

Public-Private Partnerships (PPPs)

Summary paper

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TABLE OF CONTENTS

0. INTRODUCTION	3
1. OVERVIEW	3
1.1. CONCEPT AND DEFINITIONS	3
1.2. GROWTH OF PPPs	3
2. EU LAW AND POLICIES IN RELATION TO PPPS.....	4
2.1. LIMITS ON GOVERNMENT DEFICIT.....	5
2.2. EU PROCUREMENT LAW AND PPPS.....	5
3. CLAIMS AND MYTHS ABOUT PPPS	6
4. EVALUATING PPP PROPOSALS	7
4.1. COST OF CAPITAL.....	7
4.2. CONSTRUCTION COSTS	8
4.3. EFFICIENCY	8
4.4. TRANSACTION COSTS	8
4.5. UNCERTAINTY	8
4.6. THE SUMMARY CASE OF METRONET: LEARNING FROM A FAILURE.	9
5. ALTERNATIVES TO PPPS	10
5.1. EU FRAMEWORK	10
5.2. PROCUREMENT DIRECTIVES.....	11
5.3. UNION INVOLVEMENT IN PUBLIC SERVICES REFORM.....	11
5.3.1. <i>EU level union initiatives on public service principles</i>	11
5.3.2. <i>Dialogue at national and local level</i>	11
5.3.3. <i>Worker participation</i>	11
5.4. PUBLIC PARTICIPATION	12
5.5. REFERENDA.....	12
5.6. SERVICE QUALITY AND PROCUREMENT	13
5.7. PUBLIC OWNERSHIP AND PUBLIC FINANCE.....	13
5.8. EUROPEAN SOCIAL MODEL AND SOLIDARITY	13
5.9. UNION CAMPAIGN IN ITALY	14
6. PUBLIC SERVICE WORKERS AND PPPS	14
6.1. PUBLIC SERVICES AND EMPLOYMENT ISSUES	14
6.2. LEGAL FRAMEWORK	15
6.2.1. <i>'Fair wages' clauses</i>	15
6.2.2. <i>EU procurement laws</i>	16
6.2.3. <i>Other EU law and institutions</i>	17
6.3. NEGOTIATED AGREEMENTS.....	17
6.3.1. <i>Framework agreements and national PPP policies</i>	17
6.3.2. <i>Codes and agreements on pay and conditions</i>	18
6.4. NATIONAL AND LOCAL PROCUREMENT RULES.....	18
7. BIBLIOGRAPHY	20
8. NOTES	23

0. Introduction

This paper is a summary of three reports commissioned by the European Federation of Public Service Unions (EPSU) dealing with the subject of public-private partnerships (PPPs) in Europe. It covers the development of PPPs and sets out a framework for:

- ✓ a critical evaluation of PPP proposals;
- ✓ positive initiatives for the improvement of public services and strengthening of the role of the public sector, as alternatives to PPPs; and
- ✓ ways in which trade unions in Europe have negotiated protection for their workforces under PPPs.

Each section deals with relevant EU law and policies.

1. Overview

1.1. Concept and definitions

In the 1990s a specific form of privatisation was developed to deal with limitations on public borrowing. This involved using a private company to borrow money, build a new hospital, school, road, etc, and then operate it over many years, recouping the investment and profit from payments over the whole period of operation. In the European Union (EU) in particular, these have become known specifically as PPPs. There are two main forms of PPPs: Firstly, concession contracts, where the company gets paid by user charges – for example in water services, or toll roads. Secondly, contracts typical of the private finance initiative (PFI) in the UK, where the company gets payments from a public authority. There is also a third meaning of PPP, which the European Commission has called an ‘institutional PPP’. This is a joint venture company, providing a public service, which is partly owned by a public authority and partly owned by a private company or private investors.

1.2. Growth of PPPs

In the UK the total value of PPPs/PFI deals was nearly £60billion (€75 billion) by the end of 2007. The value of all PPPs in the rest of Europe had risen to a total of €31.6 billion by the end of 2006¹. In European countries as a whole, transport infrastructure accounts for 82% by value of all completed, current and projected PPPs; in the United Kingdom (UK) over half of all the PFI/PPP projects are in health, education and local government.

Table 1. PPPs in Europe

Table 5 PPP in Europe

Value of signed contracts, €m 2001-06						Number signed deals 2001-07	Projects being procured Jan 2007 €m
	2001-04	2005	2006	2007	Total		
Spain	1000	1154	1664	309	4127	38	2931
Italy	890	2179	439	55	3563	20	29799
Ireland	720	121	623	1489	2953	18	---
France	0	1788	735	329	2852	26	3964
Greece	0	798	1600	3885	2398	7	6270
Germany	440	830	177	465	1912	34	9495
Belgium	1300	480	---	300	1780	5	3635
Netherlands	1302	---	431	---	1733	6	1211
Poland	1520	---	---	---	1520	2	1317
Austria	49	0	850	---	899	6	20
Finland	0	700	---	---	700	1	---
Bulgaria	0	366	288	366	654	6	2202
Cyprus	0	500	---	---	500	1	---
Portugal	278	---	32	140	450	6	1515
Other countries	488	2	528	15	1018	17	5221
Total (exc.UK)	7987	8918	7367	7353	31625	193	67580
UK	21849	6237	14111	10698	42196	501	

Source: Public Private Finance, DLA Piper

Source: IFSL (2008)

