Public Procurement and Labour Rights: Governance by Scaremongering?

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1. Background

The regulation of public procurement is one of the most encompassing harmonisation projects in European law. The purpose is to open up projects that are publicly funded for competition on the whole internal market. Therefore the European Union has introduced a detailed and complicated system of procedural rules that have to be followed before a public entity enters into a procurement contract.

From a governance perspective the public procurement legal regime is rather special, because it interferes in the contractual relations between public and private actors and it also involves – in different ways – different actors on multiple levels: A large part of public contracting takes place at local level, for example on behalf of municipalities, which means that local authorities are involved. But contracting – and to some extent regulation of public procurement – can also take place at regional level, which is the case for example in a federal state like Germany. The national level is important both as the level where general legislation is adopted, and also because this is where administrative and judicial governance of public procurement usually takes place. Last but not least, the EU is significant as the overall regulatory level, and as the level for judicial review in the form of preliminary rulings and direct actions in the Court of Justice of the European Union (CJEU).

As the vast majority of public procurement projects are performed by paid labour and the costs for wages and other working conditions have to be calculated when bidding for public contracts, there are certain links between labour rights and public procurement. However, as the CJEU’s decision in C-271/08 Commission v. Germany (which we will describe later) has shown, there are other, less self-evident, interconnections between public procurement and labour rights as well. In this article we are specifically interested in exploring how labour rights are dealt with in the context of public procurement, and what implications the multilevel structure of the public procurement legal regime has had for this. By way of background, we shortly present a general picture of the scope for social considerations in public procurement, a subject which we have dealt with in detail in a recently published report in Swedish.¹

2. The EU rules on public procurement – an overview

Much – but by no means all – public procurement in the Member States is governed by EU regulation. The purpose of this regulation is to improve the function of the single market and eliminate the risk of national authorities discriminating, directly or indirectly, against foreign undertakings in the course of their procurement.

The main provisions are contained in two directives, namely, the “Utilities” Directive on procurement of water, energy, transport and postal services, and the “Classic” Directive on the award of public works contracts, public supply contracts and public service contracts. A third directive specifically concerns procurement in the fields of defence and security. These three directives are supplemented by two more which are aimed at ensuring that the Member States have effective procedures in place for examining the propriety of a procurement. In addition, there are a couple of legal instruments of a more “technical” nature, aimed at simplifying public procurement procedure.

One thing which all these legal instruments have in common is that they only apply to procurements exceeding certain threshold values. But the threshold values are not the only things deciding whether the provisions of the Directives are applicable. Procurement of certain types of services (known as non-priority services), such as health and social services, education and vocational education and hotel and restaurant services, is only partly subject to the Directives, even if the contract is worth more than the threshold values. Certain other services are exempted altogether.

This is not to say that the Member States can do as they please in procurements not coming under the Directives. The CJEU has laid down that the rules of the Treaty and the principles of the single market apply to those procurements as well – provided that the procurement is of

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transnational interest in the first place. Thus, this case law only applies to contracts of
importance for the single market. In the case of procurements not coming under the directives,
then, it is for the procuring authorities themselves to judge whether the procurements can be of
any interest to economic players in other Member States. If not, then Community law will not be
at all applicable.

The Directives, needless to say, are based on the same Treaty articles and principles as CJEU
case law, but on at least one point of particular importance for our purposes they include a rule
which has no counterpart in case law. The Directives (Articles 55 and 53 respectively) require
the contract to be awarded either to the economic operator offering the lowest price or to the one
submitting “the most economically advantageous tender”. But the case law on procurements not
coming under the Directives has nothing to say concerning the criteria for the award of contracts,
so long as they are transparent, non-discriminatory and verifiable. The same applies to
procurement of the “non-priority services” which are only partly subject to the Directives.

3. The procurement procedure

Procurement is a strictly structured procedure, and the Directives contain rules for all its phases,
to guarantee that economic operators everywhere in the EU/EEA will be given genuine and equal
opportunities of taking part, and to prevent the inclusion of irrelevant considerations in the
selection process. Various kinds of societal consideration may come into question in each of
these phases, but what type of social policy requirements a procuring entity can lay down varies
from one phase to another, and so one must be careful to distinguish between them. Here two
aspects can be observed:

- To what extent can contracting authorities prevent enterprises that compete with poor
  employment and working conditions from taking part in procurement? There is no doubt
  that all contractors should comply with all applicable rules of labour law, but it is not
  equally clear what means the authority can use to safeguard that this will in fact happen.
- To what extent can the authorities use their purchasing power in order to further positive
  measures aimed at realising social policy objectives beyond the minimum requirements of
  applicable legislation?

