
Specifications – Invitation to tender No VT/2010/036

Transfers of undertakings in insolvency situations

1. Title of the contract

Tender No VT/2010/036: Transfers of undertakings in insolvency situations

2. Background

2.1. PROGRESS programme

PROGRESS¹ is the EU's employment and social solidarity programme, set up to provide financial support for the attainment of the European Union's objectives in employment, social affairs and equal opportunities as set out in the Social Agenda². The realisation of the Social Agenda relies on a combination of instruments comprising EU legislation, the implementation of open methods of coordination in various policy fields and financial incentives such as the European Social Fund.

The PROGRESS mission is to strengthen the EU's contribution in support of Member States' commitments and efforts to create more and better jobs and to build a more cohesive society. To this effect, PROGRESS will be instrumental in:

- Providing analysis and policy advice on PROGRESS policy areas;
- Monitoring and reporting on the implementation of EU legislation and policies in PROGRESS policy areas;
- Promoting policy transfer, learning and support among Member States on EU objectives and priorities; and
- Relaying the views of the stakeholders and society at large.

More specifically, PROGRESS supports:

- The implementation of the European Employment Strategy (section 1);

¹ Decision No 1672/2006/EC of the European Parliament and of the Council of 24 October 2006 establishing a Community Programme for Employment and Social Solidarity — Progress, JO L 315 of 15.11.2006

² Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions - Renewed social agenda: Opportunities, access and solidarity in 21st century Europe COM/2008/0412 final of 02.07.2008.

- The implementation of the open method of coordination in the field of social protection and inclusion (section 2);
- The improvement of the working environment and conditions including health and safety at work and reconciling work and family life (section 3);
- The effective implementation of the principle of non-discrimination and promotion of its mainstreaming in all EU policies (section 4);
- The effective implementation of the principle of gender equality and promotion of its mainstreaming in all EU policies (section 5).

The present call for tenders is issued in the context of the implementation of the 2010 annual work plan which can be consulted at <http://ec.europa.eu/social/main.jsp?catId=658&langId=en>.

2.1. Background information specific to this contract

Original Directive 77/187/EEC of 14 February 1977 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of businesses³ did not lay down the provisions specifically regulating the transfers of undertaking in insolvency situations. The European Court of Justice⁴ could not introduce a comprehensive set of rules to be applied to insolvency situations, although it declared, among others, that transfers effected in insolvency liquidation proceedings were excluded from the Directive⁵.

It was only Directive 98/50/EC of 29 June 1998 amending Directive 77/187/EEC⁶ that introduced such provisions. The Commission explained that it decided to initiate a new approach for the transfers as going concerns of undertakings, businesses and parts of businesses in the context of pre-liquidation and liquidation proceedings taking into account the case law of the ECJ, the need to conciliate the survival of insolvent undertaking, the acquired rights of creditors and the rights of employees, notably the right to work⁷.

In accordance with the preamble to Directive 98/50/EC, with a view to ensuring the survival of insolvent undertakings, Member States should be expressly allowed not to apply Articles 3 and 4 of Directive 77/187/EEC to transfers effected in the framework of liquidation proceedings, and certain derogations from that Directive's

³ OJ L 61, 5.3.1977, p. 26–28.

⁴ See Case 135/83 Abels (1985), para. 23. See also other cases where the Court tackled the issue of transfers in insolvency situations, notably Case 179/83 *Industriebond FNV* (1985), Case 189/83 *Botzen* (1985), Case 105/84 *Mikkelsen* (1985), Case C-362/89 *D'Urso* (1991), Case C-472/93 *Spano* (1995), Case C-319/94 *Dethier* (1995), Case C-399/96 *Europièces* (1998) and Case C-561/07 *Commission against Italy* (2009).

⁵ See the proposal for a Council Directive on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of businesses - COM/94/300 final - CNS 94/0203, p. 8-9.

⁶ OJ L 201, 17.7.1998, p. 88–92.

⁷ See the proposal for a Council Directive - COM/94/300 final - CNS 94/0203, p. 9.

general provisions should be permitted in the case of transfers effected in the context of insolvency proceedings.

The provisions regulating transfers in insolvency situations set forward by Directive 98/50/EC have been codified in what is now Article 5 of Directive 2001/23/EC of 12 March 2001 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses⁸.

Article 5 of Directive 2001/23/EC provides:

"1. Unless Member States provide otherwise, Articles 3 and 4 shall not apply to any transfer of an undertaking, business or part of an undertaking or business where the transferor is the subject of bankruptcy proceedings or any analogous insolvency proceedings which have been instituted with a view to the liquidation of the assets of the transferor and are under the supervision of a competent public authority (which may be an insolvency practitioner authorised by a competent public authority).

2. Where Articles 3 and 4 apply to a transfer during insolvency proceedings which have been opened in relation to a transferor (whether or not those proceedings have been instituted with a view to the liquidation of the assets of the transferor) and provided that such proceedings are under the supervision of a competent public authority (which may be an insolvency practitioner determined by national law) a Member State may provide that:

(a) notwithstanding Article 3(1), the transferor's debts arising from any contracts of employment or employment relationships and payable before the transfer or before the opening of the insolvency proceedings shall not be transferred to the transferee, provided that such proceedings give rise, under the law of that Member State, to protection at least equivalent to that provided for in situations covered by Council Directive 80/987/EEC of 20 October 1980 on the approximation of the laws of the Member States relating to the protection of employees in the event of the insolvency of their employer (1), and, or alternatively, that,

(b) the transferee, transferor or person or persons exercising the transferor's functions, on the one hand, and the representatives of the employees on the other hand may agree alterations, in so far as current law or practice permits, to the employees' terms and conditions of employment designed to safeguard employment opportunities by ensuring the survival of the undertaking, business or part of the undertaking or business.

