

Protecting workers in PPPs

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1. Introduction

This report is one of three commissioned by EPSU. One report discusses the problems with PPPs. Another discusses alternative ways of improving and investing in public services. This report concerns the protection of public service employees affected by PPPs.

1.1. PPPs, public services and employment issues

The quality and efficiency of public services depends on the workers delivering those services. Their commitment and professionalism, sometimes called the 'public service ethos', are a key element in delivering those services. The impact of PPPs on workers thus also has a negative impact on the public service concerned, because it affects workers' motivation, and limits the resources spent on service provision. The impact of PPPs on public employees therefore matters to everybody, as well as the workers themselves.

PPPs worsen the employment conditions of workers and their collective organisation in unions. These effects are caused by firstly, the employees being transferred to a separate private employer, and secondly, by the dominant role of the PPP contract itself, which forces public authorities to prioritise payments to the PPP company over all other expenditure. The effects can be categorised under five broad headings.

- Security of employment is reduced, because it is related to the contract itself and/or the private company, rather than the public authority. The private company has a greater incentive to reduce employment in order to increase profit margins, and has less incentive to maintain 'overheads' such as training. The terms of a contract and the profit-maximising incentives of the private company, may lead to further casualisation through the use of short-term contracts or secondary sub-contracting.
- Workers normally lose their status as public employees. Possible future returns to public sector employment become more complex. Workers may lose the benefit of public sector pension schemes.
- It is more difficult to protect and improve pay and working conditions. This depends on the enforceability of indirect mechanisms such as fair wages clauses or legal rules on sectoral pay agreements. The PPP contract itself may not guarantee funding for nationally agreed pay increases. Private employers may apply different employment conditions to new entrants compared with transferred workers, creating a '2-tier' workforce.
- Union organisation is weakened because employees are divided into smaller units with different employers, thus weakening solidarity and forcing unions to deal with a number of different employers. The management of private companies is not directly subject to considerations of public policy in relation to employment issues, and may thus be less supportive of union organisation and workers' rights.
- Other public service workers may also be affected as a result of the existence of the contract. If the income of a public authority is reduced, or if the PPP itself becomes more expensive than expected, the cuts are concentrated on the remaining direct employees, because the PPP contract cannot be broken.

PPPs also have the general effect of weakening weaken the public sector itself, and the role of public services. Strategies for dealing with these effects are the subject of a separate report.

1.2. Framework: factors and institutions

The impact of PPPs on employees is affected by a number of factors. These include the EU legal and policy framework for procurement, PPPs, and employment law, which is common for all countries in the EU (and has a strong influence on countries which are candidates for accession, or in the EEA, or in the EU neighbourhood). The impact also depends on the legal and policy framework for procurement, PPPs, and employment law in each country; the rules and policies of the public authority which creates a PPP; the practices of the private companies; and collective agreements at all levels. The possibilities for negotiating protection for employees and unions also depend on local social and political context, including the strength of union organisation.

The following table identifies some key mechanisms for protecting workers from the impact of PPPs. The first two columns set out some key issues as they arise during the process of proposing, procuring, and implementing a PPP. The central column indicates EU laws which are particularly relevant to each issue, some of whose provisions may be used to improve protection for workers. These laws are of equal relevance in all countries.

The next two columns indicate the national and local laws and policy instruments which can affect the impact on workers, and the potential use of framework agreements to regulate the issue. The laws and policies which can be used vary from country to country. As the examples in the following sections show, they include employment laws (e.g. in Hungary), procurement laws (e.g. in Norway), and national policies and codes on PPPs (e.g. in the UK). Regional or local authorities may adopt procurement or employment policies which are better than the national rules (e.g. in Sevilla). Finally, framework agreements may be negotiated with national or local public authorities, and these agreements may then be incorporated into rules and policies (e.g. in Italy).

Table 1 Employment issues in PPPs: EU, national and local laws, policies and agreements

Stage	Issue	EU law/rules/policy	National and local law/rules/policy	National or local framework agreement
Before PPP	In-house option	Treaty	PPP rules/policies	National or local framework agreement
	Consultation	Consultation directive	PPP rules/policies National law/code Local authority laws/rules/policy	National or local framework agreement
	Risk assessment	Eurostat rules Banks rules	PPP rules/policies Local authority laws/rules/policy Audit rules	National or local framework agreement
Procurement process	Consultation	Consultation directive	PPP rules/policies National law/code Local authority laws/rules/policy	National or local framework agreement
	In-house bid		PPP rules/policies National law/code Local authority laws/rules/policy	National or local framework agreement
	Fair wages clause, two-tier workforce, pension rights	Procurement directives/ILO94	PPP rules/policies National law/code Local authority laws/rules/policy Contract spec	National or local framework agreement
	Health, safety, training, equality, other social clauses	Procurement directives	PPP rules/policies National law/code Local authority	National or local framework agreement

			laws/rules/policy Contract spec	
	Transfer of employees, exclusion of employees from PPP, secondment	Acquired rights directive	PPP rules/policies National law/code Local authority laws/rules/policy Contract spec	National or local framework agreement
	Criteria for awards, exclusion of abnormally low bids, exclusion of convicted companies	Procurement directives	National law/code Local authority laws/rules/policy Contract spec	National or local framework agreement
Actual PPP	Company pay and conditions and employment practices	Acquired rights directive EU employment law	National law/code Contract spec	National or local framework agreement Company agreement
	Union recognition	Consultation directive EWC directive	National law/code Contract spec	National or local framework agreement Company agreement
	Monitoring of PPP		PPP rules/policies National law/code Local authority laws/rules/policy Contract spec	National or local framework agreement Company agreement
PPP termination	Transfer of employees	Acquired rights directive		National or local framework agreement

1.3. Fair wages, procurement rules, and agreements

This report examines how workers can be protected under three broad headings:

- the general use of ‘fair wages’ clauses, and other social clauses, under international and EU law;
- the negotiation of national and local framework agreements to regulate the impact of PPPs on employment, pay and conditions
- the use of national and local procurement laws and policies to regulate the impact of PPPs on employment, pay and conditions.