3.1 Determining the subject of the procurement

The EU provisions are concerned with procurement procedure. They have nothing to do with
what happens beforehand. In principle, then, an authority having identified a need is at liberty to
decide how that need will be provided for, if indeed the need occasions any purchase at all, or
whether the need should be met through activities under the authority’s own aegis. The only
restriction applying if the authority decides to resolve the problem by procurement is that the
subject of the procurement, the subject matter of the contract, may not be defined in such a way that tenderers from other Member States are disfavoured.

3.2 The description of the subject matter of the procurement

The way in which the subject matter of the contract is described in the invitation to tender, however, can in itself decide whether or not a certain operator will be able to participate in the procurement, and so the directives include rules on this point. Among other things it is stipulated (Article 23)\(^5\) that technical specifications “shall afford equal access for tenderers and not have the effect of creating unjustified obstacles to the opening up of public procurement to competition.” Accordingly, the specifications are to be stated either as references to standards of different kinds or in terms of performance or functional requirements, or as a combination of these things.

The technical specifications define the quality, in a strict sense, of the goods or services to be procured. This means that there is little room for including requirements that concern the employment and working conditions of those who will perform the work, unless this can contribute to the quality of the subject matter of the contract. However, as part of the technical specifications for works, supply or service contracts, production processes and methods can explicitly be taken into account. Thus, for example, the technical specifications for public works contracts may include technical requirements aiming to protect the health and safety of the workers at the construction site.

3.3 Delimitation of those eligible to participate

The question of which undertakings can join in competing for the contract is then decided by two types of selection criteria.

First, the contracting authority may require candidates and tenderers to meet a minimum level of economic and financial standing and of professional and/or technical ability. The Directives contain an exhaustive list of criteria that the contracting authority is allowed to use in order to assess if candidates have sufficient professional and/or technical ability to fulfil the requirements specified in the contract. Other criteria cannot be applied. Also, the minimum levels of professional and/or technical ability required by the procuring authority must be proportionate and related to the subject matter of the contract.

Thus if it is necessary that the contractor has special skills in the social field or specific technical equipment in order to be able to fulfill the social aspects of the contract, then this can be used as a selection criterion. Here it has been argued that this should include a possibility to ask the tenderers to give evidence of their ability to manage health and safety issues at the work place by indicating what methods and equipment they use in order to ensure a safe work environment.

\(^5\) Article numbers refer to Directive 2004/18.
However, the Directives only refer to “environmental management measures” (Article 48(2) f) and it is doubtful whether this can interpreted as covering work environment measures.6

The second type of selection criterion lays down that candidates may, or indeed shall, be excluded from participation on grounds of personal unsuitability. Two of these grounds for exclusion relate to social issues: an economic operator may (but need not necessarily) be excluded if it has neglected to pay social security contributions or has been guilty of grave professional misconduct, proven by any means that the contracting authority can demonstrate (Article 45(2)). The definition of what is “grave professional misconduct” is left to the Member States, but it is clear from the examples in the Recitals of the Directive’s Preamble that it may consist in failure to comply sufficiently with certain provisions of labour law.7

3.4 Award of the contract

When the tenders have been opened and tenderers not meeting the selection criteria have been weeded out, the tenders remaining have to be compared. As we have seen, there now remain only two possibilities if the procurement is of a kind to which the Directive is fully applicable. The contract must be awarded either to the tenderer quoting the lowest price or to the tenderer submitting the tender which is most economically advantageous from the viewpoint of the contracting authority (Article 53). In the latter case, in other words, various qualitative factors can be balanced against the price.

If the contract is to be awarded to the tenderer quoting the lowest price, the matter is fairly straightforward. Judging what is most economically advantageous can be more difficult, added to which, opinions differ as to the type of criteria to be included in this assessment. They must, however, be “linked to the subject-matter of the public contract in question”, and Article 53

6 Ahlberg & Bruun (2010) p. 34 et seq.
7 Recital (34): “The laws, regulations and collective agreements, at both national and Community level, which are in force in the areas of employment conditions and safety at work apply during performance of a public contract, providing that such rules, and their application, comply with Community law. In cross-border situations, where workers from one Member State provide services in another Member State for the purpose of performing a public contract, Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services (1) lays down the minimum conditions which must be observed by the host country in respect of such posted workers. If national law contains provisions to this effect, non-compliance with those obligations may be considered to be grave misconduct or an offence concerning the professional conduct of the economic operator concerned, liable to lead to the exclusion of that economic operator from the procedure for the award of a public contract.”