Table 2. PPPs/PFI in UK**Table 4 UK PFI/PPP sector breakdown**

Signed projects, £m Sector						Cumulative 1987-2006	% share 1987-2006
	2003	2004	2005	2006	2007		
Transport	442	457	403	292	497	16605	28.4
Health	707	2681	992	3020	1911	13848	23.2
Education	373	575	1146	2434	2415	9268	15.5
Accommodation	332	718	443	1455	616	6416	10.7
Defence	775	121	600	1800	1000	6021	10.1
Telecoms & IT	60	25	540	---	490	2672	4.5
Waste mg. & water	343	300	---	575	314	2537	4.2
Local government	361	295	98	---	---	910	1.5
Other projects	68	74	38	31	75	1118	1.9
Total	3461	5245	4261	9607	7318	59745	100.0

Source: Public Private Finance

Source: IFSL (2008)

A number of companies have developed as multinational specialists in building and operating public infrastructure and services. These include companies with sectoral specialisms, e.g. in water and waste Suez, Veolia, and FCC; construction companies e.g. Hochtief and Bouygues; and a large number of banks and other financial institutions. The financial institutions which are buying infrastructure PPPs include a group of specialist private equity firms operating so-called infrastructure funds. The largest of these is the Australian bank Macquarie.²

2. EU law and policies in relation to PPPs

The rules, laws and policies of the EU have a significant effect on the use of PPPs. They can be divided into three main headings:

- ✓ EU rules on government borrowing, which creates incentives for PPPs
- ✓ European Commission policies of promoting and encouraging PPPs
- ✓ procurement laws, which affect how PPPs have to be created

2.1. Limits on government deficit

The limits on government borrowing defined by EU, national and International Monetary Fund (IMF) policies is the strongest explanation for the growth in PPPs. The EU fiscal rules were introduced in 1996 as part of the Maastricht treaty, and state that “Member states shall avoid excessive government deficits”, defined as 3% for the ratio of the planned or actual government deficit to GDP and 60% for the ratio of government debt to Gross Domestic Product (GDP). The EU definitions of general government exclude public enterprises which operate commercially through charging for services. The EU rules create an incentive for PPPs in government operations which are not carried out through trading operations, such as many health and education services, because they shift borrowing for capital investment from the government to the private partner.

The European Commission (EC) and other EU bodies have been actively facilitated and encouraged PPPs.

In 2004 the EC issued a green paper on PPPs³ which aimed: “to facilitate the development of PPPs under conditions of effective competition and legal clarity”.⁴ Public banks guaranteed by the EU and member states, the European Investment Bank (EIB) and European Bank for Reconstruction and Development (EBRD), finance PPPs.⁵ In 2003 and 2004 guides were issued stating that “*The European Commission has an interest in promoting and developing PPPs within the framework of the grants it provides*”⁶. The EC has created a European PPP Expertise Centre (EPEC), and, with the EIB and the EBRD created the Joint Assistance to Support Projects in the European Regions (JASPERS): “*The key priority of JASPERS is the preparation of PPPs to help ensure that they are compliant and compatible with necessary regulations.*”⁷

A ruling by Eurostat, the Statistical Office of the EC, in February 2004, stated that the assets involved in a PPP should be classified as non-government assets, and therefore recorded off balance sheet for government, as long as (a) the private partner bears the construction risk, and (b) the private partner bears either availability or demand risk.⁸ This is an easy requirement – the IMF warned that the ruling: “*gives considerable cause for concern, because it could provide an incentive for EU governments to resort to PPPs mainly to circumvent the fiscal constraints.*”⁹ There is further uncertainty because international financial reporting standards (IFRS) now recommend that asset ownership in service concessions should be decided on the basis of effective control, not risk transfer.¹⁰ This is expected to force governments to treat PPPs as public debts after all.¹¹

2.2. EU procurement law and PPPs

EU procurement laws do not fit simply with PPPs. Some PPPs are concessions, which are technically exempt from the procurement directives, although they are still subject to the competition and transparency rules of the treaty.¹² The EC proposes to issue a new communication. Other PPPs, where the contractor is paid by the public authority, are contracts subject to competitive tendering under the procurement directives. This has created problems, as many PPPs were signed without any competition, and a number have been ruled illegal as a result. For companies which are jointly owned by public authorities and private shareholders, known as ‘institutional PPPs’, the EC published an interpretative communication in February 2008.¹³ Its overriding concern is to remove uncertainty that might deter the creation of IPPPs.

However, a series of judgments by the European Court of Justice (ECJ) concerning the in-house exemption from competitive tendering has created great uncertainty, especially for corporatised ‘arms-length’ entities.

- ✓ The Arnhem judgment ruled that if there is competition from private companies to provide a service, then a municipally owned entity providing that service must be regarded as a commercial entity, not as a public law body pursuing public service objectives, and so could not be awarded contracts without open competitive tendering.¹⁴
- ✓ The Teckal judgment ruled that an organisation can only be assigned work without competitive tendering if the public authority exercises over it: “*a control which is similar to that which it exercises over its own departments*” – and if the ‘essential’ part of its work is for the public authority.¹⁵

- ✓ The Parking Brixen case ruled that an organisation could not be treated as an in-house entity, even if it was 100% owned by the municipality, if there was a possibility that the municipality might sell some shares to a private investor and thus lose control¹⁶ (the Stadt Halle case had already ruled that even a minority private shareholding makes it impossible for an entity to be treated as an in-house operation¹⁷).