1.4. Related issues: alternatives to PPPs and social procurement policies

Two related and important issues are discussed in the separate report on alternatives. They are:

- How to ensure that in-house provision is always considered as a policy option, and/or as a competitive option
- The use of social and environmental clauses to promote other social policies

2. EU and international legal framework: 'fair wages' clauses

2.1. 'Fair wages' clauses: history and international context

'Fair wages' policies have been applied to public sector contractors for over a century, in order to use the economic activity of public authorities to "create avenues of just and secure employment". In France, the USA, the UK and other countries, 'fair wages' legislation and clauses were introduced, specifying minimum conditions of work and/or the need to recognise rates agreed with trade unions. In 1892, the newly elected London County Council, for example, used clauses insisting on an eight-hour working day, and trade union rates.¹

In the 20th century procurement developed as a key policy instrument for supporting the employment of disabled workers, and for eliminating racial, gender or religious discrimination. Many countries introduced clauses requiring contractors to apply equal opportunity policies. In the USA, for example, the civil rights movement led to the use of procurement preferences as part of 'affirmative action' policies to advance the economic status of groups who had suffered discrimination, and similar legislation has since been implemented in South Africa since the ending of apartheid. Procurement has also been used as an instrument of international solidarity, for example by excluding companies who were trading with the apartheid regime in South Africa.²

The EU itself included the principle of equal pay in the original Treaty of Rome, and procurement clauses were a key mechanism for enforcing this principle, through: "the adoption of linkage between procurement and non-discrimination requirements by several *Länder* (states) in Germany, several local authorities in the United Kingdom, and many local authorities in the Netherlands."³

The ILO adopted the principle of fair wages clauses in 1949, in Convention 94, which requires States to include clauses in their public contracts ensuring that wages (including allowances), hours of work, and other conditions of labour were not less favourable than those established for work of the same character in the trade or industry in the district where the work is carried out. The ILO also adopted the use of procurement clauses for pursuing equality in recommendation 111, which advocates that commitment to equality principles should be a condition of eligibility for public contracts. The ILO has also encouraged the use of social clauses as a mechanism for enforcing its core labour standards, especially to protect construction workers, and to improve conditions of employment in developing countries.⁴

The development of these policies has often been resisted by commercial interests and right-wing political parties. The Thatcher government in the UK, for example, denounced the ILO convention, repealed the UK's fair wages law, and finally restricted the right of municipalities to apply social criteria. This reflected constant and successful lobbying by private companies, who wanted to undercut the pay and conditions agreed in the public sector.⁵ Employers organisations still attempt to resist fair wages clauses: the Confederation of Norwegian Enterprises (Næringslivets Hovedorganisasjon, [NHO](http://www.nho.no)) argued against Norway's ratification of the ILO convention in 2008, and employers in Latvia argued against a procurement law which favours companies with good social insurance contributions on behalf of their employees.⁶

The objectives of social clauses have not been a prominent feature of other recent international initiatives on procurement, which have been concerned to liberalise trade through opening government procurement to international bidders.

One part of the work of the World Trade Organisation (WTO) has been to try and open public sector procurement to international competition. This includes a special government procurement

agreement (GPA), which requires such liberalisation.⁷ Like the WTO's attempt to liberalise services, it has been strongly resisted around the world: few countries have signed up to it - the EU has signed it on behalf of its 27 member states, but only 12 others have done so. The GPA is silent on social clauses, neither requiring them nor containing any provisions that forbid them. Indeed, 12 out of the 38 countries which are parties to the GPA have also ratified ILO Convention 94. As a result, the principle of non-discrimination in the GPA means that such clauses must be applied equally to bids from countries all over the world.⁸ The UN commission on international trade (UNICTRAL) also produced a 'model law' on procurement in 1994, which neither requires nor forbids social clauses. It allows countries to use criteria such as 'the extent of local content, including manufacture, labour and materials....[and] the economic-development potential offered by tenders...', and allows countries to include any other 'additional criteria', social or otherwise, without restriction.⁹

These trade-focused initiatives affect the climate on social policies, even where they do not formally exclude them: "national and international policy environments regarding social procurement are a primary determinant of the extent to which organisations engage in social procurement."¹⁰

Despite these changes in international climate, fair wages clauses are still being used and introduced by countries as an instrument of social policy.

- In Belgium new social clauses were introduced in the Brussels region in 1999
- In the Netherlands, public procurement has been thought about and used as a way of promoting employment policies "more often since 1994 than before".¹¹
- In countries of central and eastern Europe the growth of illegal employment without social insurance or recognised pay and conditions is seen as a major problem by governments: Hungary, Slovakia and Latvia have all introduced for the first time new procurement laws which place conditions on the employment practices of companies tendering for public contracts (see below).
- Public authorities in the USA continue to operate strong equality programmes favouring minority- or women-owned suppliers.¹²
- An international survey of procurement policies in 2007 found that public authorities are much more oriented towards social aspects of sustainable procurement – purchasing from small/local companies, and worker safety, rather than environmental issues (whereas private companies tend to focus only on environmental issues when presenting their corporate social responsibility statements).¹³

2.2. ILO convention 94

Labour Clauses (Public Contracts) Convention, 1949 (No. 94). International Labour Organisation (ILO) <http://www.ilo.org/ilolex/cgi-lex/convde.pl?C094>

The purpose of ILO Convention 94 is, firstly, to prevent companies bidding for public contracts from competing on the basis of cutting labour costs; and secondly, to ensure that public contracts do not exert a downward pressure on wages and working conditions, by placing a standard clause in the public contract to the effect that workers employed to execute the contract shall receive wages and shall enjoy working conditions that are not less favourable than those established for the same work in the area where the work is being done by collective agreement, arbitration award or national laws and regulations. An ILO report published in 2008 notes that the increased use of outsourcing - including through PPPs - and the use of labour-only subcontracting, make the problems even more acute now than when ILO 94 was first agreed.¹⁴

Article 2 requires governments which have ratified the convention to include fair wages clauses in government contracts:

“Contracts to which this Convention applies shall include clauses ensuring to the workers concerned wages (including allowances), hours of work and other conditions of labour which are not less favourable than those established for work of the same character in the trade or industry concerned in the district where the work is carried on:

- (a) by collective agreement or other recognised machinery of negotiation between organisations of employers and workers representative respectively of substantial proportions of the employers and workers in the trade or industry concerned; or
- (b) by arbitration award; or
- (c) by national laws or regulations.” (ILO Convention 94: Article 2)¹⁵