From Recital (43): “Non-observance of national provisions implementing the Council Directives 2000/78/EC (1) and 76/207/ECC (2) concerning equal treatment of workers, which has been the subject of a final judgment or a decision having equivalent effect may be considered an offence concerning the professional conduct of the economic operator concerned or grave misconduct.”
gives examples, environmental characteristics being one of them. It is clear from Recital 46 of the Preamble that criteria aimed at meeting social requirements may also be included, but this has not been given expression in the Article. The examples given in the Preamble do not concern labour rights, and the question of what types of social criteria a procuring authority can take into account for judging what is most economically advantageous is one of the most controversial. 

Regardless of whether one is to choose the tender with the lowest price or the tender which is most economically advantageous, there is a possibility of rejecting tenders which are abnormally low. First, however, the contracting authority must give the tenderer a chance of clarifying the conditions on which the tender is based. The clarifications may, for example, concern the compatibility of the tender with the rules of employment protection and working conditions in the place where the service is to be provided.

### 3.5 Drawing up the contract

Once the authority has decided which tenderer is to be awarded the contract, it remains for the contract to be drawn up. Here it is permissible, under Article 26, to “lay down special conditions relating to the performance of a contract” and the article specifically provides that the requirements may include social and environmental considerations.

It goes without saying that any contractor is supposed to comply with all applicable national law, including the rules on workers’ rights. However, the procuring entity may want to underline this in the contract and couple this requirement to some kind of contractual sanction, should the contractor fail to do so. Even more, the procuring entity may impose conditions that go beyond the mere compliance with mandatory minimum rules and aim at furthering positive social policy objectives, for example that the contractor has to pay its workers according to the collective agreement in place where the work is performed or that it should take measures aimed at promoting equality between men and women or ethnic diversity during the performance of the contract. Other examples are instanced in point 33 of the directive’s preamble.

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8 From Recital 46: "Under the same conditions, a contracting authority may use criteria aiming to meet social requirements, in response in particular to the needs — defined in the specifications of the contract — of particularly disadvantaged groups of people to which those receiving/using the works, supplies or services which are the object of the contract belong."

9 Ahlberg & Bruun (2010) p. 38 et seq. and 73 et seq.

10 From Recital 33: “They may, in particular, be intended to favour on-site vocational training, the employment of people experiencing particular difficulty in achieving integration, the fight against unemployment or the protection of the environment. For instance, mention may be made, amongst other things, of the requirements — applicable during performance of the contract — to recruit long-term job-seekers or to implement training measures for the unemployed or young persons, to comply in substance with the provisions of the basic International Labour Organisation (ILO) Conventions,"
There is no doubt that authorities that want to use their purchasing power for furthering social policy objectives have the widest room to manoeuvre when laying down the conditions for the performance of the contract. The reason is that these are conditions that any tenderer will have to accept if it is awarded the contract. Thus they do not affect the choice of contractor.

However, here too there are some limitations. First, contract performance conditions must have been indicated already in the call for tenders, so the tenderers are able to take them into consideration when calculating their offers. Second, they must be linked to the performance of the contract. In other words, they cannot relate to the contractor’s business in general, only to the work covered by the contract in question and the workers occupied with performing this work. Third, the contract performance conditions must be compatible with Community law. As is well known after Laval and Rüffert, this neutral wording means that in case the contract will be performed by workers posted from another country, authorities cannot make the participation in a public procurement conditional on the observance of terms and conditions in just any type of collective agreement. This restriction does not apply if the work is performed by workers employed by domestic companies. Even though Rüffert concerned a public contract it did not concern the interpretation of public procurement legislation, only the Posting Directive.

4. The multilevel governance of labour rights in public procurement

4.1 The points of departure

Many Member States have a long tradition of using their procurement for promoting different social policy objectives. However, in a number of cases before the CJEU from the 1980’s and onwards the European Commission had demonstrated that it did not accept how this was done. Similarly, in 1998 officials at the Directorate-General for the internal market warned the Swedish Government in a “non-paper” not to ratify the ILO Convention No 94 on labour clauses in public contracts, as this might be contrary to EU law on public procurement and posting of workers. As a consequence, when the EU Procurement Directives came up for revision at the beginning of the millennium a number of Member States, among them Sweden and Denmark, often supported by Belgium and France and by the Parliament, eagerly advocated that the scope for taking social

assuming that such provisions have not been implemented in national law, and to recruit more handicapped persons than are required under national legislation.”


considerations into account would be expressly defined in the Directives.\textsuperscript{13} On the trade union side voices were even heard calling for them to directly enjoin the integration by national authorities of social considerations in their procurement activities.