The effect of these rulings is that public sector organisations are treated increasingly like private contractors or PPPs. This is especially damaging in countries such as Germany where many local services are carried out by a large number of public sector organisations with various legal forms.¹⁸

The interpretation of procurement law by the ECJ has also damaged another widespread form of public sector cooperation, inter-municipal organisations, which enable municipalities to cooperate and take advantage of economies of scale. The EC has taken cases against Spain, France, Germany and Italy, prompted by complaints from private contractors, arguing that the provision of services by municipalities to such organisations, or vice versa, are contracts which should be subject to competitive tendering.^{19 20 21 22}

3. Claims and myths about PPPs

Four claims made by supporters of PPPs are: firstly, that there is no alternative to PPPs; secondly, that PPPs allow public money to be spent on other things; thirdly, that governments are relieved of risks, which are transferred to the private companies; and fourthly, that the private sector is intrinsically superior at delivering goods and services.

Governments claim that, because of the constraints on government borrowing, and a reluctance to increase taxes or charges, projects such as new schools and hospitals could not go ahead at all without PPPs. But the 'budgetary constraints' on government borrowing are political decisions, not set in stone. Many countries have even undertaken borrowing which breaches the Maastricht rules, and the EC had to revise its rules to allow for longer adjustment. The financial crisis of 2008 has shown how governments everywhere are increasing their spending and borrowing in order to support the financial sector and the economy in general. The scale of this is far greater than investments raised for public services through PPPs. **The nationalisation of one failed bank in the UK (Northern Rock) in 2008 increased the UK national debt by £87billion – a figure greater than the combined total value of all the PPPs and PFIs ever signed over the last 13 years in the UK (£60billion) and the whole of Europe (€32billion, equivalent to £26billion).**²³ The same is true of taxation. Governments constantly adjust taxes, and often increase them, even in periods of economic difficulty. For example, in September 2008 France increased taxes on capital by over 1%, generating €1.5billion per year to fund a social initiative

The second key assertion is that PPPs are better because somehow they do not cost the public, or the public sector, anything. This myth takes various forms: the idea that the public – or the public authorities – do not have to pay for schools or hospitals developed by PPPs; the idea that the government or municipality will have more money left to spend on other services; and the idea that PPPs mean a reduction in borrowing. But in PPPs like hospitals or schools, the government pays for the cost of the PPP from taxation – by paying for the cost of construction, and then the cost of running the service. So PPPs are paid for by the public sector in just the same way as projects carried out directly by public authorities.

The notion of 'risk transfer' plays an important role in justifying PPPs. In the UK, major hospital PFI projects looked worse value than the public sector option until an estimate of 'risk transfer' was introduced, although no attempt is made to monitor if this risk transfer happens in reality.²⁴ But transferring risk is not free. It is possible to write contracts which transfer the risk of construction delays to the contractor, for example – but these contracts cost about 25% more than conventional contracts (see below). An economic analysis of risks and PPPs concluded that it is most efficient for demand risk to remain with governments, rather than the private sector, even if a PPP is used – and so it would be a waste of money to pay for this risk to be transferred to the private sector.²⁵

The final claim is that the private sector is more efficient in all areas than government and public sector employees. It is assumed that private companies can finance investment more cheaply and easily, and operate a service more efficiently, than the public sector. These assumptions are false. In almost every country in the world, governments can borrow money more cheaply, at lower rates of interest, than the private sector. And empirical evidence shows that the private sector is not overall more efficient than the public sector.

4. Evaluating PPP proposals

As the IMF insists: “When considering the PPP option, the government has to compare the cost of public investment and government provision of services with the cost of services provided by a PPP”²⁶

In practice, PPPs rarely carry out such a comparison - some PPP assessments only consider whether the PPP is economically feasible for a private consortium. A report on PPPs in the health sector in Italy found that “Italian health-care trusts.... neither drew up any calculation for weighting their future costs and revenues related to the project, nor did they consider the social consequences for the community. They merely followed the legal requirements and prepared a financial plan from the private partner perspective.”²⁷ A state audit office report in Estonia said that PPPs have been assessed “by primitive investment accounting, measuring the benefits in terms of cost savings and profits”: as a result “non-transparent, costly and unfavourable contracts” have been signed.²⁸

This section sets out a framework for evaluating whether any PPPs is preferable to a ‘conventional’ public sector approach. The first heading of evaluation is to compare the costs of capital finance for the PPP proposal and for the public sector alternative; the second is to compare the cost of construction; the third is the comparative efficiency of operation; the fourth looks at the comparative costs associated with setting up and monitoring a PPP contract; the fifth compares the uncertainties involved in such contracts.

Table 3. Framework for evaluating PPP proposals against public sector alternative

			Evidence	Note
1	Cost of capital	Interest + dividends	PPP more expensive	Private sector has to pay higher interest rates than government
2	Cost of construction		PPP more expensive	Higher cost of ‘turnkey’ projects, offset by saving on cost of overruns
3	Cost of operation	Efficiency	Neutral	Empirical evidence suggests no significant difference
4	Transaction costs	Preparation and tendering	PPP more expensive	Costs of preparing contracts and tenders
		Monitoring	PPP more expensive	Costs of monitoring and supervising contractors
5	Uncertainty	Renegotiation and contingent liabilities	PPP more risky	Future renegotiations and changes

4.1. Cost of capital

Governments can nearly always borrow money more cheaply than private companies or private individuals. This is because there is very little risk of defaults. This means that any PPP always starts with a handicap of higher costs of capital – which can only be offset by lower operating costs, i.e. greater efficiency, as emphasised by international institutions and commentators:

“...the cost of capital of the private partner is usually higher than that of government, i.e. the interest rate on private sector loans usually exceed the interest rate on public sector loans. Thus...if the efficiency gain [of a PPP] falls short of the additional interest cost, the minimum unit price at which the private partner can deliver the service will not be lower than the price government will pay in the case of traditional procurement.” (OECD 2008)²⁹ ; *“...when PPPs result in private borrowing being substituted for government borrowing, financing costs will in most cases rise even if project risk is lower in the private sector.”* (IMF 2004)³⁰ ; *“...it seems obvious*

that the finance of assets is a suitable function for the public sector, which has one huge advantage - the ability to borrow cheaply." (Martin Wolf)³¹.

