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COMMENTS ON THE DRAFT REPORT OF THE COMMITTEE ON LEGAL AFFAIRS AND THE INTERNAL MARKET OF THE EUROPEAN PARLIAMENT
2000/0117(COD) REV, DATED 9 APRIL 2001
- RAPPORTEUR: STEFANO ZAPPALÁ –
ON THE REVISION OF THE EU DIRECTIVES ON THE PROCUREMENT PROCEDURES IN THE WATER, ENERGY AND TRANSPORT SECTORS

UNICE welcomes the opportunity to comment on the draft report ("the Utilities Report") of the Committee on Legal Affairs and the Internal Market on the revision of the directives ("the Utilities Directives") affecting the water, energy and transport sectors. UNICE has already published its commentary on the rapporteur's draft report ("the Classical Report") on the Public Purchasing directives (2000/0115(COD)). In the Classical Report he proposed that those directives should not be overburdened with formal requirements; the Utilities Report contains no Explanatory Statement but UNICE has assumed that the rapporteur's views remain the same.

Several of the proposals in the Utilities Report would have the effect of overloading the Utilities 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, modifications to the Utilities Report are necessary. These modifications are set out below.

UNICE has noted that there appear to be some differences between the texts of the Utilities Report in the various languages; this paper uses the English version and there may thus be matters which it would address if it were using all the language versions. Furthermore, UNICE has had but little time to review the Utilities Report and there may possibly remain some matters on which it will wish to comment further.

This paper groups some of the topics for ease of discussion and cites the affected amendments at the end of each section. Other aspects are taken in the order in which they appear in the Utilities Report.

A Comments on grouped topics

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 entities 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 Utilities Directives to dictate procurement strategies to member states and contracting entities in this way. In particular, these bodies should be free to determine

their own views on how to package contracts and the mix of the factors that determine the most economically advantageous offer. The Utilities Directives then play a crucial role in ensuring that 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 entities 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 4, 7)**.

?? The Utilities Directives should have no role in dictating whether or not contracting entities award single contracts which combine "intellectual" and "executive" services. Contracting entities 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 Utilities Directives to make this judgement on behalf of contracting entities. 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 3, 7, 20)**.

?? 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 **(amendment 3**).

?? The Utilities Directives should not impose a particular weighting for aesthetic and functional aspects on the award criteria used by contracting entities. Even if contracting entities may in practice wish to base decisions primarily on qualitative or aesthetic factors for "intellectual" services, it is not the role of the Utilities 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, 25)**.

?? **UNICE recommends the deletion of:**

amendment 2	[recital 41]	amendment 12	[article 13 (5)]
amendment 3	[article 1 (2) (b)]	amendment 19	[article 37, last amendment]
amendment 4	[article 1 (2) (c)		
amendment 7	[article 1 (8)a (new)]	amendment 20	[article 37a (new)]
		amendment 25	[article 54 (2)a new]

A2 Social 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 Utilities 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 Utilities Directives' well-established principles upon which the proper functioning of the single market depends.

The Utilities Report draws on the European Court of Justice case, dated 26 September 2000 (C 225/98, 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 Utilities Directives **(amendment 1)**.

Irrespective of the current legal position, UNICE is deeply concerned about proposals which would require or allow contracting entities explicitly to ask for the fulfilment of social conditions with regard to the production process or the provision of works or services (**amendments 22, 23)**. Using the Utilities 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 same principles apply to the use of the Utilities Directives. The paper is attached as Annexe 1.

UNICE is seriously concerned that:

- The inclusion of social aspects into the Utilities Directives would undermine the principle that contracting entities should conduct their purchasing in accordance with good commercial practice.
- An increasing majority of contracting entities which are subject to the Utilities Directives are companies with shareholders to whom they are responsible; the number which are state owned is reducing. Whilst contracting entities – in common with all companies in the EU – must observe their social obligations, requiring them uniquely to police social policy would divide rather than unify the single market.
- Social and labour law already carries its own sanctions and enforcement mechanisms. That is the proper way to achieve social goals.

UNICE recommends the deletion of:

amendment 1 [recital 32]
amendment 22 [article 53a (new)]
amendment 23 [article 54 (1) (a)]

B Comments on individual draft amendments not addressed in section A

B1 Application of the Utilities Directives – amendment 9

It has long been a principle of the Utilities Directives that they should apply to all entities operating in the sector regardless of their ownership or their statutory form but not in areas where there is manifest competition. Article 20 deals with types of contract excluded and Article 29 with exclusion of the contracting entity entirely; for the avoidance of confusion, exclusion should not be dealt with elsewhere.

UNICE recommends the deletion of:

amendment 9 [article 2 (3)a (new)]

B2 Confidentiality – amendment 11

UNICE welcomes the recognition of the importance of confidentiality in relationships between contracting entities and economic operators. The proposed amendment, whilst seeking to strengthen the existing wording by making it more precise, may actually have the effect of weakening it.

The growing use of electronic commerce will require special measures to protect confidential information; UNICE recommends that Article 12 be amended accordingly.

UNICE recommends the deletion of:

amendment 11 [article 12 (2)]

and the insertion of the following text:

Where electronic means are used for the tendering and contract processes, appropriate measures shall be taken to ensure security of information during transmission and during storage. Contracting entities shall, upon request, provide evidence that the necessary measures are in place.

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 entity 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 Utilities Report goes too far. The Utilities Directives already include the provision (article 44 (1)) that contracting entities 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 21 [article 44 (1) – (8)] - delete the changes to points 2-4, 7-end

C Matters which UNICE particularly welcomes

C1 Purchase of energy – amendment 15 – article 27

UNICE agrees that it is logical that, for the purchase of primary energy by contracting entities which are explorers, extractors, producers, transporters or distributors of primary energy, those contracting entities should enjoy the same regime with respect to their purchases of primary energy as do water companies with respect to their purchases of water.

C2 Exclusion where there is competition – amendments 16, 17 – article 29

UNICE agrees that a contracting entity which believes that it is exposed to competition should itself have the opportunity to apply for exclusion as provided in article 29. That opportunity may well avoid unnecessary frustration should a member state or the Commission not be willing to act at a time when the Utility believes that it qualifies. UNICE recommends, however, that the word "enterprise" be replaced by "contracting entity" in order to remain consistent with the rest of the Utilities Directives.

Annexe

1 UNICE position paper on Social Aspects in the Directives

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Annexe 1

3 April 2001

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.

(1) 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.

(2) 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.

(3) 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-stablished 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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