3. A Member State may apply paragraph 2(b) to any transfers where the transferor is in a situation of serious economic crisis, as defined by national law, provided that the situation is declared by a competent public authority and open to judicial supervision, on condition that such provisions already existed in national law on 17 July 1998.

⁸ OJ L 82, 22.3.2001, p. 16–20.

The Commission shall present a report on the effects of this provision before 17 July 2003 and shall submit any appropriate proposals to the Council.

4. Member States shall take appropriate measures with a view to preventing misuse of insolvency proceedings in such a way as to deprive employees of the rights provided for in this Directive."

Only paragraphs 1, 2 and 4 of Article 5 concern insolvency situations that should form part of the analyses of the present study. The situation as regards the use of Article 5(3) of the Directive in Italy (none of the other Member States were considered to be concerned by the provision of Article 5(3)) has already been assessed in a separate study. Hence, Article 5(3) does not need to be covered by the present study.

Insolvency situations stemming from the scope of Article 5 (1) (2) and (4) form a broad group which differ from one Member State to the other. An indicative and certainly not exhaustive list of insolvency proceedings can be found in Annexes A and B to Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings, as amended⁹.

On the other hand, Member States may lay down the provisions regulating the proceedings in case of economic difficulties that, due to different reasons, cannot be regarded as falling within the scope of insolvency situations covered by Article 5 (1) and (2) of the Directive. It is thus important to know such proceedings and the arguments in favour of their exclusion from Article 5 (1) and (2) in order to be able to correctly determine the scope *ratione materiae* of Article 5 (1) and (2) of the Directive in every Member State.

Three situations can be distinguished following the provisions of Article 5:

- 1) Articles 3 and 4 of the Directive do not apply to insolvency proceedings which have been instituted with a view to the liquidation of the assets of the transferor and are under the supervision of a competent public authority.
- 2) Articles 3 and 4 of the Directive apply to insolvency proceedings - whether or not those proceedings have been instituted with a view to the liquidation of the assets of the transferor, and provided that such proceedings are under the supervision of a competent public authority - and the options provided for in Article 5 (2)(a) and/or 5 (2)(b) are used.
- 3) Articles 3 and 4 of the Directive fully apply to insolvency situations.

It is important to note that fourteen Member States declare actually not to apply national provisions implementing Articles 3 and 4 of the Directive to the transfers in bankruptcy proceedings and analogous insolvency proceedings mentioned in Article 5(1) of the Directive¹⁰.

⁹ OJ L 160, 30.6.2000, p. 1–18.

¹⁰ See the questionnaire annexed to Commission report on Directive 2001/23/EC adopted on 18 June 2007 – COM(2007) 334 final. The following Member States made that declaration: Belgium, Greece, France,

Seven Member States declare to make use of the possibilities offered by Article 5 (2)(a) and/or 5 (2)(b)¹¹.

However, only the Czech Republic, Denmark, Estonia, Hungary and Portugal declare not to make use of both Article 5 (1) and Article 5 (2)(a)(b) of the Directive and hence do not provide for special provisions regulating transfers in insolvency situations and aiming at the transposition of Article 5 (1) and (2)¹². As the purpose of this study is the analysis of not only the legislative framework but, most importantly, of the practical application of the provisions and of the level of protection of employees in case of the transfers in insolvency situations, also these Member States need to be included within the scope *ratione personae* of the present study.

Although Article 5 of the Directive was adopted with a view to ensuring the survival of insolvent undertakings, one cannot forget that the purpose of the Directive is the protection of employees in the event of a change of employer, in particular, to ensure that their rights are safeguarded. This is especially important in the current critical period, when insolvency proceedings become more frequent and the employees are at greater risk of having their rights violated.

It is also important for the national authorities, including judges and for the public (especially employers and employees) to know how to apply the relevant provisions, what rights of employees are safeguarded and how to protect them and to compare the way the provisions are applied in other countries. For the Commission the study would provide updated detailed information on the national implementing provisions, their interpretation, application and effects in practice and the problems occurring in the process of application. The study should also provide for solutions to the problems incurred. It could also be used as a source of information on possible infringements. In general, the study should answer to the question on how and to what extent are the rights of employees protected in case of transfers in insolvency situations mentioned in Article 5 of the Directive in the 27 Member States.

In line with the better regulation agenda and the evaluation policy of the Commission, there is need to evaluate whether EU law has actually met the identified needs in an effective, efficient and consistent way, and whether it produced the intended results.

Ireland, Italy, Cyprus, Latvia, Malta, the Netherlands, Austria, Slovenia, the Slovak Republic, Finland and Sweden. **It is important to note, however, that the declarations by the Member States made in the questionnaire must be treated only as an indication. Therefore, and taking into account that the questionnaire does not include Bulgaria and Romania, it is for the contractor to ascertain how many and precisely which Member States fall within this category.**

¹¹ See the questionnaire mentioned in the preceding footnote. The following Member States made that declaration: Belgium, Germany, Spain, France, Poland, Luxembourg and the United Kingdom. **Again, in view of the explanation given in the preceding footnote it is for the contractor to ascertain how many and precisely which Member States fall within this category.**

¹² See the questionnaire mentioned in footnote 9. **Again, in view of the explanation given in the preceding footnote it is for the contractor to ascertain how many and precisely which Member States fall within this category.**

A study was commissioned on the implementation of the Directive (including the provisions regulating the transfers in insolvency situations) in the EU-25, which was published in 2007¹³. Furthermore, recently a study has been carried out regarding the implementation in Romania and Bulgaria. The studies do not concentrate specifically on the issue of the transfers in insolvency situations and therefore, in addition to the information already provided in those studies, updated, more systematic and in depth description of the measures in force and the profound analysis of the application in practice and the effects of the provisions concerned is sought.