4.2. Construction costs

It is frequently argued that the construction stage of PPP projects is invariably completed on time and within budget, and that this is a crucial advantage of PPPs over conventional public sector projects. But the certainty of completion is achieved through "turnkey contracts", under which the contractor accepts responsibility for a wider range of risks, and contractors have to be paid more for doing this. A European Investment Bank (EIB) report compared the cost of PPP road projects across Europe with conventionally procured road projects, and found that the PPPs were on average 24% more expensive than the public sector option.³² The extra expense benefits the PPP financier, who requires greater certainty about completion date, because the returns on investment only begin when the building is completed.

4.3. Efficiency

Empirical evidence from a number of studies shows public operators are as likely to be more efficient as private operators. **So in evaluating PPPs there cannot be any general assumption of superior private sector efficiency – the assumption should be of neutrality.** A global review of empirical evidence on efficiency of public and private utilities in 2005 by the World Bank concluded: "For utilities, it seems that in general ownership often does not matter as much as sometimes argued..."³³ A study of cities with different types of bus operators found that the most efficient cities were equally likely to be public or private.³⁴ A study of the use of PPPs in defence in the UK concluded that PPPs do not necessarily lead to efficiency gains and that there are significant costs and disadvantages.³⁵

4.4. Transaction costs

The transactions costs involved in setting up PPPs, negotiating and renegotiating the details, and the monitoring and liaison between the public authority and private company, including legal processes, are higher than ordinary construction contracts. A study by EIB researchers of transaction costs in 55 PFI projects and 32 EIB projects found that the procurement costs averaged over 10% of the total value of each PPP contract.³⁶ In the USA, monitoring costs are estimated to be 10 percent of the contract value in PPPs.³⁷ If the EIB and the USA data are combined, then the total transaction costs for PPP projects could average over 20% of the total project value.

4.5. Uncertainty

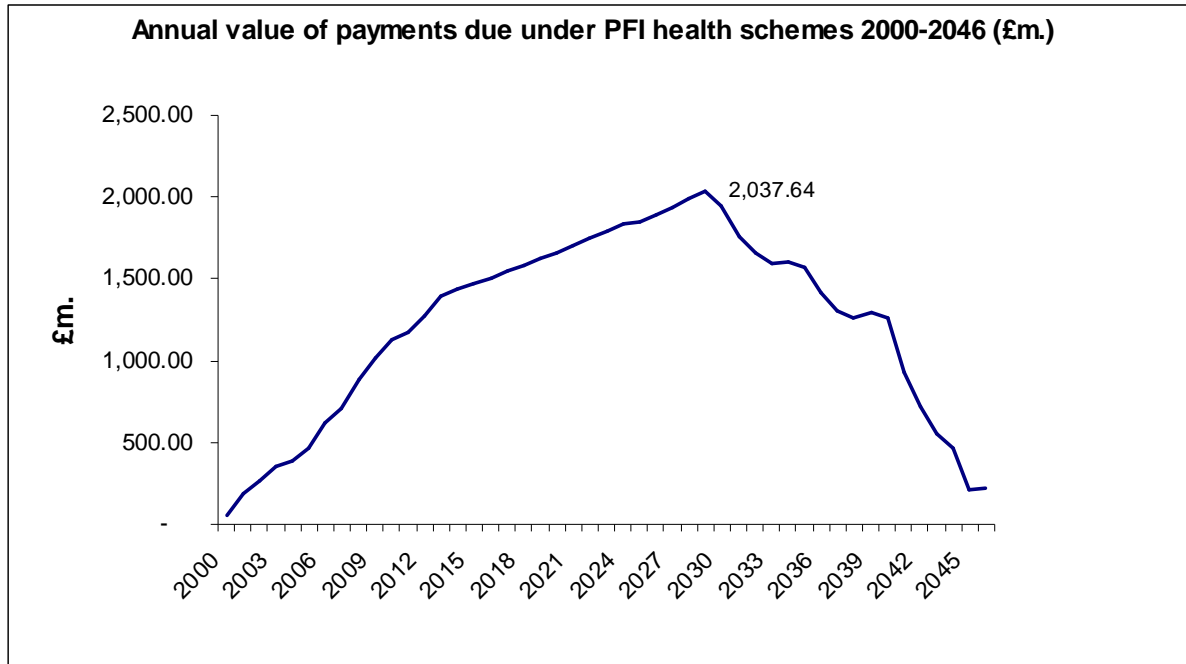
PPP contracts, like other contracts, are imperfect (or 'incomplete'). They cannot cover all the unknown circumstances and possible problems with delivery of service – especially over 25 to 30 years, a common lifetime for a PPP contract. Companies systematically underestimate the costs of the investments, and exaggerate the expected demand for the service. A global study concluded that: "*The problem of misinformation is an issue of power and profit and must be dealt with as such, using the mechanisms of transparency and accountability.*"³⁸ Renegotiations are nearly always to the benefit of the private contractor, at the expense of the public. In one year in the UK, 2006, changes were made to PFI contracts costing a total of about £180million.³⁹ One form of abuse of a PPP is when monopoly concessions are used to overcharge customers. A comprehensive study of water PPPs in France found that in 2004, after making allowance for all other factors, the price of water under PPPs is 16.6% higher than in places where municipalities provide the service...⁴⁰ A number of PPPs have been ruled invalid because they breached basic competition rules, and even involved clear corruption. The citizens of Farum, a small town in Denmark, had to pay an extra 3, 2% local income tax to rectify the municipal finances after corrupt PPPs set up by the mayor.

