Public procurement and labour rights: Governance by scaremongering?

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Two different approaches

- The scope for social considerations a stumbling block in the negotiations over the Directives.
- Primarily political arguments, not legal arguments.

Points of departure

- The EU procurement regime is neutral to the question whether it's advisable or not to use the procurement for safeguarding labour rights.
- The EU has no say in how Member States should spend tax payers' money. No direct requirement of MS getting "value for money" can be inferred from the Directives.

Points of departure

- The member states decide *if* and *to what extent* social considerations should be integrated in their procurement.
- EU law entails some restrictions on *how* this can be done.

EU law on public procurement

- Object: to improve the function of the internal market and to guarantee that economic operators all over the EU/EEA have genuine and equal opportunities to participate in tendering.
- Applicable only to procurements of importance for the single market.
- Detailed rules for procurements over certain threshold values – except non-priority services such as health and social services, education, hotel and restaurant services etc.

The Directives

- Regulate the procedure only.
- Aimed at preventing that irrelevant considerations influence the selection of contractors.
- Lay down what type of conditions that can be used at different stages in the procurement procedure. Important to distinguish between the stages.

Procurements not coming under the Directives

- The principles of non-discrimination, equal treatment and transparency must be complied with – provided that the procurement is of transnational interest.
- No rule on criteria for the award of contracts as long as they are transparent, non-discriminatory and verifiable.
- Contracts without importance for the internal market are not at all subject to EU law.

The scope for social considerations

- Restricted room for requirements that concern employment and working conditions during the selection procedure. No consensus over the exact limitations.
- Clear room for including such requirements in the contract performance conditions.

The scope for social considerations

- The room for manoeuvre is wider in procurements not, or only partly, coming under the Directives.

Implementation in the member states

- National legislation is prepared by ministries that deal with competition issues.
- Administrative guidance on how to handle public procurement is given by competition authorities.
- Judicial review takes place in courts that are unfamiliar with labour rights.

Implementation in the member states

- The result is a tendency to imbalance in the national legislation, where social considerations are neglected in favour of economic considerations.

Implementation in the member states

- While rules on procurement are primarily a matter for the national legislator, regulation of labour rights is to a great extent an issue for the social partners (e.g. in the Nordic countries) or the regional legislator (e.g. in Germany).

Implementation in the member states

- A lack of interest on the part of the legislator and of positive administrative guidance make procuring entities to resort to a “precautionary principle”.
- The European Commission’s interpretative communication govern their policies.

Sweden the most marked example

- Applies the provisions of the Directives even on procurements that are not, or only partly, governed by the Directives.
- Competition Authority preoccupied with what is forbidden, is completely unfamiliar with labour law and has obvious difficulties in explaining (correctly) what is allowed.
- Scares procuring entities from including labour clauses in their contracts.

Denmark at the other side of the spectrum

- Separate legislation for procurements that are not, or only partly, covered by the Directives.
- Positive guidance on how to include social considerations in public procurement.
- And yet: procuring entities refrain from integrating social considerations out of fear for doing wrong.

Cases before the CJEU refer the issue back to EU level

- Rüffert:
  - The procurement regime's neutral approach to labour rights is irrelevant when posted workers are involved.
- C-271/08 Commission v. Germany:
  - The procurement regime restricts the freedom of collective bargaining in the public sector in an unprecedented way.

Consequences of Rüffert on national level

- **Germany** have introduced minimum wages for specific sectors.
- Existing *Tariftreuegesetze* have been modified to comply with Rüffert.
- However, more *Länder* than before have, or are about to adopt, Tariftreuegesetze.
- Procurement specific minimum wages introduced by some *Länder*.

Consequences of Rüffert on national level

- The **Swedish** Competition Authority deters procuring entities from using labour clauses. Draws conclusions from Rüffert for purely domestic situations.
- ESA questions **Norway's** application of ILO 94.
- **Denmark** continues to apply ILO 94 as before.

Consequences of C-271/08 on national level

- Commission urges **Germany** to ensure that the collective agreement is immediately renegotiated and that all contracts between local authorities and insurers are terminated. Negotiations initiated in May 2011.
- **Sweden** and **Denmark** keep a low profile so far.

Conclusions

- A number of factors in the multilevel governance structure further the recourse to the precautionary principle.
- Action at local level will be decisive for how this practice evolves.
- Positive guidance and a high level of professionalism is necessary.

A new procurement regime?

- COM(2011) 896 of 20 December 2011 Proposal for a new Directive replacing the two central Directives.
- A more (explicitly) permissive approach?