3. Subject of the contract

Against the background described above and in order to ascertain how and to what extent have the rights of employees been protected, the contractor has to (1) describe the measures in force (or forming part of ongoing reforms) regulating the transfers of undertakings, businesses or parts thereof in insolvency or similar situations in the 27 Member States of the EU, (2) analyse the application in practice of those measures in a selected group of Member States, (3) assess the effects for the same selected group of Member States, (4) identify best practices aiming at the protection of employees in case of transfers in insolvency situations and the solutions of the problems occurring in the process of application of the law.

4. Participation

Please note that:

The competition is open to any physical person or legal entity coming within the scope of the Treaties and any other physical person or legal entity from a third country which has concluded with the Union a specific agreement in the area of public contracts, under the conditions provided for in that agreement.

Where the Multilateral Agreement on Public Contracts concluded within the framework of the WTO applies, the contracts are also open to nationals of States that have ratified this Agreement, under the conditions provided for therein. It should be noted that research and development services, which come under category 8 of Annex II A of Directive 2004/18/CE, are not covered by this Agreement.

5. Tasks to be carried out by the contractor

5.1 General - requirements on how the tasks shall be carried out

The PROGRESS Programme aims to promote gender mainstreaming in all its five policy sections and commissioned activities. Consequently, the Contractor shall take the necessary steps to ensure that:

- Gender equality issues are taken into account when relevant for the drafting of the technical offer by paying attention to the situation and needs of women and men;

¹³ <http://ec.europa.eu/social/main.jsp?catId=706&langId=en&intPageId=208>.

- Implementation of the requested tasks includes a gender perspective by considering systematically the women and men dimension;
- Performance monitoring includes the collection and gathering of data disaggregated by sex when needed;
- Its proposed team and/or staff respects the gender balance at all levels.

Equally, needs of disabled people shall be duly acknowledged and met while executing the requested service. This will ensure in particular that where the Contractor organises training sessions and conferences, issues publications or develops dedicated websites, people with disabilities will have equal access to the facilities or the services provided.

Finally, the Contracting Authority encourages the Contractor to promote equal employment opportunities for all its staff and team. This entails that the Contractor is encouraged to foster an appropriate mix of people, whatever their ethnic origin, religion, age, and ability.

The Contractor will be required to detail in its final activity report the steps and achievements made towards meeting these contractual requirements.

5.2 Specific

Against the background described under point 2 above, and in order to ascertain how and to what extent have the rights of employees been protected, the contractor shall prepare a report in English on the measures in force (or forming part of ongoing reforms) regulating the transfers of undertakings, businesses or parts thereof in insolvency or similar situations in the EU Member States and on the effects of the application in practice of those measures.

The report should contain the following elements:

I. Description of national measures in all 27 Member States

- For those Member States that made use of Article 5 of Directive 2001/23/EC and provide for special provisions regulating transfers in insolvency situations - describe in a systematic way the measures in force (or forming part of ongoing reforms) aiming at the implementation of Article 5 paragraphs 1, 2(a) and 2(b) of the Directive. The description shall be made separately for each of the aforementioned paragraphs and must show that the measures/proceedings classified under paragraphs 1, 2(a), 2(b) meet the requirements and conditions for application provided for in those paragraphs and the case-law of the European Court of Justice, notably that mentioned in footnote 4 above.
- For the Member States concerned, briefly but exhaustively describe the national measures regulating the proceedings in case of economic difficulties that cannot be regarded as falling within the scope of insolvency situations covered by Article 5 (1) and (2) of the Directive.

Set forth the arguments, based on the provisions of Article 5 (1) and (2) of the Directive and the case-law of the ECJ (notably that mentioned in footnote 4 above), why such national measures are outside the scope of respective paragraphs of Article 5 of the Directive.

II. Analysis of the application in practice of the national measures for a selected group of Member States

- Identify difficulties (from the point of view of all the stakeholders involved, including employees, employers, public authorities and courts) that have arisen with the application in practice of the national measures in case of transfers in insolvency situations (including the situations of economic difficulties).
- Analyse how the collective rights of employees, as enshrined in Articles 6 and 7 of the Directive, have been realised in insolvency situations (including the situations of economic difficulties)

The selected group of Member States, for which a detailed analysis is to be undertaken, should include at least 12 – 15 Member States, of which at least 4 are large Member States (UK, Germany, Spain, Italy, France, Poland). The group should contain a representative number of Member States of the EU within the specific categories comprising of the Member States that:

- (1) do not apply national provisions implementing Articles 3 and 4 of the Directive to the transfers in bankruptcy proceedings and analogous insolvency proceedings aimed at liquidation, mentioned in Article 5(1),
- (2) make use of the possibilities offered by Article 5 (2)(a) and/or 5 (2)(b) and are different from the ones under point (1) above,
- (3) do not make use of both Article 5 (1) and Article 5 (2)(a)(b) of the Directive and hence fully apply Articles 3 and 4 of the Directive to insolvency situations mentioned in Article 5 (1) and (2).

The tenderer must note that as explained in footnote 10, the questionnaire mentioned there may not provide an accurate picture of the actual situation and therefore in drawing up the bid the tenderer must lay down the methodology used in order to select the Member States falling within the three categories mentioned above.