The rigidity of the contractual obligations to PPPs can mean that the spending of this money gets priority over other spending, even at the expense of services. In the UK, the annual payments by NHS trusts to the PFI contractors continue for the next 38 years, peaking at £2billion per year in

2029, and total £57 billion. At the Queen Elizabeth Hospital trust in Greenwich, the costs of a PFI scheme rose to 11.3%, and the hospital cut clinical services by 10%.

It is therefore extremely important that allowance should be made for the potential costs of various problems in assessing the comparative value of any PPP proposal.

Chart A. Expenditure on PFI schemes in the NHS



Source: calculated from Treasury PFI projects list http://www.hm-treasury.gov.uk/documents/public_private_partnerships/ppp_pfi_stats.cfm

4.6. The summary case of Metronet: learning from a failure.

In 2007 Metronet, one of the largest PFI schemes in the UK collapsed. The parliamentary report on its failure⁴¹ makes strong recommendations:

“Metronet’s shareholders, had the company been operated effectively, stood to make quite extravagant returns. Now that it has failed, it is the taxpayer and the Tube passengers who must meet the cost.

- ✓ *“In terms of borrowing, the Metronet contract did nothing more than secure loans, 95% of which were in any case underwritten by the public purse, at an inflated cost - the worst of both possible worlds.....”*
- ✓ *“Metronet’s inability to operate efficiently or economically proves that the private sector can fail to deliver on a spectacular scale.... The evidence is clear: it cannot be taken as given that private sector involvement in public projects will necessarily deliver innovation and efficiency.... Future assessments of the comparative value for money of private sector-managed models for infrastructure projects should not assume a substantial efficiency-savings factor;*
- ✓ *“The Government should bear the Metronet debacle in mind if and when its parent companies - Atkins, Balfour Beatty, Bombardier, EDF Energy, Thames Water - next come to bid for publicly-funded work.*
- ✓ *“The Government should remember the failure of Metronet before it considers entering into any similar arrangement again. It should remember that the private sector will never wittingly expose itself to substantial risk without ensuring that it is proportionally, if not generously rewarded. Ultimately, the taxpayer pays the price.*

- ✓ *“Whether or not the Metronet failure was primarily the fault of the particular companies involved, we are inclined to the view that the model itself was flawed and probably inferior to traditional public-sector management. In comparison, whatever the potential inefficiencies of the public sector, proper public scrutiny and the opportunity of meaningful control is likely to provide superior value for money. Crucially, it also offers protection from catastrophic failure. It is worth remembering that when private companies fail to deliver on large public projects they can walk away—the taxpayer is inevitably forced to pick up the pieces.”*

5. Alternatives to PPPs

Unions and other organisations in many EU countries are developing ways of improving and strengthening the role of public services. These initiatives focus mainly on strengthening democratic processes, through public participation; increasing the potential for worker participation; improving the quality of services, for example through progressive procurement policies; and strengthening the role of public ownership and public finance. These initiatives are alternatives to the widespread ideology which favours the introduction of the private sector, or private sector management techniques, into public services.⁴²

5.1. EU framework

Much of the EU legislative framework has created problems for public services. These include the competition and internal market principles of the treaty, the related provisions on state aid, and the rulings of the ECJ on these issues and on the interpretation of the procurement directives. The decisions of the ECJ have made it increasingly difficult to maintain direct public provision of services, by extending the circumstances in which authorities have to offer work for public tendering. Investment in public services is also constrained by the limits on government borrowing which form part of the rules of the EU economic and monetary union. But it is still possible, within the existing EU framework, to pursue policies which promote public services. In this section references to articles are to the existing consolidated treaty, unless specified as referring to the proposed new treaty.

Despite the problems created by ECJ case law on procurement, the EU treaty, in principle, allows governments and other public authorities to choose to provide a service directly by in-house organisation (article 295).⁴³ The EC’s guidance states: *“A public authority has full discretion to decide whether it provides services itself or entrusts them to a third party. Public procurement rules only apply if the public authority opts to externalise the service provision....”*⁴⁴ **So the first, and most fundamental, decision, whether to provide a service directly, can be publicly debated by reference to public service criteria – what is best for the public service - not on what is best for the market.**

The treaty includes a number of provisions which support public services. The tasks and activities of the EU include promoting *“a high level of employment and of social protection...the strengthening of economic and social cohesion....”* (article 2). There is a general provision requiring the EU and its member states to ensure that services of general economic interest (SGEI) *“operate on the basis of principles and conditions which enable them to fulfil their missions”* (article 16).