The convention also requires governments to ensure the health and safety of contractors’ workers (article 3), and for the provisions to be publicised and enforced (articles 4, 5)

Sixty countries have ratified convention 94, but implementation is weak. In some countries which have signed the convention, such as France, new legislation on procurement no longer requires a fair wages clause.¹⁶ Only 3 countries have ratified the convention in the last 10 years, and modern initiatives on social procurement rarely mention the ILO convention. Development banks have, at best, adopted weak clauses on employment, but the World Bank has acknowledged that in countries which have signed up to ILO convention 94: “procuring entities must ensure that clauses on labour standards (fair wages, health and safety measures and social security) are incorporated in works contracts and enforced by contract managers”.¹⁷

Table 2 European countries, ILO convention 94, and WTO procurement agreement

Country	EU status	ILO 94	WTO
Austria	EU	Ratified	GPA*
Belgium	EU	Ratified	GPA*
Bulgaria	EU	Ratified	GPA*
Cyprus	EU	Ratified	GPA*
Denmark	EU	Ratified	GPA*
Finland	EU	Ratified	GPA*
France	EU	Ratified	GPA*
Italy	EU	Ratified	GPA*
Netherlands	EU	Ratified	GPA*
Norway	EEA	Ratified	GPA
Spain	EU	Ratified	GPA*
Turkey	Accession	Ratified	

*Covered by EU signature

Source: Labour clauses in public contracts, ILO 2008, Appendix I, III; WTO

2.2.1. Application to PPPs

It is sometimes suggested that the ‘complexity’ of the arrangements in PPPs makes it uncertain whether these are covered by the conventional procurement process.¹⁸ **In the EU, there is no doubt that PPPs are covered by procurement laws and treaty rules on competition, because they involve the award of contracts to entities which are separate from the public authority.** The EC communication on institutional PPPs, for example, clarifies that:

“The fact that a private party and a contracting entity [i.e. public authority] co-operate within a public-private entity cannot serve as justification for the contracting entity [i.e. public authority] not having to comply with the legal provisions on public contracts and concessions when assigning public contracts or concessions to this private party or to the respective public-private entity..... public authorities are not permitted ‘to resort to devices designed to conceal the award of public contracts or concessions to semi-public companies’”.¹⁹

Policies, rules, laws and treaties concerned with public contracts, including ILO Convention 94, are therefore clearly applicable to PPPs. In terms of ILO convention 94, a PPP always involves “employment of workers by the other party to the contract”, and “expenditure of funds by a public authority” (except for the very rare case of a pure concession).

2.2.2. Compatibility with the EU procurement directives

Opponents of fair wages clauses have suggested that labour clauses in general, and the ILO Convention itself, may be in conflict with the EU procurement directives. For example, the Norwegian employers’ association claimed that ILO 94 is incompatible with the directives,²⁰ and a Swedish parliamentary committee in 2004 was uncertain on the matter.²¹

The main claim behind these suggestions is that the EU procurement directives require the selection of the cheapest bid, and that social clauses prevent this. But the procurement directives do not, and never have, required the selection of the cheapest bid: they explicitly allow for the selection of the ‘most economically advantageous tender’, which can include a range of other criteria.²² Academic analysts have therefore dismissed the idea of any general incompatibility: “there is no conflict or contradiction between the EU legal regime on public procurement and the ILO Convention No. 94.”²³

The European Commission itself has always been careful not to imply any conflict. It has acknowledged that public authorities may pursue social objectives through procurement, including “legal obligations relating to employment protection and working conditions binding in the locality where a works contract is being performed”; that where all the work is performed within the country concerned, then “tenderers and contractors must comply, as a minimum standard, with all obligations relating to employment protection conditions and working conditions, including those deriving from collective and individual rights, that arise from applicable labour legislation, case law and/or collective agreements”; and that in all cases “provisions more favourable to workers [than generally prevailing laws and agreements] may, however, also be applied (and must be complied with)”.²⁴

Even the Ruffert judgement (see below), which seriously weakens the impact of fair wages clauses, is not based on a conflict between the social clause and the procurement directives, but on a perceived conflict with the Posting Directive.

A 2008 review by the ILO also concludes unequivocally that:²⁵

“there is nothing in the provisions of the two EU directives which would prevent EU Member States from requiring contractors through national laws to ensure to workers engaged in the execution of contracts wages (including allowances), hours of work and other conditions of labour which are not less favourable than those established for work of the same character in the trade or industry concerned in the district where the work is carried on by the methods set out in the Convention..... there is no contradiction between the requirements of ILO Convention No. 94 and the principles set out in the two EU public procurement directives” (bold emphasis in original)

2.3. EU Procurement directive: allowing social and employment clauses

Directive 2004/18/EC Procurement Directive for public works, supplies and services²⁶
http://ec.europa.eu/internal_market/publicprocurement/legislation_en.htm

The 2004 EU procurement directives do not *require* a fair wages clause, but they *allow* fair wages clauses and other provisions to protect employment conditions. The Ruffert judgment does *not* make such clauses illegal (see below).

2.3.1. Special conditions: social and environmental clauses

Article 26 of the Public Sector Directive 2004/18/EC explicitly acknowledges that public authorities can use social and environmental conditions in procurement:

- “Contracting authorities may lay down special conditions relating to the performance of a contract, provided that these are compatible with Community law and are indicated in the contract notice or in the specifications. The conditions governing the performance of a contract may, in particular, concern social and environmental considerations”.

The preamble of the directive itself envisages a wide range of ‘contract performance conditions’ which are compatible with the directive:

- “Contract performance conditions are compatible with this Directive provided that they are not directly or indirectly discriminatory and are indicated in the contract notice or in the contract documents. They may in particular be intended to encourage on-site vocational training, the employment of people experiencing particular difficulty in integration, the fight against unemployment or the protection of the environment. For example, mention may be made of the requirements – applicable during the performance of the contract – to recruit long-term jobseekers or to implement training measures for the unemployed or for young persons, to comply in substance with the provisions of the basic International Labour Organization (ILO) Conventions, assuming that such provisions have not been implemented in national law, and to recruit more handicapped persons than are required under national legislation.” (33rd recital, preamble, Directive 2004/18).

It also states that “The laws, regulations and collective agreements, at both national and Community level, which are in force in the areas of employment conditions and safety at work apply during performance of a public contract” (recital 34, preamble, Directive 2004/18).