III. Assessment of the effects for the same selected group of Member States (cf point II above)

Assess the social and economic effects of the national provisions in view of the attainment of the objective to protect employees and to ensure the survival of insolvent undertakings. The contractor will strive to answer in particular the following questions:

- To which extent have national provisions transposing the Directive been applied in insolvency situations in the Member States concerned (number of transfers in insolvency situations)?
- What are (in quantitative and qualitative terms) the costs and benefits related to the measures aiming at the implementation of respectively paragraphs 1, 2(a) and 2(b) of Article 5 of the Directive for workers, employers, other actors (e.g. creditors) and the economy/society at large?
- What was the level of the survival of insolvent undertakings; have the provisions been helpful to attain this objective?
- Have the provisions led to the increase of the level of unemployment?
- Have the provisions been helpful to safeguard employment opportunities? Have the effects on employment been durable?
- To what extent have the insolvency proceedings been accompanied by the social plans aimed at helping the workers losing their jobs; were the social plans satisfying the workers' needs and to what extent they appeared to compensate the loss of jobs?
- Have the transfers of employees in insolvency situations led to changes in their job quality? Have the changes been substantial? Have the minimum employment standards been safeguarded?
- Have the provisions had an effect on facilitating restructuring?
- To what extent have the measures transposing Article 5(4) of the Directive been effective with a view to preventing misuse of insolvency proceedings in such a way as to deprive employees of the rights provided for in the Directive?
- Indicate and briefly describe case studies in support of the above.

IV. Identification of solutions

- On the basis of comparative analysis, identify best practices aiming at the protection of employees (their individual and collective rights) in case of transfers in insolvency situations.
- Propose solutions to the problems occurring in the process of application of the relevant provisions of the Directive in the Member States, including where appropriate proposals for reform regarding the Directive in case major difficulties are discovered in the Member States.

The contractor shall report on the views of concerned stakeholders (including the public administration, the Labour Inspection and the social partners) on the issues covered by points II – IV above.

The report shall include: (1) a section with meaningful conclusions; (2) for every Member State, tables indicating each specific paragraph of Article 5 of Directive 2001/23/EC and the corresponding provisions of the national implementing measures, in English, and a list of national implementing measures; (3) a presentation of the key points for each Member State (1 page per Member State) of the analyses - key points should be concise, sharp, easily understandable; (4) a list of relevant national case-law, (5) a list of relevant bibliography consulted, (6) a table listing (i) the insolvency situations falling within respectively paragraph 1, paragraph 2(a) and paragraph 2(b) of Article 5 of Directive 2001/23/EC and (ii) the proceedings in case of economic difficulties that, although similar, cannot be regarded as falling within the scope of insolvency situations covered by Article 5 (1) and (2) of the Directive, (7) a separate, clear and comprehensive executive summary of the main findings in English, French and German (of about 10 pages), following the structure of the report.

6. Professional qualifications required

The tenderer must demonstrate the experience and ability to perform the administrative and financial management and the coordination of large-scale contracts and research projects at European level, as well as the capacity to set up the appropriate organisational structure to carry out all the tasks involved, in particular the ability to call on the necessary expertise and linguistic skills to cover all EU Member States concerned.

The team should be composed at least of the following experts:

- Senior expert(s) satisfying the requirements for Level II experts (see the table in Annex IV of the draft contract). This will require distinguished academics and/or practising lawyers and/or practitioners with: proven expertise and at least 10 years professional experience with at least 4 years experience in dealing with legal issues in the areas of transfers of undertakings and insolvency and in conducting socio-economic evaluation in the areas concerned by the study, including the theoretical and empirical aspects.

Senior expert(s) will be responsible for drafting the final report.

- Other experts forming part of the team who must satisfy the requirements for at least Level III experts (see the table in Annex IV of the draft contract). They need to be experienced lawyers and/or academics and/or practitioners with: proven expertise and a minimum of 5 years professional experience of which at least 2 years experience in dealing with legal issues in the areas of transfers of undertakings and insolvency and in conducting socio-economic evaluation, including the theoretical and empirical aspects, in the Member States concerned.

The experts must have good knowledge of European Union law, in particular the labour law *acquis*, and have experience allowing analyzing the social and economic effects in the areas concerned by the study.

The contractor is to appoint one senior expert as the study coordinator. This will require the distinguished academic and/or practising lawyer and/or practitioner with: proven expertise and at least 10 years professional experience with at least 4 years experience in dealing with legal issues in the areas of transfers of undertakings and insolvency and in conducting socio-economic evaluation in the areas concerned by the study, including the theoretical and

empirical aspects. He/she will be responsible for contacts with the European Commission and will attend all meetings, accompanied by other experts as appropriate. This expert must demonstrate the experience and ability to perform the management and coordination of large-scale contracts and studies at European level.

7. Time schedule and reporting

The duration of the tasks shall not exceed 11 (eleven) months from the entry into force of the contract.

For further details see Article I.2 of the draft contract.

7.1. Specific deadlines for the performance of tasks:

Inception report

Within **5 (five) weeks** of the date of the entry into force of the contract, the contractor will submit to the European Commission¹⁴ an inception report which will consist of a detailed outline of the approach/methodology to be used and a detailed work schedule for the remaining period. In the report the contractor will make a proposal of the selected group of Member States, divided into three categories, as specified under point 5.2 above.

Interim report

Within **5 (five) months** of the date of the entry into force of the contract, the contractor will submit to the European Commission¹⁵ (Unit EMPL F/2) an interim report describing progress in relation to the timetable laid down, together with a summary of results obtained so far and the work programme planned for the following period. The interim report should be in English. This report will be discussed during one meeting to be held within 30 days after receipt of the report by the Commission at the premises of DG EMPL in Brussels.