The Lisbon treaty would strengthen these provisions in three ways. Firstly, the overall aims of the EU will include a *“social market economy, aiming at full employment and social progress...”* Secondly, it states that an EU regulation *“shall establish these principles and set these conditions [for services of general economic interest] without prejudice to the competence of Member States, in compliance with the Treaties, to provide, to commission and to fund such services”*. Thirdly, it adds a protocol recognising *“the essential role and the wide discretion of national, regional and local authorities in providing, commissioning and organising services of general economic interest as closely as possible to the needs of the users;”* and stating that *“The provisions of the Treaties do not affect in any way the competence of Member States to provide, commission and organise non-economic services of general interest.”*⁴⁵

These provisions can strengthen the position of unions and others in arguing that public authorities can themselves decide how to organise public services, and should do so in the interests of public service objectives.⁴⁶

5.2. Procurement directives

The EU procurement directives were revised and consolidated into two directives in 2004: the Public Sector Directive 2004/18 and the Utilities Directive 2004/17.

The directives allow public authorities to use a range of conditions and criteria in procurement, including social and environmental issues. Article 26 of the Public Sector Directive introduced a new explicit power for public authorities to use social and environmental conditions in procurement; Article 23 allows public authorities to specify technical conditions; the directive also *requires* authorities to exclude companies which have been convicted of corruption, fraud, money laundering, or participation in a criminal organization (article 45), and allows authorities to exclude 'abnormally low bids' (article 55). The EC is currently drawing up a guide on social procurement.

The EC has also produced a paper of Frequently Asked Questions (FAQs) on the relations between the procurement directives and services of general interest (SGI).⁴⁷ These FAQ state that clauses cannot be inserted restricting a tender to non-profit operators only, but 'familiarity with the locality' may be an acceptable criterion, if stated in advance.

A number of EU directives lay down standards which have the effect of regulating the quality of public services. Compliance with these standards may be part of an argument for protecting public sector provision.

5.3. Union involvement in public services reform

5.3.1. EU level union initiatives on public service principles

Union activity at EU level has been focussed on establishing basic principles of public services, through campaigns, social dialogue, and relations with European political groups. EPSU is engaged in social dialogue with representative bodies in the public sector at EU level, including healthcare, local government, and utilities. In 2008 the EPSU set out a list of 10 core proposals for the socialist group in the European parliament, which includes all the social democratic parties of EU countries. These proposals include demands for European framework provisions for public services, an EU-wide evaluation of the impact of PPPs, legislation to ensure transparency in EU institutions involved in social policy-making.⁴⁸

EPSU has set out core principles for an EU-wide campaign for quality public services, including the following points:

- ✓ freedom of choice for local authorities to give the best service possible.
- ✓ sufficient legal clarity from the EU to give a secure basis of principles to quality public services.
- ✓ preventing big business "skimming-off" profitable parts of services.
- ✓ a right for the public to have a say in how public services are run.
- ✓ a guarantee that the services are available to all.⁴⁹

5.3.2. Dialogue at national and local level

The most general issues concerning the public sector may be dealt with under the general dialogue between trade union centres and governments: for example, the social agreement for 2003-2005 in Slovenia between union confederations and the government included commitments to efficient use and allocation of public spending and to a more equitable distribution of the burden of taxation.⁵⁰

5.3.3. Worker participation

Some initiatives highlight the value to the public service organisation of workers' knowledge. The Swedish public service union Kommunal established a new approach to public sector reform based on use of workers' ideas. The approach has been formalised into a system known as 'Kom An!'

(which means 'Come On!'). It makes workers "researchers in their own jobs", and involves a total review of the whole organisation, centred on workers discussing ways of improving their jobs.⁵¹ Since the late 1990s, Fagforbundet (the Norwegian Union of Municipal and General Employees) has promoted a 'model municipality' policy, based on a similar principle of using the ideas of public sector workers to improve the quality of services.⁵² One element of the policy is that management agree that during the period of a model municipality project there will be no attempt to use competitive tendering in the relevant service.⁵³

The UK union Unison has developed the idea of 'co-production' of public services by workers and users, in collaboration with a social democratic think-tank, Compass. A new joint report argues that instead of imposing reforms from the centre, public services can better be improved "through the interaction of staff and users".

5.4. Public participation

There are initiatives for greater public participation in the decisions of public authorities in many countries in Europe. In Bulgaria, for example, there is a campaign for greater public participation which is closely linked to the issues of freedom of information and attacks on corruption.

The Norwegian union Fagforbundet (the Norwegian Union of Municipal and General Employees) has engaged in political campaigns. For a 2003 election campaign in the city of Trondheim the union drew up a 19-point plan, including the reversal of privatisations. The elections were won by the left parties, which then re-municipalised the city's bus company and the cinemas, and ended the outsourcing of care for the elderly. The city council also increased investment in schools; improved social assistance for single mothers;⁵⁴ introduced a system of planned maintenance for buildings, based on extensive consultations;⁵⁵ and is developing free wireless internet connections across the city.⁵⁶

There is a strong movement in Spain in favour of 'participatory budgeting' on the Porto Alegre model. In Sevilla, the municipality allocated between 32 and 42 per cent of its budget to 18 districts; all residents in the neighbourhoods then voted for particular projects, social policies and actions in their area and elected representatives to go to the assembly of districts; then the assembly decided on an overall budget, a decision which is binding on the municipality..⁵⁷

A number of Italian municipalities are also developing participatory systems. This movement is centred around the Rete del Nuovo Municipio (new Municipality Network), which was set up in 2002 after the first World Social Forum. The network involves over 80 Italian municipalities, academics, unions, and other individuals and organisations. A leading example is the town of Grottammare, which created neighbourhood associations and committees to participate in decision-making, including budgetary policy. These mechanisms have led to the implementation of over 100 citizen initiatives, and more rapid development of the town and its public services.

