

***Public Procurement***

***EU Legislative Package: No longer acceptable***

UNICE has up until now supported the EU Legislative Package and has during its work on it contributed constructive suggestions. However, UNICE must make it absolutely clear that the amendments resulting from the consultations in the European Parliament and the Internal Market/Competition Council call into question the underlying principles of the EU Public Procurement Directives, being the opening-up of markets and the provision of best value for money. Furthermore it is evident that, in developing the Political Agreement on the Consolidated Directive<sup>1</sup> for the Classical Sector and the Utilities Directive<sup>2</sup>, the most important concerns of industry - pointed out and emphasized by UNICE on innumerable occasions - have still not been taken into account. The Legislative Package in its essential content now seems to serve the interests of contracting authorities unilaterally, conflicting with core principles for a single public procurement market and damaging the proper interests of suppliers.

In the opinion of European Industry, the reform initiated by the Legislative Package has now lost its significance as a useful and fruitful further development of public procurement legislation in the Union. UNICE therefore sees no further gain in the Legislative Package.

At this point, we would do well to remember the actual objectives of the Reform, set out in the Commission proposal for the Legislative Package of May/August 2000. The primary intention was to simplify the Directives and to introduce a moderate reform, both of which objectives UNICE has supported. The European Parliament and Member States seem to have lost sight of these objectives and have instead introduced new measures containing elements counterproductive to the liberalisation of the Single Market and the opportunities for SMEs.

**The decisive factors leading to our present view on the Legislative Package are:**

**1. Increase of thresholds**

The European Parliament is demanding an increase of the thresholds by an average of 50%. The Member States and the Commission want to compromise and link the thresholds to the special drawing rights following the WTO Government Procurement Agreement; this would

<sup>1</sup> COD 9270/02 dated 28 May 2002

<sup>2</sup> COD 12204/02 dated 23 September 2002

lead to an increase of the thresholds by an average of 25%. To say that this is only an adjustment (to the WTO Agreement), but not an increase of the thresholds, is merely glossing over the truth. The effect on the Internal Market is an increase of the thresholds, a development UNICE clearly interprets as being counter to the objective of opening-up central, regional and municipal procurement markets in the Union; it would take a significant number and value of contracts out of the Directives altogether. The liberalisation of public procurement aimed at by the completion of the Single Market in 1993 has not yet been attained, and increasing the thresholds will encourage a reverse trend in which national market barriers will be strengthened. The argument that the principles of the EU Treaty secure the required liberalisation of the markets below the thresholds must be rejected; it should be sufficiently clear by now what this actually leads to in practice.

UNICE fails to see the value in increasing the thresholds and therefore states quite clearly that European Industry will vote against this move. In fact, we seek the opposite, namely that the thresholds in the EU Public Procurement Directives be lowered in order to improve the opportunities for SMEs, to enable SMEs to make better use of the EU-wide market for public procurement and by decreasing the thresholds also offer SMEs efficient legal protection under the EU Remedies Directives – a protection which they have so far largely not had for the contract allocations in which they have been able to participate.

## **2. Widening of in-house performance**

In the draft Utilities the increase in exceptions to applicability of the Directive is an assault on the opening-up of markets so far achieved. Instead of increasing market access, the extension of in-house procurement would create new barriers to a free competitive tendering procedure. UNICE also points out clearly that these are self-serving rules in the interest of contracting entities not in line with the goal of a Single Market for public procurements and therefore strongly opposed by European Industry.

Indeed, some of the changes enable services to be provided by entities controlled or formed by contracting authorities, under appointments made for an unlimited term, without any negotiation or any of the constraints applicable to all other enterprises.

The draft clearly discriminates between public entities and private operators without seeking to clarify the terms under which exclusive rights are awarded to such entities and whether such exclusions are compatible with the treaty.

In this respect we are strongly opposed to:

Article 23a para 4(b) on affiliated undertakings in that the article seems to allow a contracting entity to execute a contract with a joint venture or a group which it has formed without any competitive procedure.

Article 25 which extends the possibilities, already insufficiently restricted in the previous text, of executing a contract for services with one or more contracting authorities.

Moreover there is a risk that during the second reading the European Parliament might renew its proposal to extend the exclusion to all contracts including works and supplies.

## **3. Social and environmental considerations**

The result of Article 26a of the Consolidated Directive and Article 37a of the Utilities Directive is to leave the door wide open for regulations detrimental to competition. Commercial procurement based on competition, one of the mainstays of the EU Public Procurement Law, is thereby significantly weakened. We are familiar with the ways in which the potential effects

of these two regulations have been glossed over. However, one need only read Recital 22 of the Consolidated Directive (ditto Recital 32 of the Utilities Directive) to appreciate the kind of contract performance conditions introducing unrelated political requirements that the bidder is likely to face.

There is enough evidence that using the award of public contracts as a vehicle for the pursuit of general political objectives is detrimental to competition and transparent procurement procedures. Once again, it becomes clear that SMEs in particular, who depend on their competitiveness to survive, will be adversely affected. Furthermore, one must bear in mind that muddy elements in public procurement procedures foster manipulation and corruption and are therefore in conflict with the objectives and measures necessary to fight corruption. Here again, it has to be said: UNICE will not support this.

#### **4. Electronic procurement**

The regulations concerning electronic procurement in both draft Directives may be progressive on paper, but are certainly not so in practice. Reverse auctions may be something new and exciting for public authorities but in commercial B2B they have meanwhile been discarded as much less effective than expected in a lot of area. They are still used in B2B but under certain preconditions, which cannot be transferred to public procurement (longer advance negotiations with prospective companies which would not be acceptable for public contracts).

The intended Dynamic Procurement contains elements that are entirely unrealistic, and a considerable amount of red tape, which will yield anything but dynamic results.

On the other hand, the practical aids required to carry out electronic procurement (establishing digital signatures, encryption etc.) are missing from the respective regulations. UNICE's conclusion is therefore: in practice, the optional clauses of the current Directives are the better way of establishing electronic procurement in the Member States.

#### **5. Class action by employees or Trade Unions**

Demanded by the European Parliament but not yet included in the Political Agreements of the Internal Market/Competition Council, and presently still undecided, is the intention to allow employees or Trade Unions to dispute public procurements. It should be absolutely clear that the Remedies Directives guarantee the necessary legal protection.

#### **6. Other aspects**

Some elements within the Legislative Package are certainly helpful, notably the introduction of competitive dialogue, provisions for exclusion of utilities in competitive markets, consolidation of the three classical directives and clarification of the language. But, valuable as they are, the benefits are outweighed by adverse effects set out above.

#### **Conclusions**

**European Parliament and Member States amendments to the Legislative Package reduce market opening and create opportunities for abuse. If this cannot be rectified then the ongoing Legislative process should be stopped.**