Draft final report

Within **9 (nine) months** of the date of the entry into force of the contract, the contractor will submit to the European Commission¹⁶ (Unit EMPL F/2) a draft final report, which will include the elements referred to in point 5 of the present technical specifications. The report should be in English. The European Commission will examine the draft final report and notify the contractor of possible objections or comments to be made within 35 (thirty five) days of receipt of this draft final report.

Final report

The contractor will have to present to the European Commission the final report within 11 months of the date of the entry into force of the contract, taking into

¹⁴ Official receipt date by DG EMPL, attested by its Archive Department, Internal Mail Service stamp.

¹⁵ Official receipt date by DG EMPL, attested by its Archive Department, Internal Mail Service stamp.

¹⁶ Official receipt date by DG EMPL, attested by its Archive Department, Internal Mail Service stamp.

account, where appropriate, the objections or comments made by the European Commission. The aforementioned final report shall be transmitted by the contractor in both paper and electronic versions compatible with Commission standards (texts in Word, spreadsheets in Excel). Each paper copy will correspond in full with the electronic version. The aforementioned documents, plus two copies of them, must arrive at the Commission no later than the last day of the period of execution of the tasks.

Meetings with the Commission

The contractor may be requested to attend four meetings with the Commission in Brussels: one to kick off the study, one to discuss the inception report within 25 days after receipt of the report, one to discuss the interim report within 25 days after receipt of the report and one to discuss the draft final report within 25 days after receipt of the report.

7.2. Other requirements

i) Publicity and information requirements

1. With a view to facilitating appropriate monitoring, evaluation and valorisation by the European Commission of all results obtained and outputs delivered under PROGRESS programme, the Contractor will be required to provide for each of the tasks required under the present Call:

- Presentation of their key points, as described in point 5.2 above. Key points should be concise, sharp and easily understandable. They shall be provided in English, French and German.

- An executive summary, as described in point 5.2 above.

2. In accordance with the General conditions, all contractors are under the obligation to acknowledge that the present service has received funding from the Union in all documents and media produced, in particular final delivered outputs, related reports, brochures, press releases, videos, software, etc, including at conferences or seminars. In the context of the Community Programme for Employment and Social Solidarity – PROGRESS, the following formulation shall be used:

This (publication, conference, training session etc) is commissioned by the Community Programme for Employment and Social Solidarity - PROGRESS (2007-2013).

This programme is managed by the Directorate-General for Employment, social affairs and equal opportunities of the European Commission. It was established to financially support the implementation of the objectives of the European Union in the employment and social affairs area, as set out in the Social Agenda, and thereby contribute to the achievement of the Lisbon Strategy goals in these fields.

The seven-year Programme targets all stakeholders who can help shape the development of appropriate and effective employment and social legislation and policies, across the EU-27, EFTA-EEA and EU candidate and pre-candidate countries.

PROGRESS mission is to strengthen the EU contribution in support of Member States' commitment. PROGRESS will be instrumental in:

- providing analysis and policy advice on PROGRESS policy areas;
- monitoring and reporting on the implementation of EU legislation and policies in PROGRESS policy areas;
- promoting policy transfer, learning and support among Member States on EU objectives and priorities; and
- relaying the views of the stakeholders and society at large

For more information see: <http://ec.europa.eu/progress>.

For publications it is also necessary to include the following reference: "The information contained in this publication does not necessarily reflect the position or opinion of the European Commission"

With regard to publication and any communication plan linked to the present activity, the Contractor will insert the European Union logo and mention the European Commission as the Contracting Authority in every publication or related material developed under the present contract.

ii) Reporting requirements

PROGRESS is implemented through a results-based management - RBM. Managing for outcomes and results is about working to maximise results for European citizens. This includes:

- Identifying the most important results for European citizens;
- Managing these results, including setting out clearly the desired results, implementing plans based upon these results and learning about 'what works' in the process;
- Seizing opportunities to work together whenever this helps achieve the results.

The Strategic Framework, developed in collaboration with Member States and civil society organisations, sets out the intervention logic for Progress-related expenditure and defines PROGRESS' mandate and its long-term and immediate outcomes. It is supplemented by performance measures which serve to determine the extent to which PROGRESS has delivered the expected results. See in Annex the overview of PROGRESS performance measurement framework. For more

information on the strategic framework, please visit PROGRESS website <http://ec.europa.eu/social/main.jsp?catId=659&langId=en>.

The Commission regularly monitors the effect of PROGRESS-supported or commissioned initiatives and considers how they contribute to PROGRESS outcomes as defined in the Strategic Framework. In this context, the Contractor will be asked to dedicatedly work in close cooperation with the Commission and/or persons authorised by it to define the expected contribution and the set of performance measures which this contribution will be assessed against. The Contractor will be asked to collect and report on its own performance to the Commission and/or persons authorised by it against a template which will be annexed to the contract. In addition, the Contractor will make available to the Commission and/or persons authorised by it all documents or information that will allow PROGRESS performance measurement to be successfully completed and to give them the necessary rights of access.

8. Payments and standard contract

See Article 1.4 and II of the attached draft contract.

Article I.4 (Payment periods and formalities) of the draft contract provides that:

"Payments under the Contract shall be made in accordance with Article II.4. Payments shall be executed only if the Contractor has fulfilled all his contractual obligations by the date on which the invoice is submitted. Payment requests may not be made if payments for previous periods have not been executed as a result of default or negligence on the part of the Contractor.

I.4.1. Pre-financing

Following signature of the Contract by the last contracting party, within 30 days of the receipt by the Commission of a request for pre-financing with a relevant invoice, a pre-financing payment equal to 30% of the total amount referred to in Article I.3.1 shall be made.