The Commission, represented by DG Internal market, opposed to all this. Its arguments went primarily along two lines. One was systematic: as the object of the projected Directives was to coordinate procedures for the award of public contracts and not to impose specific obligations concerning social or other legislation on companies, the substantive provisions of these Directives were simply not the right place. The second line of argument concerned the appropriateness of allowing procuring entities a wide scope for using social criteria at different stages of the procedure. This would leave the field open for all sorts of irrelevant considerations, the Commission argued. Only as an exception it brought forward legal arguments, notably against Sweden’s proposal that the Directives should explicitly allow the contracting authority to oblige economic operators to apply working and employment conditions not less favourable than those established in the trade or industry concerned, and the introduction of a recital, implying that the Directives would not affect the application of ILO Convention No 94 or prevent a Member State from ratifying it. This would be contrary to EU law, according to the Commission.

The great debate ended in a kind of neutrality approach. As shown above, parts of the Preambles confirm the existence of some scope for considerations prompted by social policy. It is up to the Member States to decide to what extent they want to make use of this scope, as long as they respect the general principles of transparency, non-discrimination and equal treatment. Thus the first point of departure is that the public procurement regime is neutral to the question whether it is advisable or not to use the procurement for safeguarding labour rights.

The second point of departure is that the EU has no say in how Member States want to spend tax payers’ money. If they want to keep up high standards of work environment or high minimum wages it is primarily a policy matter for the Member State. No direct obligation on Member States to secure more “value for money” can be inferred from the procurement Directives.\textsuperscript{14}

\textsuperscript{13} A thorough record of different actors’ positions and arguments during the negotiations over the Directives can be found in Ahlberg & Bruun (2010), p. 28 et seq.

4.2 Labour rights in public procurement context become primarily a national issue

Thus, EU law leaves more or less explicitly to the Member States to decide how to handle the issue of labour rights in their public procurement. The individual Member State’s policy in this field, in turn, is a result of decisions taken at national as well as regional and local levels.

National actors

- The legislator has to deal with this when preparing the legislation for implementation of the EU Directives. In most Member States public procurement is a “competition issue”, so in case the labour ministries are at all involved in the implementation phase, they are likely to have a mere consultative role.
- In line with this, the administrative guidance on how to handle public procurement is primarily given by competition authorities.
- The judicial review takes place in administrative courts or other courts that are unfamiliar with labour rights.

All this taken together is likely to lead to a kind of imbalance, where social considerations are to some extent neglected in favour of economic considerations. If we are allowed to generalize: The experts on procurement law are often inclined to agree with the kind of arguments against “procurement alien factors” put forward by the European Commission’s GD for the internal market.

In several countries there is another factor that adds to this imbalance. While rules on procurement are primarily an issue for the national legislator, regulation of labour rights are to a great extent left to the social partners (e.g. in the Nordic countries) or the regional legislator (as in Germany).

Local perspectives

In many (most?) countries, local authorities account for the largest volumes of public procurement, and they have an interest in how tax payers’ money is used. Municipalities, county councils and regions may want to buy only ethical trade goods, to promote employment of persons with a weak position on the labour market or to prevent the undermining of applicable collective agreements.

But if the openness and neutrality on EU level is combined with a lack of interest and motivation to take a stand on national level, this may cause difficulties on local level. In such cases, local authorities tend to resort to a “precautionary principle” and refrain from using criteria and conditions aimed at securing labour rights, as the procurement procedure is complex and time consuming, and they do not want to risk a delay caused by a judicial review. As a consequence, their policies are in fact governed by the European Commission’s opinion, expressed in its
interpretative communication\textsuperscript{15} or Guide\textsuperscript{16} which are the outcomes of compromises within the Commission and which are not legally binding.

**Three examples**\textsuperscript{17}

The situation in Sweden, for example, may serve as an illustration to the above. Quite paradoxical, the political will demonstrated by the Swedish Government in the negotiations in the Council is not mirrored in the legislation transposing the Directives finally adopted. The text of the Public Procurement Act is more or less a blueprint of the Directives and, as such, simply reproduces their neutral approach to the inclusion of social policy considerations in public procurement. The preparatory works, which are very important for the interpretation of Swedish legislation, do not pay much attention to the issue apart from repeating some phrases from the Commission’s communication of 2001. In fact, the Swedish legislator does not even utilise the scope expressly provided for in the Directives. As a consequence, contracting authorities which want to use their purchasing power for promoting social policy objectives are not given any guidance on how, let alone any incitement, to do so. In addition, the Public Procurement Act makes most of the provisions of the Directives applicable to procurements that are not, or only partly, governed, by the Directives.