5.5. Referenda

In a number of countries legislation exists which enables organisations to mobilise votes and demand referenda on specific issues. In 2007 a coalition of social organisations and unions in Leipzig campaigned for a referendum to stop the mayor from selling the municipal shares in the city's energy company. Within 4 months, over 42,000 signatures were obtained, which obliged the city to hold a referendum. In the actual referendum itself, there was a turnout of 35%, with an 87.4% majority in favour of the proposal, which forbids the city from privatising any essential services, including the energy company.⁵⁸

Similar referenda have taken place in other countries:

- In Slovenia January 2003 in two referendum ballots the Slovenians voted decisively against the privatisation of the state railways and the telecommunications industry.⁵⁹
- In Hungary in December 2004 65% of voters rejected privatisation of hospitals⁶⁰
- In Netherlands, in May 2002 Amsterdam voted against the privatisation of the city transport company GVB⁶¹

5.6. Service quality and procurement

Procurement policies have been developed in all EU countries to promote environmental sustainability and better meals for school children. A survey found a total of 103 initiatives to use procurement for environmental or social objectives – and none of the initiatives have made any use of PPPs: “Partnering and financial/economic instruments hardly exist in this context.”⁶² Public authorities use procurement policies for food purchases in schools, care homes and hospitals to support local communities as well as environmental and health objectives.⁶³

In 1997 the city of Copenhagen established divided its organisation into a ‘purchaser’ part and an in-house technical services company acting as a ‘provider’. This led to internal tensions over objectives within the organisation as a whole. From 1st January 2008 the provider and purchaser were reunited into one organization with responsibilities for the whole range of services, with three divisions for parks, cleansing and roads – but some services will still be carried out by the private sector.⁶⁴

Unison has protected and improved in-house services at Newcastle City Council by intensive involvement at all stages in proposals for procurement of revised services. The union successfully defended the in-house provision of social service meals for home, resource and day centres, by developing a service improvement plan. The in-house bid defeated proposals to supply frozen meals from multinational companies ISS and Appetito.⁶⁵

5.7. Public ownership and public finance

A core traditional role of public ownership is that it enables public authorities to invest in services and facilities which PPPs or commercialised services have failed to maintain. Germany continues to maintain a strong base of public sector service organisations through its *stadtwerke*, enterprises which are usually owned by municipalities. Despite some creation of PPPs through sale of shares, these municipal enterprises remain a vital part of German public services and have in some cases expanded their role at the expense of the private sector. For example, *Stadtwerke Osnabrück* was created in 1890, transformed into a public limited company in 1964, but remains wholly-owned by the city of Osnabrück in 2007. It is responsible for electricity, gas, district heating, water, and local public transport services. It has increased its responsibility in recent years, adding sewage disposal and treatment, and management of three new swimming baths.⁶⁶ In Bergkamen, the waste management service was remunicipalised in 2006. The in-house service was able to reduce costs by 30% through cooperation with other councils, reduce fees to users, while still maintaining the level of pay and conditions.

In Estonia, the railways were partly privatised in 2001 when the state sold a 66% share to a consortium of international companies, thus creating an institutional PPP in which the public sector was the junior partner. In January 2007 the state bought back all the shares of the private consortium, thus ending the PPP and returning the railways to full public ownership again.

5.8. European Social Model and solidarity

The notion of the ‘European Social Model’ (ESM) is often used to support the idea that public services have a central role to play in European countries. At the centre of this model is the concept of social solidarity, which has attracted growing interest in recent years in analyses of public services in Europe, and which contrasts with the individualistic political principles of neo-liberalism.⁶⁷ Legal analysts also identify the principle of solidarity as of central importance to the legal framework of public services.⁶⁸ The principle of solidarity financing continues to be visible in the operations of the EU itself. About one-third of the EU’s budget is spent through the structural funds, which are designed to reduce inequalities between member states by centrally financing developmental spending, especially expenditure on environmental and transport infrastructure, and paying for retraining of workers in declining regions, and combat discrimination against groups of workers. The 2007-2013 programme involves €304 billion.⁶⁹

Ver.di and Unison have published a joint statement on the values underlying public services and the importance of developing public services. The booklet “*The Future of Public Services in Europe/ Die Zukunft der öffentlichen Dienste in Europa*” identifies a series of common issues which extend across the different national administrative practices for delivering services.

Public services, especially public sector investment, are key elements in the policies of social democratic governments in key emerging countries, for example India, Brazil, and South Africa. Major international NGOs such as Oxfam and Bread for the World now argue that public services are central for social and economic development and social and territorial cohesion. Public Services International (PSI) is running a global campaign for quality public services.

5.9. Union campaign in Italy

Italian trade union FP-CGIL (Funzione Pubblica – Confederazione Generale Italiana del Lavoro) has been proactive in establishing networks and joint initiatives with Italian NGOs and social movements. Such initiatives aim at promoting alternative policies to the neo-liberal agenda in the area of public services, particularly in water supply and sanitation. The choice to focus on the water sector derived from the need to start the struggle for a more socially-oriented approach to public service provision, mindful of the public interest, on favourable ground. Since the beginning, FP-CGIL’s strategy has been to use any successes obtained by the water campaigns as an example for replicating similar experiences in other sectors. In terms of tactics and strategies adopted, there has been a considerable interweaving of experiences from the water campaigns and those run in other sectors.

The main lesson drawn is that treating NGOs and civil society organisations as equal partners is vital to strengthening mutual support around common objectives shared by trade unions and social movements. This has enabled trade unions to achieve results beyond their actual social and political clout. Results obtained by the water campaigns undertaken in Italy included progress on promoting national legislation outlawing water privatisation and the exclusion of water services from the application of EU competition law. FP-CGIL has recognised that the above characteristics make the water sector particularly mature to start a struggle to counter the neo-liberal offensive. However, it has devised a conscious strategy to “export” the struggle to other public services where the rejection of neo-liberal policies is no less urgent.