I.4.2. Interim payment

Requests for interim payment by the Contractor shall be admissible if accompanied by

- an interim technical report in accordance with the instructions laid down in Annex I,
- the relevant invoices,

provided the report has been approved by the Commission.

The Commission shall have 60 days from receipt to approve or reject the report, and the Contractor shall have 30 days in which to submit additional information or a new report.

Within 30 days of the date on which the report is approved by the Commission, an interim payment corresponding to the relevant invoices, up to maximum 30% of the total amount referred to in Article I.3.1, shall be made.

I.4.3. Payment of the balance

The request for payment of the balance of the Contractor shall be admissible if accompanied by:

- the final technical report in accordance with the instructions laid down in Annex I,
- the relevant invoices,

provided the report has been approved by the Commission.

The Commission shall have 60 days from receipt to approve or reject the report, and the Contractor shall have 30 days in which to submit additional information or a new report.

Within 30 days of the date on which the report is approved by the Commission, payment of the balance of the total amount referred to in Article I.3.1 shall be made.

I.4.4. Performance guarantee

Not applicable."

In drawing up the bid, the tenderer should take into account the provisions of the standard contract comprising the "General terms and conditions applicable to service contracts".

9. Prices

Under the terms of Articles 3 and 4 of the Protocol on the Privileges and Immunities of the European Communities, the latter are exempted from all charges, taxes and duties, including value added tax; such charges may not therefore be included in the calculation of the price quoted. The amount of VAT is to be indicated separately.

The price must be stated in EUR(€), net of VAT (using, where appropriate, the conversion rates published in the C series of the Official Journal of the European Union on the day when the invitation to tender was issued), and broken down according to the model in Annex III included in the attached standard contract.

Part A: Professional fees and direct costs, to be specified:

- Fees, expressed as the number of person-days multiplied by the unit price per working day for each expert proposed. The unit price should cover the experts' fees and administrative expenditure,
- Travel expenses (other than local transport costs),
- Subsistence expenses of the Contractor and his staff (covering the expenditure incurred by experts on short-term trips outside their normal place of work),
- Expenses for the shipment of equipment or unaccompanied luggage, directly connected with performance of the tasks specified in Article I.1 of this Contract,
- Any translation expenses,

- Unavoidable expenses necessary to the achievement of the Contract.

Part B: Reimbursable expenses

Not applicable

Total price = Part A

The total price may not under any circumstances exceed **250,000.00 €**

Tenderers should note that any bid exceeding these limits will not be considered.

10. Groupings of economic operators or consortia

Tenders can be submitted by groupings of service providers/suppliers who will not be required to adopt a particular legal form prior to the contract being awarded, but the consortium selected may be required to assume a given legal form when it has been awarded the contract if this change is necessary for proper performance of the contract¹⁷. However, a grouping of economic operators must nominate one party to be responsible for the receipt and processing of payments for members of the grouping, for managing the service administration, and for coordination. The documents required and listed in the following points 11 and 12 must be supplied by every member of the grouping.

Each member of the grouping assumes a joint and several liability towards the Commission.

11. Exclusion criteria and supporting documents

1) Bidders must provide a declaration on their honour, duly signed and dated, that they are not in one of the situation referred to in Articles 93 and 94 a) of the Financial Regulation.

Those articles are as follows:

"Article 93 :

Applicants or tenderers shall be excluded if:

- a) they are bankrupt or being wound up, are having their affairs administered by the courts, have entered into an arrangement with creditors, have suspended business activities, are the subject of proceedings concerning those matters, or are in any analogous situation arising from a similar procedure provided for in national legislation or regulations;*

¹⁷ These entities can take the form of an entity with or without legal personality but offering sufficient protection of the Commission's contractual interests (depending on the Member State concerned, this may be, for example, a consortium or a temporary association).

The contract has to be signed by all members of the group, or by one of the members, which has been duly authorised by the other members of the grouping (a power of attorney or sufficient authorisation is to be attached to the contract), when the tenderers have not formed a legal entity.

- b) *they have been convicted of an offence concerning their professional conduct by a judgement which has the force of res judicata;*
- c) *they have been guilty of grave professional misconduct proven by any means which the contracting authority can justify;*
- d) *they have not fulfilled their obligations relating to the payment of social security contributions or the payment of taxes in accordance with the legal provisions of the country in which they are established or with those of the country of the contracting authority or those of the country where the contract is to be performed;*
- e) *they have been the subject of a judgement which has the force of res judicata for fraud, corruption, involvement in a criminal organisation or any other illegal activity detrimental to the Communities' financial interests;*
- f) *they are currently subject to an administrative penalty referred to in Article 96(1)¹⁸.*

(...)

Article 94 :

Contracts may not be awarded to candidates or tenderers who, during the procurement procedure:

- a) *are subject to a conflict of interest;*
- b) *are guilty of misrepresentation in supplying the information required by the contracting authority as a condition of participation in the procurement procedure or fail to supply this information;(..."*

2) The tenderer to whom the contract is to be awarded shall provide, within a time limit defined by the contracting authority and preceding the signature of the contract, the evidence referred to in Article 134 of the implementing Rules, confirming the declaration referred to in point 1 above.

Article 134 of the Implementing Rules – Evidence

§3. The contracting authority shall accept as satisfactory evidence that the candidate or tenderer to whom the contract is to be awarded is not in one of the situations described in point (a), (b) or (e) of Article 93(1) of the Financial Regulation, a recent extract from the judicial record or, failing that, an equivalent document recently issued by a judicial or

¹⁸ "Article 96(1): The contracting authority may impose administrative or financial penalties on the following:
 (a) candidates or tenderers in the cases referred to in point (b) of Article 94;
 (b) contractors who have been declared to be in serious breach of their obligations under contracts covered by the budget.
 (...)"

administrative authority in the country of origin or provenance showing that those requirements are satisfied. The contracting authority shall accept, as satisfactory evidence that the candidate or tenderer is not in the situation described in point (d) of Article 93(1) of the Financial Regulation, a recent certificate issued by the competent authority of the State concerned.

