays to the process and jeopardise the confidence of contracting authorities and of suppliers.

**UNICE recommends the deletion of:**

- amendment 1 [recital 22]
- amendment 29 [article 49 (a) new]

amendment 30 [article 53 (1) b]

#### **A4 Qualitative selection criteria – convictions**

UNICE recognises the need to combat corruption and to ensure that contracting authorities have the necessary powers to exclude those convicted of offences from the opportunity to bid for public sector contracts. However, how best to regulate in this area is an issue which requires careful consideration, so as to ensure that the legislation is workable and clear in practice.

UNICE agrees with the argument put forward in the Report that any decision on exclusions should be on the basis of *final judgement* convictions (**amendment 25**).

UNICE argues strongly against the proposal to build into the Directives the Council decision on criminal law protection against fraudulent or other unfair anti-competitive conduct in relation to the award of public contracts in the common market (OJ C 253, 4.9.2000, p. 3) (**amendment 24**). This would act against the Report's goal of clarification. The definitions of the relevant offences are much too vague, making the proposal unacceptable, given the extremely far-reaching sanctions set out in the proposal.

UNICE invites the Rapporteur to revisit this matter.

**UNICE welcomes:**

amendment 25 [article 46 (2) ( c) new]

**and recommends the deletion of:**

amendment 24 [article 46 (1) (cc) new]

### **B Further important items not mentioned in the explanatory statement**

#### **B1 Confidentiality**

UNICE welcomes the increased clarity of the amendment. It recommends, however, that the same wording from amendment 20 "during and after" should replace the word "throughout" so that the amended text will read ". . . the contracting authorities shall respect fully, during and after the award procedure the confidential nature . . . "

**UNICE recommends the amendment of:**

amendment 10 [article 5]

#### **B2 Competitive dialogue (article 30)**

UNICE supports the intention to ensure that contracting authorities and participants should be able to undertake competitive dialogue on "complex contracts". It is important that the rules are workable in practice. Some elements of the proposals put forward in the Report (**amendment 15**) are welcome - notably the call for a mandatory payment for the solutions of participants and the strict prohibition on mixing different participants' proposals. However, some other aspects of the proposal appear too complicated for practical use.

UNICE has previously made a complete proposal for the text of article 30; this paper is attached as Annexe 2.

**UNICE recommends reconsideration of:**

amendment 15 [article 30]

#### **B3 Time limits**

UNICE welcomes the rapporteur's approach on shortening time limits where electronic tendering is used; it is equitable that the time saved should be shared between the contracting authority and the tenderers.

Although UNICE has argued in the past that the existing deadlines are already very short for bidders, the large extension of minimum deadlines as proposed in the Report go too far. The Directive already includes the provision (art. 37) that contracting authorities should set time limits which are appropriate, and proper application of that provision would be more effective than overall lengthening.

**UNICE recommends reconsideration of:**

- amendment 18 [article 37 (1) – (6)] - delete the proposed changes to points 2-4
- amendment 19 [article 37 (9)] - time limit of 12 days for electronic tendering

**B4 Concessions and project financing**

UNICE is in favour of Public-Private Partnerships but the Directives are not the right instrument to determine their structure. The proposals (**amendment 33 and 34**) are very wide-ranging; they also include matters which are not public procurements and are outside the natural scope of the Directives. They cover contractual details relating to the running of the concession rather than to its initial establishment or even to the procurement of major works by the concessionaire. UNICE intends to produce a separate paper on Concessions and Public-Private Partnerships which will be published separately from UNICE's comments on the legislative package.

**UNICE recommends the deletion of:**

- amendment 33 [article 64]
- amendment 34 [article 65 (a) new]

**B5 Data Security in Electronic Procurement (not mentioned in the Report)**

**UNICE recommends that:**

- ?? the proposals (amendment 36) of the draft opinion of the Parliament's Committee on Industry, External Trade, Research and Energy (Rapporteur: Helmut Kuhne) should be incorporated into the Report. (Copy of that amendment attached for convenience as Annexe 3)

In the Commission's proposal, data security in Electronic Procurement is not sufficiently safeguarded. The reference to the EU Directive on Electronic Signatures needs to be clarified. The principle of confidentiality must apply not only for the transmission but also for the storage of electronic data. The reason is that the latter – at least to the same degree as electronic communication – is vulnerable to unauthorised access as well as to manipulation.