6. Public service workers and PPPs

6.1. 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 generally 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.

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.

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.

6.2. Legal framework

6.2.1. 'Fair wages' clauses

'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 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. 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.⁷⁰ The International Labour Organisation (ILO) adopted the principle of fair wages clauses in 1949.

Despite adverse changes in international climate, such as the World Trade Organisation (WTO) government procurement agreement (GPA), which requires liberalisation, 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; 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.⁷¹

ILO Convention 94 is intended, 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. 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.⁷² Article 2 requires governments which have ratified the convention to include fair wages clauses in government contracts. 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.⁷³

6.2.2. EU procurement laws

It is sometimes suggested that the 'complexity' of the arrangements in PPPs makes it uncertain whether these are covered by the conventional procurement process.⁷⁴ 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.⁷⁵ Policies, rules, laws and treaties concerned with public contracts, including ILO Convention 94, are therefore clearly applicable to PPPs.

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.⁷⁶ 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.⁷⁷ 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*"⁷⁸; the European Commission itself has always been careful not to imply any conflict and the 2008 review by the ILO also concludes unequivocally that there was no conflict.⁷⁹ 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.

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

Thus procurement contracts, including PPPs, 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.⁸⁰

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; Article 48 requires public authorities to assess the technical and professional capability of a contractor; Article 55 allows authorities to exclude 'abnormally low bids' and to demand information about employment and working conditions; Article 45 *requires* authorities to exclude companies which have been convicted of corruption, fraud, money laundering, or participation in a criminal organization, and 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.

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).⁸¹ The ECJ ruling was criticised by the ETUC and the association of public sector employers, CEEP, as an invitation for social dumping and an infringement of the freedom of public authorities to pursue social goals.⁸²

6.2.3. Other EU law and institutions

The Acquired Rights Directive (ARD) EC 2001/23⁸³ 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.

In general the outsourcing of work by local authorities, including outsourcing through PPPs, is covered by the directive. The UK government for example has said that TUPE (the UK implementation of the ARD) should always apply, including PPPs.⁸⁴

The EU employee information and consultation Directive EC 2002/14⁸⁵ applies to the public as well as the private sector and gives employees the right to information and consultation on information on any plans which will affect employment, substantial changes in work organisation or in contractual relations, including collective redundancies and transfers of undertakings.⁸⁶

The European Works Councils Directive (EWC) 94/45⁸⁷ gives workers the right to representation on a 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 to be represented on a EWC if the company concerned operates across two or more EU countries.

The EIB's Environmental and Social Practices handbook⁸⁸ emphasizes the importance of public consultations, and recognises that the stakeholders include unions and employees; it also includes a section on "social assessment" which covers: "...negative impacts on local employment; minimum labour standards; exacerbated social inequalities". 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.

6.3. Negotiated agreements

6.3.1. 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. The terms of such a framework may be included in a law, a code, or a collective agreement. The negotiation of these agreements may make use of political mechanisms and relationships. The new laws in Hungary (see below) were facilitated by the relations between the unions and the socialist party in government at the time.⁸⁹

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,⁹⁰ and in the guidance on assessment of comparative value-for-money.⁹¹

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." A more extensive agreement in Scotland 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.⁹²

The Italian unions negotiated a national framework agreement with the centre-left government in 2007. The agreement included a commitment to limit outsourcing and the use of consultants, and return to in-house services.⁹³

The Irish trade unions negotiated a framework agreement with the government on the implementation of PPPs in Ireland in 2001. The agreement specifies that: “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.”⁹⁴

6.3.2. Codes and agreements on pay and conditions

It is 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 have negotiated a series of 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.

The unions negotiated an agreement with the government in relation to healthcare PPPs for the ‘Retention of Employment’ (RoE) for staff employed on services such as cleaning and catering to have the option to remain employees of the national health service. 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.⁹⁵ In a PPP which took over the water service in Berlin, 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.

In the UK, the unions negotiated a code providing that all new recruits by the private companies had to be given the same terms and conditions as those transferred, given legal strength by incorporating a reference into the Local Government Act. The principles of this code were extended to the wider public sector in 2005.⁹⁶ A number of local authorities in the UK have reached agreements with the unions which provide even greater protection for transferred and existing workers, and for trade union rights, for example by a guarantee that there is no deterioration in pay and conditions during the life of a contract, and trade union bargaining rights for all staff, including new starters. The unions have also negotiated agreements with a number of the largest companies involved in PPPs, 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.

The UK unions also negotiated a code requiring that 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.⁹⁷ For local government, police and fire staff, a private company operating a PPP can be admitted to the Local Government Pension Scheme, so that staffs 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.⁹⁸

6.4. National and local procurement rules

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 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. 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.⁹⁹

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..¹⁰⁰

The 2006 Public Procurement law of Latvia introduced in 2006 encourages contracting authorities to take into account a wide range of criteria, including 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.¹⁰¹ 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."¹⁰²

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.¹⁰³ 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 city of Aarhus in Denmark uses standard social clauses in all its contracts. 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.¹⁰⁴

The Greater London Authority (GLA) 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 GLA also sets a 'London Living Wage' (LLW), significantly above the national minimum wage. It estimates that over 400 workers gained from implementation of the LLW in 2007.¹⁰⁵

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