Thus the contract conditions can include objectives and criteria related to employment – for example observation of collective agreements, requiring sub-contractors and suppliers to do the same, observing conditions comparable to public authorities, employment of young/local/unemployed. Procurement contracts may in principle:

- Include a fair wages clause
- require compliance with ILO conventions, such as convention 94, even if they have not been adopted in national law
- select contractors on the basis of their social and environmental policies
- select contractors on the basis of their proven ability to monitor their own sub-contractors’ compliance with such social clauses.
- include conditions requiring suppliers to include equivalent conditions in sub-contracts, for example that clothing supplies must not be made using child labour.²⁷

(For wider social, economic and environmental objectives allowed under this clause, see the accompanying paper EUPPPs-altern).

2.3.2. Selection criteria

Under article 53, in selecting the contractor, the public authority can use not only the simple criterion of the lowest price, but also on the basis of other criteria specified in advance:

- “the criteria on which the contracting authorities shall base the award of public contracts shall be either: (a) when the award is made to the tender most economically advantageous from the point of view of the contracting authority, various criteria linked to the subject-

matter of the public contract in question, for example, quality, price, technical merit, aesthetic and functional characteristics, environmental characteristics, running costs, cost-effectiveness, after-sales service and technical assistance, delivery date and delivery period or period of completion, or (b) the lowest price only.”

Article 48 requires public authorities to assess the technical and professional capability of a contractor. It allows this to be done by reference to various criteria, including the company’s record of direct employment and use of sub-contractors²⁸ :

- “The technical and/or professional abilities of the economic operators shall be assessed and examined in accordance with paragraphs 2 and 3. Evidence of the economic operators' technical abilities may be furnished by one or more of the following means.....(g) “a statement of the average annual manpower of the service provider or contractor and the number of managerial staff for the last three years;... (i) an indication of the proportion of the contract which the services provider intends possibly to subcontract.”

Article 55 allows authorities to exclude ‘abnormally low bids’ and to demand information about employment and working conditions:

- “If, for a given contract, tenders appear to be abnormally low in relation to the goods, works or services, the contracting authority shall, before it may reject those tenders, request in writing details of the constituent elements of the tender which it considers relevant. Those details may relate in particular to:..... (d) compliance with the provisions relating to employment protection and working conditions in force at the place where the work, service or supply is to be performed”

Article 45 *requires* authorities to exclude companies which have been convicted of corruption, fraud, money laundering, or participation in a criminal organization.

Article 45 also provides that a contractor may be rejected from the participation in a public contract if it has failed to pay social security contributions or taxes:

“Any economic operator may be excluded from participation in a contract where that economic operator:..... (g) has not fulfilled obligations relating to the payment of social security contributions in accordance with the legal provisions of the country in which he is established or with those of the country of the contracting authority; (h) has not fulfilled obligations relating to the payment of taxes in accordance with the legal provisions of the country in which he is established or with those of the country of the contracting authority.”

Table 3 Employment-related contract conditions and selection criteria in EU procurement directives

Evaluation and selection criteria and information	Directive 2007/18
Social and environmental conditions	Article 26
Range of possible selection criteria	Article 53
Technical competence: direct employment record	Article 48
Technical competence: sub-contracting plans	Article 48
Abnormally low bids and employment conditions	Article 55
Social insurance payments record	Article 45
Taxation payments record	Article 45

2.4. ECJ ruling limits effect of fair wages clause on posted workers

Two rulings by the ECJ threaten the ability of public authorities to regulate pay and conditions of workers employed by contractors.

In April 2008, the ECJ ruled in the Ruffert case that a German regional authority, the land of Lower Saxony, could not enforce a requirement for contractors to apply the pay and conditions in a local agreement, where workers were 'posted' from another country (in this case, Poland).²⁹ Like other German länder, Lower Saxony has a law that building contractors, and their sub-contractors, must pay wages and conditions as specified in a regional collective agreement. The court acknowledged that Lower Saxony could in principle impose requirements, but that the law did not restrict the freedom of employers under the Posting Directive because (a) the agreement covered only part of the construction industry – the part working for public authorities – and so did not have the status of "universally applicable" necessary to cover posted workers; and (b) that there was no evidence to justify protecting workers on public contracts in this way when workers on private contracts did not enjoy such protection.

There had previously been political controversy in Germany over legislation on procurement requiring companies to declare that they pay wages in line with those collective agreements which are applicable at local level. In 2002 the upper house, dominated by a right-wing majority, rejected a bill passed by the lower house with a social democrat majority.³⁰

The ECJ ruling was criticised by the ETUC, which described it as "in effect an open invitation for social dumping" which failed to recognise "the rights of member states and public authorities to use public procurement instruments to counter unfair competition on wages and working conditions of workers by cross-border service providers".³¹ The association of public sector employers, CEEP, also criticised the restriction on the freedom of public authorities to pursue social goals and ensure that the quality of services through ensuring the quality of employees conditions.³² MEPS from both centre-left and centre-right groups also criticised the ruling and supported changes in EU legislation if necessary to reverse the effect of the Ruffert judgment.³³

A previous ECJ ruling on the Posting Directive ruled that a strike by Swedish trade unionists, against a foreign sub-contractor for paying wages below Swedish agreements was illegal. The action took place on a site refurbishing a school, but the court ruled that Swedish law on collective agreements was too vague to restrict the right of foreign employers under the Posting Directive.³⁴

Example: Action at EU level

The provision for social and environmental conditions in the procurement directives were the result of concerted pressure at EU level by EPSU and the ETUC in coalition with associations of European public sector employers (CEEP), local government associations (ICLEI), the European environmental bureau (EEB), and others.

EPSU continues to campaign to ensure that fair wages and other social clauses remain fully protected under EU and international law. (see <http://www.epsu.org/r/71>). The European Commission intends to publish a guide on social procurement in 2009, and has commissioned a survey of practice and attitudes of public authorities across Europe: EPSU is seeking to ensure that this guide provides positive support for fair wages and other strong employment protection clauses.

2.5. Other EU law and institutions

Some EU employment legislation is relevant to PPPs.

