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CECOP's position on the revision of the Directives on public procurement

Cooperatives are people-centred enterprises owned, controlled and run by and for their members, who share equal voting rights and reinvest the profit generated in the enterprise. Cooperatives are locally rooted and are protected by some specific mechanisms against delocalisation. They support, serve, and play a significant role in retaining wealth in their local communities, making them the ideal partners in ensuring European preference when allocating public funds. A significant number of cooperatives in CECOP's network provide goods or services for public authorities, such as in construction, energy, social services, transport, waste management, education, care, and more. Therefore, public procurement is fundamental for supporting cooperatives, and access to public procurement is vital for cooperative enterprises active in industry and services.

The 2014 revision of the public procurement Directive (Directive 2014/24/EU) brought significant improvements to public procurement rules. The key developments that CECOP had advocated for and welcomed in the revision included awarding contracts to the Most Economically Advantageous Tender, the possibility to divide the contract into lots, the possibility of including social and environmental award criteria, and reserved contracts. Nevertheless, in practice, issues persist. Under the current public procurement rules, cooperatives are often excluded, mainly due to the continued emphasis on the lowest price in public tenders, rather than qualitative criteria, while cooperatives apply higher social standards when it comes to the work conditions, training etc. It is imperative that the upcoming revision ensures that future public procurement not only creates a level playing field for cooperatives but also embraces the principles of environmentally friendly and socially responsible public procurement, taking into account the points elaborated below.

1. Revise and improve the selection criteria to ensure that price is not the deciding factor when awarding contracts

While Directive 2014/24/EU on public procurement improved rules on selection criteria, there are still fundamental issues with the methodology for awarding contracts. Price-only awarding is still used across the EU, and even where the Most Economically Advantageous Tender (MEAT) criteria is used, there remains an overwhelming weight on price when awarding these contracts. Although MEAT is supposed to appreciate quality, according to our members¹, it does not happen in practice as the Directive does not regulate the weighting of the criteria. As such, price remains important, and often is the decisive criterion in tenders. Emphasis on price, in turn, negatively impacts the work conditions or the quality of the services offered under the tender.

The 2014 Directive provided a framework for the use of qualitative criteria, particularly environmental and social aspects, albeit only on a voluntary basis. However, public authorities are reluctant to apply these, citing bureaucratic burdens associated with incorporating environmental and social criteria into procurement processes, and even when applied, they are often used as

¹ National federations of industrial and service cooperatives

on/off criteria, i.e., aspects that are either in the tender or not. This leads to the diminished value of these criteria, and, once again, making price the decisive factor when awarding the contracts.

As long as the decisive criterion is price, cooperatives are essentially excluded from tenders by default, as these enterprises, that prioritise the protection of jobs over the creation of profit, face higher upfront costs compared to businesses that are profit oriented. It is essential that the revised Directive leads to qualitative criteria being systematically adopted and applied in tender procedures in order to achieve environmental and social objectives through procurement.

2. Maintain the option to reserve contracts (Article 20) and thus facilitate the work integration of disadvantaged persons

Reserved contracts (Article 20) are key for work integration enterprises whose core mission is the work integration of vulnerable workers, with at least 30% of their employees being disabled or disadvantaged. This also includes social cooperatives, which represent one of the most effective models for integrating disadvantaged workers into the workforce, that also are service providers for their local communities, combining high quality services and social responsibility with participatory governance. Reserved contracts often make it possible for these enterprises to provide these services. As such, it is essential to maintain the use of reserved contracts.

3. Improve the terms of reserved contracts for certain services to ensure continuity of services (Article 77)

One of the key issues in terms of reserved contracts for certain services is that the maximum duration of contracts under Article 77 can only be three years, therefore, extending this period would be beneficial for cooperatives. Another problem is that an enterprise that is awarded a contract cannot have been awarded a contract for the same services in the previous three years. This poses an issue particularly for cooperatives operating in the areas of childcare and elderly assistance, and it is antithetical to Article 76, which states that “Member States shall ensure that contracting authorities may take into account the need to ensure [...] *continuity* [...] of the services”. The scope of the current Article is also too restrictive; it would be necessary to broaden the scope of reservations, and thus, provide further access to social economy enterprises to public contracts.

4. Clarify the rules of grounds for exclusion (Article 57) to avoid uncertainty

The current Article 57 on exclusion grounds – and especially the rule of the “grave professional misconduct” (Art. 57(4)(c)) – despite its importance, is very vague and thus has contributed to great uncertainty and a lot of litigation. In fact, in Italy, the majority of litigation in the context of public contracts is disputes over the grounds for exclusion. Therefore, a clearer and more unambiguous regulation would be needed, with a view to legal certainty and interpretive clarity.

5. Lower administrative burden to create a level playing field for SMEs

The bureaucratic burden in public procurement is substantial, leading to SMEs being discouraged and not bidding due to concerns about potential losses. Small and medium cooperatives face the same challenges. As a result, these opportunities frequently favour large enterprises that possess the administrative capabilities to satisfy these requirements. The procurement directives must be revised in a manner that promotes good governance and transparency while also simplifying processes to encourage broader participation. In particular, SMEs, including small and medium cooperatives, should find it simpler to bid, win, and manage contracts profitably. This approach would create a level playing field. Additionally, meaningful research into the obstacles SMEs, including small and medium cooperatives face when bidding for public contracts is essential to inform future policy improvements.

6. Encourage the participation of small and medium-sized cooperatives via business consortia

In order to promote the participation of SMEs, the revised rules should encourage the possibility to set up business consortia. Based on the Italian example, where a specific law was adopted to allow their creation, business consortia of cooperatives can bring together micro, small and medium-sized cooperatives, thus promoting their market access, growth, and engender more competition among economic operators on the public procurement market.

7. Make price-revision clauses mandatory

In terms of modification of contracts (Article 72), price-revision clauses are crucial, particularly in the face of inflation. However, currently there is no obligation in the Directives for Member States to provide price-revision mechanisms for public contracts. Recent experience – the COVID-19 crisis and the Russian invasion of Ukraine – has taught that the absence of price-revision clauses constitutes a serious problem as it can lead to the erosion of profit margins or to the need to suspend performance in order to avoid providing services at a loss. In certain countries, these have been added to national legislation, e.g., Italy, which added indexation clauses, or France. However, it would be essential to make these mandatory across the EU.

The revision of the public procurement rules is a critical initiative. While the 2014 revision made great strides towards ensuring better procurement practices, there is a need to further improve them and guarantee environmentally friendly and socially responsible procurement. By emphasising quality over price, the revised rules will enhance social economy enterprises', including cooperatives', access to public procurement.

CECOP is the European Confederation of Industrial and Service Cooperatives, representing approximately 43,000 cooperatives, employing over 1.3 million workers, across 15 EU countries and the UK. The majority of cooperatives affiliated to CECOP's members are worker cooperatives (72%), which are democratically managed and owned by the workers, and social cooperatives (27%), which, in addition to workers, often include other types of members, such as service beneficiaries or public authorities. Social cooperatives primarily provide services of general interest and many of them contribute to the work integration of disadvantaged and marginalised people. The remaining cooperatives represented by CECOP (1%) are composed of self-employed workers.