The proper application of the Act is monitored by the Swedish Competition Authority, which explicitly disfavours obligations or even recommendations to include social criteria, as being too burdensome – for the contracting authorities in the first place, not so much for the contractors.\textsuperscript{18} Also, it is symptomatic that when the Competition Authority publishes opinions on the use of labour clauses in procurement contracts, it focuses on what is forbidden and has obvious difficulties in explaining (correctly) what is allowed. Judicial review takes place in the administrative courts. In some cases these courts have excluded the application of the rules on protection of workers in the event of transfers of undertakings, basing their conclusions exclusively on procurement law arguments and without trying one single argument that is relevant for deciding whether a transfer has taken place or not.

In Germany, it has been a wide spread practice among authorities ever since the 1970s to integrate social considerations in their procurement. At that time, tenderers who could show that they had taken positive action to promote equal opportunities for men and women or who were open to employ apprentices were often given preference before other tenderers. Also, it was

\textsuperscript{15} COM(2001) 566 on the EU law applicable to public procurement and the possibilities for integrating social considerations in public procurement.


\textsuperscript{17} The examples are taken from a comparative research project published in Ahlberg & Bruun (2010).

\textsuperscript{18} Utvärdering av antidiskrimineringsförordningen, Konkurrensverkets rapportserie 2009:2, p. 79; Miljöhänsyn och sociala hänsyn i offentlig upphandling, Konkurrensverket 2011, p.10
usual practice to require that tenderers signed a “loyalty declaration” were they undertook to pay their employees the collectively agreed rate for the area. These practices were based on circulars, ordinances or regulations at Länder level, or simply on custom. As time went by, they were called into question by national authorities such as the Bundeskartellamt (the Competition Authority) as being contrary to EU law as well as to national law.\textsuperscript{19} Thus, the tension between authorities responsible for competition issues and authorities that have a broader mission is not unfamiliar in Germany. However, the German legislation approaches public procurement from a broader perspective.

Procurement over the Directives’ thresholds are governed by Part 4 of the federal Act against Restraints of Competition, GWB. Already in its initial Section (§ 97) on General Principles it underlines that contract performance conditions can be applied which concern, in particular, “social, environmental and innovative considerations”. In the preparatory works, the Government specifies that undertakings which do not respect, \textit{inter alia}, generally binding collective agreements, the equal pay principle or the principles and rights enshrined in ILO core Conventions are to be excluded from competing for public contracts. Procurements under the thresholds are regulated by legislation on Länder level. The GWB authorises the Länder to adopt more far-reaching requirements, a possibility that several of them have utilised, for example for adopting so-called \textit{Tariftreuegesetze}, i.e. the kind of legislation that has become famous through the \textit{Rüffert} case.

During the negotiations over the Directives in the Council, Denmark very much took the same position as Sweden. However, unlike the Swedish Government, Denmark’s Government pursued the same policy at national level after the Directives had been adopted. This is not immediately obvious from the legislation. First, Denmark has made the Directives as such binding through a decree, which applies exclusively on procurements fully governed by these. Second, it has adopted separate legislation for procurements which are not, or only partly covered by the Directives. The text of this Act too is neutral to the issue of social considerations. Instead, this policy is manifested in circulars, guides and legislation in other areas. In line with the ILO Convention No 94, a circular from the Ministry of Finance obliges all central state authorities to include labour clauses in their contracts, and recommends local authorities to do likewise. Another circular gives detailed information on how state authorities can, and should, ensure that the interests of its employees are guaranteed when it is considering outsourcing part of its activities. The Work Environment Act obliges both private and public clients to take account of possible health and safety consequences when drawing up invitations for tenders etc. Last but not least, the Danish Competition and Consumer Authority has issued a guide with positive examples on how to act in order to integrate social considerations in procurement within the

\textsuperscript{19} In 2006 the Constitutional Court finally ruled that the \textit{Tariftreueklausel} in Land Berlin’s Public Procurement Act was compatible with the Constitution as well as with other parts of German law, BVerfG, 11 BvL 4/00 vom 11.7.2006.
limits set by law. It underlines that the scope is much wider in procurements not coming under the Directives. It is an encouraging and independent piece of work, which even questions the European Commission’s interpretation of the CJEU’s case-law.