2.5.1. Acquired Rights Directive

The Acquired Rights Directive (ARD) EC 2001/23³⁵ protects employees when the business in which an employee works transfers from one employer to another. This protects employees' terms

and conditions at the point of the transfer, but not subsequent changes to these conditions and not the conditions of workers recruited after the transfer. It is also limited in terms of the protection it offers in respect of pension rights.

The directive also requires the public authority and the company to inform employees and their representatives of any proposals for such a transfer, before the transfer takes place, together with the reasons and the implications,; and consult about any proposed measures with employee representatives “in good time with a view to reaching an agreement.” (article 7).

In general the outsourcing of work by local authorities, including outsourcing through PPPs, is covered by the directive. Although the decisions of the ECJ leave some uncertainty, it is often simpler for companies and public authorities, as well as workers, to adopt a general principle that the directive applies to such contracts.

Example: General application of ARD to public sector outsourcing

In January 2000 the UK government issued a *Statement of Practice on Staff Transfers in the public sector* which set out that TUPE (the UK implementation of the ARD) should always apply, even where there were doubts about the legal necessity, to public sector transfers. This applies to all situations where a service or function is contracted out, re-tendered, brought back into the public sector, transferred within the public sector, or restructured and organised in a new way in a different part of the public sector – including PPPs.³⁶

2.5.2. Employee Information and Consultation

The EU employee information and consultation Directive EC 2002/14³⁷ applies to the public as well as the private sector and gives employees the right to information and consultation on:

- information on the recent and probable development of the undertaking or establishment’s activities and economic situation;
- information and consultation on the situation, structure and probable development of employment within the undertaking and any planned measures which will affect employment;
- Information and consultation on decisions likely to lead to substantial changes in work organisation or in contractual relations, including collective redundancies and transfers of undertakings.³⁸

2.5.3. European Works Councils

The European Works Councils Directive 94/45³⁹ gives workers the right to representation on an EWC of an employer which operates across two or more EU countries. Workers employed by a private company as a result of a PPP are equally entitled be represented on an EWC if the company concerned operates across two or more EU countries.

2.6. Development banks: EIB and EBRD

International development banks are key funders of many PPP projects. In the EU, the key banks are the EIB and the EBRD. In order to be satisfied that their investments are worthwhile, they support public consultation and assessments of negative impacts of projects. Another aspect of this is risk assessment by the banks. Banks financing PPPs want to assess all kinds of potential risks to their investment. One such risk may be the risk of labour disputes, and so banks may want to encourage prior consultations with unions in order to avoid the risk of such disputes.

- The EIB’s Environmental and Social Practices handbook⁴⁰ emphasizes the importance of public consultations. It states as an objective: “To establish the nature and significance of any stakeholders’ interests in the proposed project, and to ensure appropriate consultation

and participation is undertaken”, and recognises that the stakeholders include unions and employees.

- The EIB’s guidance also includes a section on “social assessment” as part of the routine assessment of projects. The social assessment covers: “...negative impacts on local employment; minimum labour standards; exacerbated social inequalities; rights and livelihoods of vulnerable groups; effects on cultural heritage”, but this does not form a standard part of appraisal for projects within the EU – the EIB draft policy statement states that: “The EIB social requirements, however, are applied outside the EU only. Within the EU, the Bank works with a presumption of legality, it being assumed that the competent authorities fulfil their responsibility to ensure compliance with the relevant EU law.”⁴¹
- The EIB also recognises the importance of assessing “non-financial risks associated with investment decisions. These include the risks that arise from potential adverse environmental and social impacts. They also include reputational risks associated with investments in weak and conflict prone regions, risks associated with investments in controversial sectors, as well as risks associated with a lack of transparency and accountability.” The EIB policy statement also emphasises that “The EIB aims to identify, quantify and value environmental and social externalities where their influence on the viability of the project is expected to be significant.”, which could include an assessment of whether the viability of a project depends on the reduction of pay and conditions, for example.⁴²

Example: Bulgaria - union consulted over power station proposals

In relation to a private power station project in Bulgaria, the EBRD required the private company to consult the union in advance, to demonstrate that they would not be at risk of labour disputes.

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3. National and local agreements

3.1. Framework agreements and national PPP policies

A framework agreement can specify the rules on consultation rights and procedures to be followed when PPPs are proposed or implemented. It may include provision for information and consultation in regard to PPP policies, tendering procedures, contract awards, monitoring of PPPs. The terms of such a framework may be included in a law, a code, or a collective agreement. It should directly or indirectly regulate the activities of a national PPP body as well as public authorities.

The negotiation of these agreements may make use of political mechanisms and relationships. The Italian unions for example negotiated an agreement with the centre-left government of Prodi, taking advantage of the supportive relationships between the unions and the parties in the governing coalition. The UK framework was negotiated by the unions on the basis of implementing a promise in the Labour Party 2001 election manifesto, and extended through an agreement initially made between the Labour Party and the TUC, which was later incorporated by the Labour government into policy guidelines. The new laws in Hungary (see below) were also facilitated by the relations between the unions and the socialist party in government at the time.⁴⁴

Example: UK policy guidelines - 'not at the expense of employees'

Negotiations between the UK trade unions and the Labour government in power since 1997 have resulted in a number of agreements concerning the treatment of employees in PPPs created under the government's private finance initiative (PFI). The key principles of these agreements have been included in the official government policy guidelines for all UK public authorities on PFI schemes,⁴⁵ and in the guidance on assessment of comparative value-for-money.⁴⁶

The government guidelines now state as a central policy rule that:

“the Government uses PFI only where it can be shown to deliver value for money and where this is not at the expense of employees' terms and conditions. The Government continues to pursue a strategy for enhancing worker protections and ensuring fair and reasonable treatment in PFI projects, based on: being open with staff; protecting terms and conditions for both transferees and new joiners; protecting staff pensions; and retaining flexibility in public service delivery, including through PFI.”