**Annexes**

- 1 UNICE position paper on Social Aspects in the Directives
- 2 UNICE position paper on Competitive Dialogue
- 3 Excerpt (amendment 36) from the draft opinion of the Parliament's Committee on Industry, External Trade, Research and Energy (Rapporteur: Helmut Kuhne)

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**COMMENTS ON THE INCLUSION OF SOCIAL ASPECTS IN THE REVISED EU  
DIRECTIVES ON PUBLIC PROCUREMENT**

UNICE recognises that social policy plays an important role in promoting a high level of employment and social protection in the EU and the EEA. Nevertheless, UNICE is deeply concerned about a broad set of proposals now being discussed to include social aspects into the Directives on Public Procurement. UNICE is convinced that public procurement regulation is not an appropriate instrument for the pursuit of social policy. Compliance with social and labour law is already subject to the existing far-reaching framework of social and labour law, both national and European. It is the role of public procurement to open the market and to pursue the commercially most advantageous solution, not to enforce social and labour law or to promote social and labour policies.

Any further linking of the EU rules on the procurement procedure with aspects on social and labour law would be both unnecessary and counterproductive. It would be unnecessary because the existing legal provisions on social and labour law already provide an elaborate legal framework. Even more important, making procurement law dependant on the fulfilment of social aspects would be counter-productive, as in practice it would undermine the well-established core principles of European Public procurement. This would equally be true if the Directives were expressly to allow for a consideration of the fulfilment of certain social aspects as award criteria, or to oblige the contracting authority to examine whether every bid is in compliance with social and labour law.

Introduction of social and labour law provisions into public procurement would in practice lead to

**(1) newly arising barriers to trade, especially in cross-border procurement, thereby closing markets**

Referencing specific national or regional social provisions could be misused to favour those national or regional bidders which the contracting authority would like to be the winner of the contract. Even provisions stating that the referenced national or regional provisions should be in compliance with European law will not be of help: almost certainly it would be extremely difficult to examine whether those conditions were indeed compliant, especially given the fact that time for the examination of compliance is very short for bidders. While cross-border procurement has repeatedly been deemed insufficient until now, referencing specific national or regional labour law provisions would obviously weaken cross border procurement and in practice lead to the closing up of markets.

**(2) creation of far-reaching bureaucratic burdens both for contracting authorities and for suppliers**

References to social and labour law provisions would put unacceptable bureaucratic burdens on contracting authorities. This would especially be true in view of the proposals which would oblige contracting authorities to establish whether all bids are compliant with social and labour law. Given the multitude and complexity of provisions on social and labour law, such obligations would put inappropriate burdens

on the contracting authority. The central obligation of a contracting authority is to select works, products and services best suited to fulfil the tasks in the public interest, but not to examine private enterprises' entire compliance with a multitude of provisions on social and labour law.

**(3) dangers to the effectiveness of the procurement of works, goods and services for public needs because of strongly increased risks of cancellation by legal review procedures, and thereby**

As already mentioned under (2), public procurement would become extremely vulnerable to a further increase of legal review procedures. Competitors of the successful bidder could very easily stop procurement procedures if they merely pointed out that the successful bidder does not comply with one single provision within a multitude of social and labour law regulations.

**(4) strongly increased risks concerning public and private investments for public purposes**

The strongly increased vulnerability of procurement procedures would increase uncertainties about public and private investments in public procurement. This would potentially lead to a decrease of interest of bidders in public procurement markets.

**(5) particular disadvantages for small and medium sized enterprises (SMEs)**

The problems mentioned above would have a particular negative impact on small and medium sized enterprises (SMEs). Especially for SMEs throughout Europe it will hardly be possible to react on a complex set of provisions of national and regional social and labour law. Thus, potentially they would be forced to withdraw from participation in public procurement.

For all the reasons mentioned above, European Industry urges that the European legislator should abstain from introducing the proposals for social aspects into the Public Procurement Directives. Otherwise the well-established core principles of public procurement, which the legislation has set up with a lot of effort during recent years, would unnecessarily be sacrificed. Public Procurement would then suffer from enormous legal and practical uncertainties which would be most harmful to the good functioning of the procurement of works, supplies and services in the public interest.

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## Annexe 2

15 February 2001

**COMPETITIVE DIALOGUE**  
**REVISED DRAFT COM (2000) 275 FINAL/2, COUNCIL 5083/01**  
**DATED 12 JANUARY 2001**  
**UNICE POSITION**

UNICE again confirms its support for the intention to permit competitive dialogue between contracting authority and candidates in particularly complex contracts provided that UNICE`s basic positions on such procedural provisions\* were recognised.