4.3 Cases brought before the Court of Justice of the European Union refer the issue back to the EU-level

As stated above, as point of departure EU law is neutral to the issue of social considerations in public procurement as long as the general principles of transparency, non-discrimination and equal treatment are respected. However, when cases where labour rights are at the back of it are brought before the CJEU, the Court seems to attach very little importance to the characteristics of national systems for industrial relations even when different economic actors are treated equally, as in Rüffert. In Germany, collective agreements on wages are concluded at regional, i.e. Länder, level, and the wages agreed differ considerably between these, especially after the German re-unification in 1989. There are also a few examples of collective agreements which cover the entire Federal Republic and which have been declared generally binding between employers and employees who are not bound by a collective agreement at Länder level. Rüffert concerned the conditions used in public contracts for building services in Niedersachsen, which obliged contractors to pay their employees at least the remuneration prescribed by the collective agreement at the place where the services were performed, in other words the regional collective agreement. This applied equally to all contractors. Nevertheless, this was and infringement of EU law, the Court concluded. The regional collective agreement was not declared generally binding, and since Germany has such a system it is reduced to using that when posted workers are involved. The Court’s strong emphasis on internal market values and formal equal treatment between the Member States when interpreting the Posted Workers Directive seems to undermine the principle of neutrality of the Procurement Directives that the EU legislator choose as a compromise solution.

In C-271/08 Commission v. Germany, national industrial relations traditions had to recede to EU public procurement law even though the question was in fact not about spending public money, but workers’ own wages. The point at issue in this case was in what situations a public authority is at all obliged to apply the rules on public procurement, and more specifically if it can negotiate a collective agreement in which it agrees with the trade unions on entrusting the administration of the employees’ old age pension to a specific insurance institution, without a call for tenders at European Union level. The Court’s answer was in the negative. It recognised that the right to bargain collectively and to conclude collective agreements is afforded special protection, but asserted that the exercise of these rights must be reconciled with the requirements stemming from the freedoms protected by the TFEU. After that, it gave its view on how the social objectives pursued by the parties to the collective agreement could be reconciled with the requirements of the procurement Directives. Seen from a procurement law perspective, the Court
actually developed in a positive way what scope the Directives leave for taking social considerations into account. For example, it stated that it is possible to let workers or their representatives participate in the contracting entity’s taking of the decision on which insurer that is to be awarded the contract.20 This had not been self-evident for “hard core” procurement lawyers. From a labour law perspective on the other hand, the ruling intrudes on the contractual freedom of the social partners in an unprecedented manner and makes public procurement a part of collective bargaining in the public sector.

4.4 The Court’s judgments restrict the freedom of action at national level

Before its decisions in Rüffert and Commission v. Germany, the CJEU had often demonstrated a comparably permissive approach to including other than purely economic aspects in public procurement. Unlike the Commission, in C-225/98 Commission v. France the Court accepted that the tenderers’ ability to contribute to a local project to combat unemployment could be used as an additional award criterion, even though it was not linked to the subject matter of the contract. In C-513/99 Concordia Bus Helsinki it approved of an award criterion connected with protection of the environment, and concluded that it did not violate the principle of equal treatment solely because it could be met only by very few undertakings (among which were the contracting entity's own transport company). But with Rüffert and Commission v. Germany, which deal more specifically with labour rights, it took a way which serves to reinforce the restrictive practice on national level. However, if you look at what has in fact happened, the picture is not unambiguous.

The greatest consequences at national level so far have followed from Laval and Rüffert, although neither of them dealt with the interpretation of EU law on public procurement.

In this context, an interesting development has taken place in Germany. On the one hand, Länder that had legislation similar to Niedersachsen’s legislation on public procurement (which was at issue in Rüffert) could not continue to apply these. On the other hand, this seems to have occasioned a new resolution among the legislators to ensure that the Government acts as a model for socially acceptable contract relations – as far as possible with regard to EU law. As one author puts it: three years after the preliminary ruling, Germany has overcome the “Rüffert shock”.21 At the time of the CJEU’s decision, nine German states had so-called Tariftreuegesetze. In July 2011, eight states had adopted new such laws and four more were preparing legislation. In other words, in a near future more states will have Tariftreuegesetze than before Rüffert. Of course, for procurements where the German Posting of Workers Act is applicable, the contractors’ obligations are limited to guaranteeing their employees the conditions in collective agreements declared generally binding and/or the minimum wages specific to certain sectors that