The guidelines refer to codes and agreements on comparable pay and conditions, pensions, and secondment of staff, and states that: “Procuring authorities should ensure that VfM [value for money] is not achieved at the expense of employee terms and conditions and all existing guidance relating to the treatment of staff terms and conditions is fully taken into account.” This is implemented in a quantitative model which does not allow for different assumptions for staff costs between the public sector option and the PFI proposals.⁴⁷

The guidelines also requires all PFI proposals to include a statement on staffing details, including the number and timing of any staff being transferred or seconded to the PPP consortium.⁴⁸

Example: Protocol on PPPs in Scotland

A more extensive and detailed agreement was reached between the trade unions in and the devolved government in Scotland. The protocol requires consultation with unions at the earliest possible stage; the creation of project boards for all proposed PPPs, with a trade union representation on the board; PPPs do not necessarily involve the transfer of any employees; new employees must be offered the same overall pay and conditions as transferred workers – thus eliminating the two-tier workforce; tenders for PPPs will be evaluated against specific employment criteria, including pay and conditions, training, and union recognition.⁴⁹

Example: Italy: framework agreement

The Italian unions negotiated a national framework agreement with the centre-left government in 2007. The agreement was wide-ranging, covering the principles and values of public service and public service reform, employment policies, and consultations with unions and the public.

The agreement included a commitment to limit outsourcing and the use of consultants, and return to in-house services:

“Improvements in efficiency and effectiveness must be pursued without resorting to outsourcing except for non-core functions, with limited use of consultants, and reducing the number of executive positions..... there will be a review of all forms of outsourcing and consultancy in order to deliver a progressive return to in-house services”⁵⁰

Example: Ireland: framework agreement

The Irish trade unions negotiated a framework agreement with the government on the implementation of PPPs in Ireland in 2001. The agreement specifies that “Stakeholders include employees and their trade unions” as well as the public and users of the service. It provides specifically for information and consultation of employees through established procedures: “Existing structures and agreements should be used to ensure extensive consultation and open communication in respect of PPP projects. Public service employees should be informed at the earliest possible stage of proposals for the introduction of PPPs and of significant developments throughout the process.” It states that all parties: “should have regard to appropriate industry norms” in pay and conditions”, and states that transfers should be based on terms “no less favourable than” TUPE [the Irish implementation of the Acquired Rights Directive].⁵¹

The agreement is referenced and reinforced in specific policy guidelines on consultation of employees and their representatives. This requires public authorities to “to ensure that employees and their trade unions and/or other representatives are informed of proposals and/or decisions regarding PPP projects with implications for employees in advance of any public statements on the issue”.⁵²

Example: Denmark: framework agreement

This national agreement covers the whole of the public sector. It provides for consultation locally on specific PPP schemes. It does not cover pay and conditions.

3.2. Codes and agreements on pay and conditions

EU laws, and national pay agreements and laws, need additional rules to prevent erosion of conditions under PPPs. The Acquired Rights Directive does not protect against loss of public sector employment status; does not protect against later changes in conditions; does not protect workers recruited after the PPP starts; and does not adequately cover pension rights. National laws may not require the employer to observe sectoral agreements; and procurement laws may not require a ‘fair wages’ clause, unless the government has ratified the ILO convention 94.

It is nevertheless possible to negotiate greater protection for workers employed on PPPs, through agreements at national or local level which provide greater security both for workers transferred and for new recruits to a PPP. The UK unions, with long experience of PPPs, have negotiated a series of agreements in relation to the UK's programme of PPPs under the private finance initiative (PFI).

A number of different agreements have been negotiated over the years, which provide protection for staff. Agreements were reached at different levels: with the UK national government; with the devolved governments of Scotland and Wales; and with specific local authorities. Some agreements originally applied in specific sectors – a code for local government workers, specific provision for health service workers against compulsory transfer – or for specific categories of PPPs, such as those developed under the private finance initiative (PFI). Over the years, the unions have succeeded in broadening and generalising the scope of these agreements and strengthening their provisions.

They can be considered under four headings:

- agreements protecting workers against transfer and preserving public sector employment status
- codes of practice on the pay and conditions of workers recruited after the PPP starts
- local agreements giving additional protection for transferred and new workers
- agreements protecting the pension rights of workers

3.2.1. Retention of public sector employment status

Workers can be protected from some of the effects of PPPs by preserving their status as employees of a public service. One way of doing this is to exclude them from coverage of the PPP, so that their work is not covered by the PPP contract, and they thus continue to be public service employees. Another way, for workers whose jobs are included in the PPP, is for them to be transferred to the private contractor on the basis of secondment rather than transfer. This means that the workers concerned remain employees of the public authority, under public sector employment contracts, even though the private company involved in the PPP manages their work. This kind of protection may be negotiated at national level so it becomes part of general policy on PPPs, or with specific local authorities, or in relation to specific PPPs.

Example: UK agreement on retention of employment

The unions negotiated an agreement with the government in relation to healthcare PPPs for the 'Retention of Employment' (RoE) for many staff affected by a PPP. Typically, a health service PPP involves the construction of a new hospital, and the PPP company takes over responsibility not only for maintaining the building but also for services such as cleaning, catering and laundry. Under the RoE model, the staff employed on these 'soft' services have the option to remain employees of the national health service. The PPP company becomes their manager, but they are seconded to work for the company, while retaining their status as public sector employees. The effect is to ensure that the majority of staff affected by the PPP remain employed by the NHS.

Secondment has also been agreed by local authorities in the context of large-scale PPPs in local government IT and corporate services, known as 'strategic partnerships' in the UK. Employees have been seconded, rather than transferred, under strategic partnerships with city councils in Birmingham, Glasgow, Liverpool, Rochdale, Rotherham, Salford, Somerset and Suffolk. Over 4,000 employees have been protected by these agreements.⁵³

General UK government guidelines on PPPs help retain public employee status in other sectors as well. These guidelines state that PFI contracts do not always involve the transfer of staff employed on soft services, and that public authorities have the discretion to retain them as direct employees

without any form of transfer, even secondment: “The Government’s policy is that departments have the option of not transferring soft services staff in a PFI project, where they believe their transfer is not essential for achieving the overall benefits of improved standards of service delivery”. The guidelines set out the perceived advantages and disadvantages of excluding staff from the PFI in this way, noting that the benefits include “direct control of this important set of services” and “more flexibility in setting service levels”.⁵⁴

Example: Germany - agreement in Berlin Wasser

Similar protections have been negotiated elsewhere. In Germany, the city of Berlin created a complex PPP to take over its water company Berlinwasser, which is now jointly owned by the city and private companies. Ver.di negotiated an agreement which protected the status of the workers as local government employees, and also negotiated restrictions on job cuts following the PPP. The workers are also represented on the supervisory board of the PPP.