Where the document or certificate is not issued in the country concerned, it may be replaced by a sworn or, failing that, a solemn statement made by the interested party before a judicial or administrative authority, a notary or a qualified professional body in his country of origin or provenance.

§4. Depending on the national legislation of the country in which the candidate or tenderer is established, the documents referred to in paragraph 3 shall relate to legal persons and/or natural persons including, where considered necessary by the contracting authority, company directors or any person with powers of representation, decision-making or control in relation to the candidate or tenderer.

See Annex I (which may be used as a checklist) for the supporting documents accepted by the European Commission to be provided by applicants, tenderers or tenderers to whom the contract will be awarded.

3) The contracting authority may waive the obligation of a candidate or tenderer to submit the documentary evidence referred to in Article 134 of the Implementing Rules, if such evidence has already been submitted to it for the purposes of another procurement procedure launched by DG EMPL and provided that the issuing date of the documents does not exceed one year and that they are still valid.

In such a case, the candidate or tenderer shall declare on his honour that the documentary evidence has already been provided in a previous procurement procedure and confirm that no changes in his situation have occurred.

12. Selection criteria

The candidates will be selected on the basis of their economic and financial capacity and their professional and technical capacity.

12.1. Economic and financial capacity:

Economic and financial capacity to carry out the tasks set out in the tender specification must be demonstrated as follows:

(i) the tenderer (or all partners of the consortium together) must provide proof of a turnover of at least twice the amount of the contract in the last financial year for which accounts have been closed.

(ii) balance sheets or extracts from balance sheets from the last three financial years that have been closed, where publication of the balance sheets is required under company law

in the country in which the service provider is established; in the case of tenders from consortia, this certificate must be provided by each member of the consortium;

(iii) if one or both of the above mentioned documents cannot be provided because of duly justified reasons, a bank declaration providing evidence of good financial standing may be accepted if the Commission so decides; in the case of tenders from consortia, this declaration must be provided by each member of the consortium.

If, for some exceptional reason which the contracting authority considers justified, the tenderer or candidate is unable to provide the references requested by the contracting authority, he may prove his economic and financial capacity by any other means which the contracting authority considers appropriate.

12.2. Professional and technical capacity:

The tenderer's professional and technical capacity in the field covered by the contract will be notably assessed on the basis of the following:

- (a) Detailed CV's of the members of the study team responsible for providing the service, together with a listing of those designated as the co-ordinator and other experts to be used for the study along with their CVs. The CVs shall be presented in accordance with the model as shown in the Annex to these terms;
- (b) A list of principal services or studies provided in the fields of transfers of undertakings and insolvency over the past five years, with sums, dates and recipients (whether public or private) identified;
- (c) Solid experience of analysis in the fields of transfers of undertakings and insolvency and socio-economic evaluation, including the theoretical and empirical aspects, as attested by the published work accredited to the members of the expert team in these fields;
- (d) For the senior expert(s) (including the study coordinator) and members of the steering committee or scientific committee, who must satisfy the requirements for Level II experts (see the table in Annex IV of the draft contract), this will require distinguished academics and/or practising lawyers and/or practitioners with: proven expertise and at least 10 years professional experience with at least 4 years experience in dealing with legal issues in the areas of transfers of undertakings and insolvency and in conducting socio-economic evaluation in the areas concerned by the study, including the theoretical and empirical aspects;
- (e) For the other experts forming part of the team, who must satisfy the requirements for at least Level III experts (see the table in Annex IV of the draft contract), this will require experienced lawyers and/or academics and/or practitioners with: proven expertise and a minimum of 5 years professional experience of which at least 2 years experience in dealing with legal issues in the areas of transfers of undertakings and insolvency and in conducting socio-economic evaluation, including the theoretical and empirical aspects, in the Member States concerned;

(f) The experts must have good knowledge of European Union law, in particular the labour law acquis;

(g) Proven ability (on the basis of past experience) on the part of the co-ordinator to deal effectively with the co-ordination and administrative tasks involved in organising and managing a team of experts capable of critically assessing legal developments in all the countries concerned by the contract. This expert must demonstrate the experience and ability to perform the management and coordination of large-scale contracts and studies at European level;

(h) Excellent knowledge of English on the part of the coordinator and the senior expert(s) to ensure communication with the Commission and, in particular, ability to draw up reports and to work in English.

(i) A declaration by the co-ordinator certifying the competence of the team to carry out the study, including their respective professional and linguistic capabilities;

(j) In the case of tenders from consortia: clear identification of the co-ordinator of the work who will also be responsible for signing the contract, and written confirmation from each member of the consortium that they would be ready and willing to participate in the execution of the contract, and briefly describing their role(s).

13. Award criteria

The contract will be awarded to the bid offering the best price/quality ratio, taking account of the following criteria:

a) Quality of the offer

- Approach - Depth of conceptual understanding of the nature of the assignment, its context and the results to be achieved, creativity and quality of the approach to the tasks to be performed. (30 points)
- Methodology –The tenderer should describe clearly the way, as well as the methods to be used, in which the tasks will be performed and the analyses will be undertaken, i.e. the various steps envisaged for collecting the necessary data, the methodology for organising and coordinating the research and analytical work, the documentary efforts to be undertaken etc. The tenderer should also explain how the various parts of the analysis will be integrated into the conceptual approach and final outcome and assessment. (40 points)
- Work Organisation - the quality of the strategy for organising and coordinating the work, in particular of the administrative and logistical tasks involved and feasibility of the time schedule provided; this criteria also includes clarity and coherence of the work programme and the overall management of the project. (30 points)

b) The Price

Please note that the contract will not be awarded to any bid that receives less than 70 % in the award criteria. The points total will then be divided by the price, with the highest-scoring bid being chosen.