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20 Paragraph 55.
have been introduced under the Act on minimum conditions of employment (Mindestarbeitsbedingungengesetz). However, this does not apply to contracts for services in the public transport sector, where Rüffert is deemed not to be relevant. Here, most of the new laws require that the contractors apply the terms and conditions of the collective agreement in place where the service is provided. A third novelty is that six states have introduced, or plan to introduce, procurement specific minimum wages that must be applied in procurements which do not belong to either of the two earlier categories. The sums, which vary between 7.50 Euro and 8.62 Euro per hour, are said to correspond to the lowest tariff groups in the collective agreements in place in the state in question.\(^ {22} \)

Even though Germany has not ratified the ILO Convention No 94 on labour clauses in public contracts, the legislation ruled incompatible with EU law in Rüffert built on the same principle as the Convention. So, what conclusions did those Member States that have ratified it draw?

At the 97th session of the International Labour Conference in May 2008, the Governments of Denmark and Norway held a fervent speech in defence of the Convention (which they have ratified) and underlined that it is useful especially when foreign service providers win the tender and perform the contract with posted workers.

What was less well-known was that the Internal Market Affairs Directorate of the Efta Surveillance Authority, ESA, had sent a letter to the Norwegian Government already two weeks after the preliminary ruling in Rüffert, asking it to clarify the content and scope of application of Norway’s rules on pay and working conditions in public contracts, in light of the Court’s judgment. ESA was not satisfied with the Government’s response and in July 2009 sent a formal letter of notice to Norway for failure to ensure compliance with Article 36 EEA and Directive 96/71/EC.\(^ {23} \) The problem, as ESA saw it, was that these rules oblige contractors and subcontractors to give their employees pay and other working conditions at least as favourable as those provided for by “the applicable nationwide collective agreement or what is otherwise normal for the relevant place and profession”, i.e. all conditions in the collective agreement in question, irrespective of whether it had been declared generally applicable or not. The Norwegian Government answered that the CJEU had not had the opportunity to examine the obligations that the ILO Convention imposes on ratifying Member States, and insisted that its rules were consistent with EEA law.\(^ {24} \) On 29 June 2011 ESA submitted a reasoned opinion.


\(^ {23} \) Letter of formal notice to Norway for failure to ensure compliance with Article 36 EEA and Directive 96/71/EC, 15 July 2009.

\(^ {24} \) K Alsos, Pay clauses in public contracts challenged by ESA, http://www.eurofound.europa.eu/eiro/2012/01/articles/no1201029i.htm
November the same year the Norwegian Government amended the regulation in order to meet some of ESA’s concerns, but it seems as if the Authority is still dissatisfied. The Minister of Labour, Hanne Bjurstrøm, has announced that she is prepared to let the Efta Court decide the case rather than reverse the Government’s policy solely based on ESA’s opinion.

Unlike Norway, Denmark has not yet seen any reason to reconsider its rules implementing the ILO Convention No 94, and procuring authorities are supposed to apply them in the same manner as before. A standard wording used in invitations to tender require the contractors to guarantee their employees “pay (including special benefits), working time and other working conditions not less favourable than those laid down in a collective agreement, arbitration award, national legislation or administrative regulation which applies to work of the same kind in the profession or industry concerned in the area where the work is performed”. In November 2011, the Danish Government and the Opposition agreed that the use of labour clauses in public contracts should be promoted even further. Thus, early in 2012 a commission was set up in order to map how they are used at present, and to analyse the legal preconditions for increasing their use and enforcing them effectively.

Sweden has not ratified ILO Convention No 94. Nevertheless, it has been common practice among Swedish authorities to stipulate that contractors pay wages in accordance with current collective agreements, guided, for example, by a circular from the Swedish Association of Local Authorities and Regions. Immediately after the judgments in Laval and Rüffert, the Swedish Competition Authority started to question this practice, and without positive guidance on what they could do without infringing EU law, many procuring entities felt that they had to abstain from contract conditions saying anything at all about the terms and conditions of employment during the performance of the contract. The Competition Authority added to the confusion by publishing a decision that could easily be misinterpreted. A public debate followed in the summer 2010 after which the Authority elucidated its position and made clear that, in its view, foreign service providers can be required to apply collective agreement conditions meeting the requirements of the revised Posting of Workers Act (“Lex Laval”). Unfortunately, in a guide on socially responsible procurement published in 2011, the Competition Authority again drops a

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26 Alsos (2012)
27 Ahlberg & Bruun (2010), p. 76.
28 Kommissorium Udvalget om modvirkning af social dumping, Beskæftigelsesministeriet, 9 January 2012.
29 Konkurrensverkets beslut 2010-04-15.
30 C-M. Jonsson, D. Holke, I. Hamskär, ”Konkurrensverket vilseleder om EU-rätten”, Dagens Industri 15.06.2010; D. Sjöblom, C. Frenander, ”Rätt att ställa krav i upphandling”, Dagens Industri 22.06.2010.
brick. It draws far reaching and partly misleading conclusions from Rüffert (that concerned posted workers) for purely national procurements, and, as usual, it is angled from the perspective of what is forbidden, not what is permitted. Thus, it is likely to cause new confusion and to reinforce the “precautionary principle”.