In the revised wording of Article 30 in Document COM (2000) 275 final/2, UNICE`s positions have to some extent been taken into consideration. But, as it stands, Article 30 still conveys the impression that the proposed procedure can serve as “fishing expedition” which could be used by contracting authorities aiming at avoiding their obligation to define their own needs clearly *prior* to a procurement procedure. Thus, UNICE sets out the following basic elements which will have to be incorporated if competitive dialogue is to work in practice and not be misused for purposes beyond objectively complex contracts:

- ?? The contracting authority, whilst it cannot identify the solution to its needs, has to define the *needs* themselves *very clearly*.
- ?? The award criteria must be set out clearly at the outset.
- ?? The mixing of ideas/solutions of participants of the dialogue procedure must be expressly excluded.
- ?? The disclosure of participants` solutions and other confidential information, already prohibited to other participants, must also be prohibited to any third parties at any time during and after the procedures.
- ?? Each participant in the dialogue will submit its (best and final) offer on the basis of its own proposals.
- ?? Compensation for costs incurred in participating in the dialogue should be mandatory.

**Should the possibility of combining, or of seeking bids based on, solutions from different participants not be clearly excluded, UNICE will definitively be unable to continue to support the Competitive dialogue procedure.**

In order to meet UNICE`s essential points for the procedure of competitive dialogue set out above, the following amendments of Article 30 would be needed:

*Article. 30*  
*Competitive Dialogue*

1. ...

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\* See previous UNICE Comment on the revised Public Purchasing Directives, dated 14 November 2000 page 3-9, especially page 5.



2. The **contracting** authorities shall publish a contract notice **clearly** setting out their needs and requirements, which they shall define in a descriptive document in terms of objectives to be achieved and, if appropriate, in terms of performance or functional requirements. **At the same time the contracting authority shall set out the selection and award criteria.**
  3. Contracting authorities shall open, with the candidates selected in accordance with Articles 43 a to 52, consultation. the sole aim of which shall be to identify ~~and define~~ the means best likely to satisfy the needs of the contracting authority. ~~so that it can draw up the contract document. The contracting authority shall continue such consultation until it can identify solutions, if need be after comparing them, capable of meeting its needs.~~ **If, in exceptional cases, the contracting authority becomes aware during the course of the procedure that aspects of the definition of its requirements need amendment, it shall forthwith advise, subject always to sub-clause 4 hereof, all the participants accordingly.**
  4. Contracting authorities **shall** not reveal to the other participants **or to any other third party** solutions proposed or other confidential information communicated by a participant without the latter's agreement.
  - 4.5. Having declared that the consultation is concluded, **and** having so informed the participants ~~and having drawn up the contract document~~, contracting authorities shall ask all candidates who have proposed solutions during the consultation to submit a tender on the basis **of their own** proposals. Contracting authorities shall assess the tenders on the basis of the award criteria laid down and shall choose the most advantageous tender in economic terms. Where the conditions laid down in Article 29 are met, tenders may be negotiated in accordance with that Article.
  - 5.6. Contracting authorities **shall** specify prizes and payments to the participants **in respect of their work in participating in the consultation and preparing proposals.** Such prizes and payments shall be taken into account in estimating the thresholds in accordance with Article 8.
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# EUROPEAN PARLIAMENT

1999



2004

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*Committee on Industry, External Trade, Research and Energy*

PROVISIONAL  
(2000)0115(COD)

20 February 2001

## **DRAFT OPINION**

of the Committee on Industry, External Trade, Research and Energy

for the Committee on Legal Affairs and the Internal Market

on the proposal for a European Parliament and Council regulation on the coordination of procedures for the award of public supply contracts, public service contracts and public works contracts

(COM(2000) 275 – C5-0367/2000 – (2000) 0115(COD))

Draftsman: Helmut Kuhne

[ Excerpt from the report: ]

(Amendment 36)  
Article 61(1a) (new)

***1a. A tender may be submitted by electronic means only if an advanced electronic signature within the meaning of Directive 1999/93/EC of 13 December 1999 on a Community framework for electronic signatures and a reliable means of encrypting the contents are used.***

*Justification:*

The purpose of this amendment is to ensure an appropriate level of data protection where tenders are submitted by electronic means