3.2.2. ‘Fair wages’ codes protecting new recruits

The lack of protection for new recruits under the ARD/TUPE has created ‘2-tier’ workforces, with new staff doing the same work as transferred staff, but on different pay and conditions. This happens not only in PPPs, but in other forms of outsourced contracts where there is no general protection provided by ‘fair wages’ laws in line with the ILO convention. Unions can negotiate agreements protecting new recruits.

Example: UK codes on 2-tier workforce

In the UK, the unions first succeeded in negotiating a national code for workers in local government to protect new recruits and limit the creation of 2-tier workforces. This code provided that all new recruits by the private companies had to be given the same terms and conditions as those transferred:

“where the service provider recruits new staff to work on a local authority contract alongside staff transferred from the public authority, it will offer employment on fair and reasonable terms and conditions which are, overall, no less favourable than those of transferred employees”.

The code was given legal strength by incorporating a reference into the Local Government Act, requiring local authorities to apply the code unless it can be demonstrated it is ‘Best Value’ to do otherwise. The Code is enforceable through including the provisions of the Code as standard in procurement contracts, so that authorities can take account of a contractor’s employment practices in deciding on how to award contracts.

The principles of this code were extended to the wider public sector in 2005, as the best value Code of Practice. It now covers all contracts in the public sector where new joiners will be working with staff transferred from the public to the private sector, except for public enterprises, and universities and colleges.⁵⁵

3.2.3. Guarantees on future pay and union rights

Transferred staff are not protected by ARD/TUPE from adverse changes in pay and conditions after the transfer takes place. In the UK, a survey by the national Audit Office found that the great majority of workers transferred had lower real hourly pay rates 3 years after the transfer.⁵⁶

Example: UK improved guarantees for transferred workers and new recruits

A number of local authorities in the UK have reached agreements with the unions which provide greater protection for transferred and existing workers, and for trade union rights. These agreements are implemented by the inclusion of standard clauses in procurement contracts (these agreements

are known as ‘TUPE-plus’, because the UK implementation of the Acquired Rights Directive is abbreviated as TUPE).

These local agreements and procurement clauses improve on the nationally applied code in a number of ways,

- guarantee that there is no deterioration in pay and conditions during the life of a contract,
- require comparable conditions for staff recruited after the start of the contract, and
- may include trade union bargaining rights for all staff, including new starters.

Such agreements have been negotiated by union branches at a number of local authorities including Newcastle, Dudley and Haringey.

Despite the general protection for comparable conditions, PPP employers may nevertheless resist following improvements in national agreements if the public authorities are not increasing the contractual payments to cover the costs of those improvements. The UK unions have therefore also negotiated agreements with a number of the largest companies involved in PPPs and other contracting in healthcare, including ISS, Sodexo, Compass, and Carillion, which cover the detailed implementation of changes to pay, hours and holidays in line with a sectoral agreement for health workers, and local procedures for dealing with disputes. The agreements address the need for public authorities to ensure that PPP contracts make provision to fund the improvements in pay and conditions.

3.2.4. Public sector pensions

Example: comparable and public sector pensions

Under the UK implementation of the ARD, transferred workers only have the right to a pension scheme of the same type as the one they have left, but the employer only has to make a contribution of 6%.

The UK unions negotiated an agreement with the government to issue guidance on the treatment of pensions for local government staff transferring to the private sector. The code was subsequently extended to the rest of the public sector.

It requires that (a) when any public sector staff are transferred to a private employer, under a PPP or any other form of outsourcing, the new employer must provide a pension scheme ‘broadly comparable’ to the pension rights they enjoyed as a public sector employee - an actuary must certify that the pension arrangements are ‘broadly comparable’, and the contract must enable employees to enforce this right (b) employees must be able to transfer the service they accrued in the public sector to the new scheme on a ‘like for like’ basis.⁵⁷

For local government, police and fire staff, the unions have negotiated a further protection. The government now allows a private company operating a PPP to be admitted to the Local Government Pension Scheme. This means that even staff who are transferred can continue unbroken membership of the scheme, and new recruits to a PPP employer can also get the benefits of the local government pension scheme.⁵⁸

3.3. Union guidance to branches

Unions have issued advice for local branches on various aspects of PPPs.

- Ver.di, the largest German union, has produced policy statements, advice to branches, and has set up a database to monitor PPPs and their impact. Union journals and newsletters regularly cover the problems of PPPs and how branches can deal with them.

- The Finnish union JHL has published a booklet for branches and activists called “The rules of Competitive Tendering”. This explains EU legislation on public procurement and competitive tendering, and explains how to compare the price of in-house service with the tenders of private service producers, and how to connect quality and social issues to decisions on PPPs.

The initiatives and advice of the UK unions are covered in an earlier section of this report. The campaigns of the Italian unions are discussed in the report on alternatives.

Table 4 Summary

Country/union	Reports, policy statements, critiques	Database	Advice to branches	Framework agreements
Denmark -DKK/OAO	x	x	x	x
Finland -JHL	x		x	
France - CGT	x		x	
Germany-VER.DI	x	x	x	
Italy – CGIL	x	x	x	x
UK- Unison, Unite	x	x	x	x

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4. National and local procurement rules

4.1. Social clauses in procurement laws

The combined result of history, the ILO convention, and the EU directives has produced a varied pattern of legislation on social clauses in procurement contracts. In some countries such as France the new procurement law implementing the EU directives omitted a 'fair wages' clause which had been part of the previous legislation. In others, such as Hungary, new laws strengthen the employment practices required of companies bidding for public contracts.

Example: Hungarian law on procurement and subsidies

In 2005 Hungary introduced a new law (Act CLXXVII) on 'orderly labour relations'. This law makes participation in public procurement tenders, and eligibility for government subsidies, conditional on employers observing good labour practices. The criteria for this include adhering to employment law, recognising the rights of trade unions, works councils, and employee representatives, and observing the laws on European Works Councils. In allocating subsidies and contracts public authorities can take account of the record of the employers in respect of these policies and also observance of the regulation on working time, pay and collective redundancies, and equal treatment of workers. Bidders for procurement contracts have to submit certificates from the Hungarian Labour Inspectorate and the Hungarian Equal treatment Authority confirming that they have not been fined for offences under relevant laws.