14. Content and presentation of bids

14.1. Content of bids

Tenders must include:

- all information and documents necessary to enable the Commission to appraise the bid on the basis of the selection and award criteria (see points 12 and 13 above);
- a bank ID form duly completed and signed by the bank;
- a "legal entity" form duly completed;
- the price;
- the detailed CVs of the proposed experts;
- the name and function of the contractor's legal representative (i.e. the person authorised to act on behalf of the contractor in any legal dealings with third parties);
- proof of eligibility: tenderers must indicate the State in which they have their registered office or are established, providing the necessary supporting documents in accordance with their national law.

14.2. Presentation of bids

Bids must be submitted in triplicate (i.e. one original and two copies).

They must include all the information required by the Commission (see points 9, 10, 11 and 12 above).

They must be clear and concise.

They must be signed by the legal representative.

They must be submitted in accordance with the specific requirements of the invitation to tender, within the deadlines laid down.

ANNEX – MODEL CV FOR THE PRESENTATION OF EXPERTS

Personal information

Surname(s) / First name(s) **Surname(s) First name(s)**
 Nationality (remove if not relevant)
 Date of birth (remove if not relevant)
 Gender (remove if not relevant)

Relevant professional experience

Add separate entries for each relevant professional experience (specify dates, number of months spent in the project of professional activity, description of tasks and employer/commissioner, starting by the most recent)

Education and training

Dates Add separate entries for each relevant training you have completed, starting from the most recent. (remove if not relevant)
 Title of qualification awarded
 Principal subjects/occupational skills covered
 Name and type of organisation providing education and training

Personal skills and competences

Mother tongue **Specify mother tongue** (if relevant add other mother tongue(s))
 Other language(s)
 Self-assessment

Understanding		Speaking		Writing
Listening	Reading	Spoken interaction	Spoken production	

Language
Language

Other relevant skills and competences Replace this text by a description of these competences and indicate where they were acquired. (Remove if not relevant)

Additional information

| Include here any other information that may be relevant. (Remove heading if not relevant)

OVERVIEW OF PROGRESS PERFORMANCE MEASUREMENT FRAMEWORK

PROGRESS Ultimate Outcome

Member States implement laws, policies and practices in a manner that contributes to the desired outcomes of the Social Agenda

PROGRESS works towards its ultimate outcome by helping strengthen the EU's support for Member States' efforts to create more and better jobs and to build a more cohesive society. PROGRESS seeks to contribute to (i) an **effective legal regime** in the EU in relation to the Social Agenda; (ii) **shared understanding** across the EU with regard to Social Agenda objectives; and (iii) **strong partnerships** working towards Social Agenda objectives.

In operational terms, support provided by PROGRESS facilitates (i) provision of analysis and policy advice; (ii) monitoring and reporting on the implementation of EU legislation and policies; (iii) policy transfer, learning and support among Member States; and (iv) relaying to decision-makers the views of the stakeholders and society at large.

Legal Regime

Outcome:

Compliance in Member States with EU law related to PROGRESS areas.

Performance Indicators

1. Transposition rate of EU law on matters related to PROGRESS policy areas
2. Effectiveness of application in Member States of EU law on matters related to PROGRESS policy areas.
3. EU policies and legislation are grounded in thorough analysis of situation and responsive to conditions, needs and expectations in Member States in PROGRESS areas
4. Extent to which PROGRESS-supported policy advice feeds into the development and implementation of EU legislation and policies
5. Cross-cutting issues are addressed in PROGRESS policy sections
6. EU policies and legislation display a common underlying logic of intervention in relation to PROGRESS issues
7. Gender mainstreaming is systematically promoted in PROGRESS

Shared Understanding

Outcome:

Shared understanding and ownership among policy/decision-makers and stakeholders in Member States, and the Commission, of objectives related to PROGRESS policy areas.

Performance Indicators

1. Attitudes of decision-makers, key stakeholders and general public regarding EU objectives in PROGRESS policy areas
2. Extent to which national policy discourses or priorities reflect EU objectives
3. Extent to which principles of good governance (including minimum standards on consultation) are respected in policy debate
4. Extent to which the outcomes of policy debates feed into the development of EU law and policy.
5. Greater awareness of policy-and decision-makers, social partners, NGOs, networks regarding their rights/obligations in relation to PROGRESS policy areas
6. Greater awareness of policy-and decision-makers, social partners, NGOs, networks regarding EU objectives and policies in relation to PROGRESS policy areas

Strong Partnerships

Outcome:

Effective partnerships with national and pan-European stakeholders in support of outcomes related to PROGRESS policy areas.

Performance Indicators

1. Existence of common ground/consensus among policy and decision-makers and stakeholders on EU objectives and policies
2. Identification and involvement by the EU of key actors in a position to exert influence or change at EU and national levels
3. Effectiveness of partnerships in relation to outcomes related to PROGRESS policy areas.
4. Number of individuals served or reached by networks supported by PROGRESS.
5. Extent to which advocacy skills of PROGRESS-supported networks have improved
6. Satisfaction of EU and national authorities with the contribution of networks
7. Extent to which PROGRESS-supported networks take a cross-cutting approach