The effects of C-271/08 Commission v. Germany are yet only to be imagined. The judgment has a potential of intruding directly in the construction of collective agreements on pensions and other insurances in several Member States. At the same time, even if the parties to these agreements have entrusted the administration of the insurances to a given insurer without a call for tenders at European Union level, the constructions differ in details, and it is not given that all of them are hit by the CJEU decision. Also, it is not clear what measures must be taken with agreements that are in fact hit.

However, in the Commission’s view, they must be immediately renegotiated. In March 2011 it sent a letter to the German Government and gave it two months to tell what measures it had taken to comply with the Court’s decision. According to the Commission, all framework contracts between local authorities and pension service providers concerned by the judgment have to be terminated in order to terminate the infringement identified in the Court ruling, and the provisions of the Collective Agreement must be brought into line with EU law.31 Negotiations in order to amend the collective agreement were obviously going on between the German trade unions and the employers’ organisation in May 2011. According to a press release from the trade union confederation DBB Tarifunion, the parties agreed that, immediately, only contracts whose value exceeds the Directive’s threshold should be subject to European wide call for tenders, while all other contracts remain unaffected.32 They continued to negotiate over what terms of insurance prospective tenderers would have to offer to be able to participate in the tendering procedure.33

The Governments of Sweden and Denmark, which intervened in support of Germany in the case before the Court, keep a low profile. They have analysed the possibly relevant collective agreements together with the social partners in order to identify similarities and – even more –

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32 The contract value is calculated on the basis of the number of employees of each local authority/undertaking.

differences compared to the German collective agreement, and seem decided not to do anything unless the Commission starts asking questions.\textsuperscript{34}

5. Conclusions

The focus of this chapter is the relation between the legal regime for public procurement in the EU, on the one hand, and social policy and labour rights in the EU/EEA Member States on the other. We have found that there is a tension within this relationship, since measures aimed at furthering labour rights may be regarded as obstacles for the implementation of an efficient and transparent public procurement process.

We have shown that the development of the EU public procurement regime, especially in the beginning of the millennium when the 2004 Directives were negotiated, was marked by an attempt by the European lawmakers to take a neutral position towards this tension, within the broad margin of appreciation set up by the fundamental principles of EU law such as non-discrimination and equal treatment, openness and transparency. Since it was understood and agreed that this tension should be dealt with on national level, they also confirmed that national legislators and public authorities might develop different approaches.

Our main findings are that this neutrality approach has not been fully upheld within the complicated multilevel framework of public procurement. Although the picture is far from clear-cut the interaction between different levels and actors has in some instances had the effect of undermining national labour rights, boomeranging into well-functioning industrial relations systems. This outcome is primarily a spill-over effect of other policies and institutional settings and it can also come about as an unintended side-effect.

Another problem is that the effects for labour rights of the public procurement regimes seem very difficult to foresee within this multilevel framework. Quite naturally this uncertainty too, together with the factors described above under 4.2, serves to contribute to procuring entities’ recourse to the precautionary principle. It might even be used by actors who, from a policy point of view, think that “procurement alien factors” should be left out of procurement, and who can dress their opinion on what is advisable in legal arguments. On the other hand we also find several examples of national countermeasures both in law and practice against the undermining of social policy by public procurement. In the end, the local level where public procurement takes place is crucial for how practice evolves.

Therefore, our final conclusion is that the multilevel governance structure also provides opportunities for those who want to promote a practice of a socially responsible public procurement. There are however several preconditions for being successful in this regard. It requires a high level of professionalism by those using the system as it is so complicated and

\textsuperscript{34} J. Kristiansen and M. Edling, Avvaktande reaktioner på tyska pensionsdomen: Stora skillnader mot danska och svenska system, EU & arbetsrätt nr 3/2010 p. r4.
highly specialised. It also requires in-depth knowledge of the different mechanisms that can be used. These kind of activities have to start locally in order to develop best practices, which can then be enforced nationally in administrative and legal practice and finally in the CJEU.