This legislation was used in November 2007 to sanction a manufacturing company. Following a series of trade union complaints about intimidation, breach of agreements and breach of labour laws, fines were imposed by the labour inspectorate, and in November 2007 the government suspended the payment of a €0.6 million training subsidy to a Korean-owned tyre factory, Hankook.⁵⁹

Example: Norwegian law on public procurement

Norway has introduced new rules on public procurement from April 2008 following its adoption of ILO Convention 94. These rules require service and construction contracts issued by all public authorities, not only central government, to place an obligation on the subcontractor to provide its employees with wages and conditions no less favourable than those laid down in national collective agreements or the local norm, including working time regulations. The Norwegian union confederation LO is asking for the Norwegian Labour Inspection Authority to be given powers to decide whether employees are paid in accordance with the labour clause.⁶⁰

Example: Latvian recommendation on illegal workers

The 2006 Public Procurement law of Latvia introduced in 2006 encourages contracting authorities to take into account a wide range of criteria, other than price, in awarding contracts. One of these criteria is the average amount of social security insurance payments made by companies, designed to penalise companies which have not employed workers 'on the books' and so avoided social insurance payments.⁶¹

The Latvian government has been concerned for some years about the extent of illegal working, which is prevalent especially in the construction sector. A working party in 2006 recommended various actions, including disqualifying companies that have employed workers without employment contracts and have paid wages 'under the table' from participating in state and municipal procurement tenders for two to three years. "There is a public consensus in Latvia that illegal work and wages must be eliminated, and there is strong support for the implementation of measures planned by the government."⁶²

The Latvian legislation is of wider interest because of the Laval case in November 2007, in which a Latvian contractor posted workers to work in Sweden but did not pay them in accordance with Swedish agreements. The Swedish unions took strike action against this practice, but the ECJ ruled that the strike was illegal under EU law.⁶³

Example: Slovakian law on illegal workers

In 2005 Slovakia passed a new law on ‘undeclared’ work, with tighter regulation on employers to declare employees and pay social insurance contributions. The law on procurement was also amended so that companies are excluded from bidding for public contracts if they have been convicted of illegal employment in the previous 5 years, or if there are outstanding claims on them for social insurance payments.⁶⁴

Example: Spain gives priority to gender equality companies

In cases where two companies tender for a contract under public procurement rules, the Spanish law on public procurement favours the proposal which gives evidence of greater gender equality.⁶⁵

4.2. Public authority procurement policies

Within national and EU legislation, public authorities can create stronger social and employment clauses and policies. Because EU law allows social and environmental clauses conditions “relating to the performance of a contract”, these clauses should be requirements within the contract itself, so that all companies bidding have to comply with strongest version of these clauses

Example: Sevilla, Spain, standard social clauses in all contracts

In May 2007 the city of Seville, Spain, adopted general social rules applicable to public contracts for construction works and services worth more than €150,000 euros and lasting longer than 9 months. A first draft of the law was rejected following a legal opinion from the regional authority that it might be considered contrary to the EU procurement directives because it introduced, among the selection criteria, social criteria which were not related to the subject of the contract.⁶⁶ The municipality therefore modified the law to put the emphasis on the introduction of social considerations as conditions for the *execution* of the contract, not as conditions for the *selection* of the tender.

The Seville law includes the following provisions:

General obligations:

- (i) compliance with labour standards set out in applicable collective agreements, either at the sector or enterprise level, the Labour Code (Workers’ Statute) and the General Social Security Act;
- (ii) for enterprises employing more than 50 persons, at least 2 per cent should be workers with disabilities;
- (iii) subcontracting may not exceed 50 per cent of the total contract value and the public authorities need to be notified in advance;
- (iv) the prevention of labour accidents needs to be integrated at all levels. –

Specific obligations:

- (i) at least 10 per cent of workers should be persons experiencing difficulties in access to employment (e.g. women, young persons, persons over 45 years of age, the long-term unemployed, migrants, persons suffering from incapacity exceeding 33 per cent);
- (ii) every enterprise with fewer than 40 per cent of women workers on its payroll has to engage during the execution of the contract at least one woman employee or transform a temporary contract of at least one woman employee into a permanent contract;

- (iii) in the case of contracts for services, at least 30 per cent of the personnel involved in the provision of the service must be employed under permanent contracts;
- (iv) the need to undertake awareness-raising activities and training during working hours on the rights established in labour laws or collective agreements relating to the balance between work and the family responsibilities of workers.”⁶⁷

Example: Aarhus social clauses⁶⁸

The city of Aarhus in Denmark uses standard social clauses in all its contracts. They are all applied as contractual requirements, not as selection criteria. One type of social clause requires the employment of a proportion of staff (typically 10%) needed to carry out the contract from specific categories of people - long term unemployed, long term sick, disabled, etc. The other type requires contractors to adopt and implement policies –on ethnic equal opportunities, human resources, and health and safety.

The local authority has a financial incentive to include the first type of clause because benefits for unemployment, disability etc are paid for by the local authority. Any reduction in the number of individuals that require such benefits has a direct benefit to the city council.

Example: Greater London Authority responsible procurement policy

The Greater London Authority (GLA) spends over £3 billion (€4 billion Euros) each year on procuring supplies, works and services. It has adopted a comprehensive social procurement policy which includes standard contract conditions on employment issues. The policy is applied not only through contract conditions but a series of meetings with suppliers and community organisations to ensure the policies are understood and supported.

The Responsible Procurement Policy consists of seven themes:

- encouraging a diverse base of suppliers
- promoting fair employment practices
- promoting workforce welfare
- addressing strategic labour needs and enabling training
- community benefits
- ethical sourcing practices; and
- promoting greater environmental sustainability.

The GLA sets a ‘London Living Wage’ (LLW), significantly above the national minimum wage. In re-tendering its cleaning and catering contracts in 2006, bidders were required to indicate whether they would accept a LLW clause as part of the contract, including ensuring that other employment conditions were not reduced as a result of paying a living wage. It estimates that over 400 workers gained from implementation of the LLW in 2007.

The GLA applies ‘supplier diversity requirements’ on major contracts, such as the East London rail redevelopment, to ensure that smaller suppliers led by minority ethnic groups, by women and disabled people have received a significant proportion of subcontracts. It also monitors the supply chains of companies, for example suppliers of uniforms, and is piloting the use of a Suppliers Ethical Data Exchange (Sedex) a system for companies to report labour conditions in all their suppliers factories.⁶⁹

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