

FORMULA

Free movement, labour market regulation and multilevel governance in the enlarged EU/EEA – a Nordic and comparative perspective

**Public procurement and labour rights:
Governance by scaremongering?**

Kerstin Ahlberg
Stockholm
Niklas Bruun
Helsinki

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KERSTIN AHLBERG AND NIKLAS BRUUN

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Work in Progress

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KERSTIN AHLBERG AND NIKLAS BRUUN

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, but also because this is where administrative and judicial governance of public procurement 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.² 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.³ 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 directives are applicable. Procurement of certain types of service, such as health and social services, education and vocational education and hotel and restaurant services, are only partly subject to the directives, even if the contract is worth more than the threshold values. Certain other services are exempted altogether.

¹ K Ahlberg & N Bruun, *Upphandling och arbete i EU*. (SIEPS 2010:3, Stockholm 2010).

² Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors; Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts and Directive 2009/81/EC of the European Parliament and of the Council of 13 July 2009 on the coordination of procedures for the award of certain works contracts, supply contracts and service contracts by contracting authorities or entities in the fields of defence and security, and amending Directives 2004/17/EC and 2004/18/EC.

³ Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts; Council Directive 92/13/EEC of 25 February 1992 coordinating the laws, regulations and administrative provisions relating to the application of Community rules on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors.

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 transnational interest in the first place. 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 description of the subject matter of the contract 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)⁴ 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,

⁴ Article numbers refer to Directive 2004/18.

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 fulfil 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. However, the Directives only refer to “environmental management measures” (Article 48(2) f) and it is doubtful whether this can be interpreted as covering work environment measures.⁵

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.⁶

3.4 Award of the contract

⁵ Ahlberg & Bruun p. 34 et seq.

⁶ 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/EEC (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.”

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 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.⁷ 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.⁸

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.

⁷ 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.”

⁸ Ahlberg & Bruun p. 38 et seq. and 73 et seq.

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.⁹

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 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.

⁹ 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, assuming that such provisions have not been implemented in national law, and to recruit more handicapped persons than are required under national legislation."

4. The multilevel governance of labour rights in public procurement

4.1 *The points of departure*

Many Member States have a tradition of using their procurement for promoting different social policy objectives. However, in a number of cases before the CJEU since the 1980's the European Commission had demonstrated that it did not accept how this was done.¹⁰ 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.¹¹ 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 considerations into account would be expressly defined in the Directives.¹² 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. This would be contrary to EU law, according to the Commission.

¹⁰ See C-31/87 *Beentjes*, C-225/98 *Commission v. France*, C-513/99 *Concordia Bus* and C-448/01 *Wienstrom*.

¹¹ See K. Ahlberg, *Kommissionens tjänstemän varnar för ratifikation ILO-konvention hindrar konkurrens*, EU & arbetsrätt 1/1998 p. 1.

¹² A thorough record of different actors' positions and arguments during the negotiations over the Directives can be found in Ahlberg & Bruun, p. 28 et seq.

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 requirement of Member States getting more "value for money" can be inferred from the procurement Directives.¹³

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

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 only have a consultative role.
- In line with this, the administrative guidance on how to handle public procurement is 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

¹³ For a thorough and knowledgeable analysis of this matter see S. Arrowsmith and P. Kunzlik, (eds.): *Social and Environmental Policies in EC Procurement Law. New Directives and New Directions*. Cambridge University Press 2009. See also K. Ahlberg and N. Bruun, 'Public procurement and labour law – friends or foes?' In: Rönmar (ed.) *Swedish Studies in European Law*, forthcoming on Hart Publishing 2011.

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 is primarily an issue for the national legislator, regulation of labour rights are to a great extent left to the social partners (the Nordic countries) or the regional legislator (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 the openness and neutrality on EU level combined with the lack of interest and motivation to take a stand on national level cause problems in implementing labour rights on local level. The procurement procedure is complex and time consuming, and in order not to risk a delay caused by a judicial review local authorities resort to “the precautionary principle” and refrain from using criteria and conditions aimed at securing labour rights. As a consequence, their policies are in fact governed by the European Commission’s opinion, expressed in its interpretative communication¹⁴ or Guide¹⁵ which are the outcomes of compromises within the Commission and which are not legally binding.

(HERE WE WILL INCLUDE EXAMPLES OF HOW THE DIRECTIVES ARE IMPLEMENTED AND APPLIED IN A NUMBER OF MEMBER STATES.

The most marked illustration to the above is Sweden...

The situation in Finland is similar, although ...

Germany, Denmark and France are more..., but...)

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

As a point of departure EU law was neutral to the issue of social considerations in public procurement as long as the general principles of transparency, non-discrimination and

¹⁴ COM(2001) 566 on the EU law applicable to public procurement and the possibilities for integrating social considerations in public procurement.

¹⁵ Buying Social A Guide to Taking Account of Social Considerations in Public Procurement, Publications Office of the European Union 2010.

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 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 in this case seems to undermine the principle of neutrality 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.¹⁶ This had not been self-evident for "hard core" procurement lawyers. From a labour law perspective on

¹⁶ Paragraph 55.

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 one looks 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*. 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".¹⁷ At the time of the CJEU's decision, nine German states had so-called *Tarifreugesetze*. In July 2011, eight states have adopted new such laws and four more are preparing legislation. In other words, in a near future more states will have *Tarifreugesetze* 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 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

¹⁷ Öffentliche Aufträge Acht Bundesländer verlangen Tarifreue, *Böcklerimpuls* 12/2011.

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.¹⁸

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 Ruffert 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, 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 preliminary ruling in Ruffert. ESA was not satisfied with the Government's response, and in July 2009 it sent a letter of formal notice to Norway for failure to ensure compliance with Article 36 EEA and Directive 96/71/EC.¹⁹ 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. In the period that followed, the Norwegian Government presented a preliminary proposal that would meet some of ESA's concerns²⁰, but so far it has not taken any further steps to realize them. Thus on 29 June 2011 ESA submitted a reasoned opinion. Now it remains to be seen if the Government is prepared to stick to its grounds and let the EFTA Court decide the case.

¹⁸ Op. cit. For an example, see Landestag Nordrhein-Westfalen 15. Wahlperiode Drucksache 15/2379, 14.07.2011, Gesetzentwurf des Landesregierung Gesetz über die Sicherung von Tariftreue und Sozialstandards sowie fairen Wettbewerb bei der Vergabe öffentlicher Aufträge (Tariftreue- und Vergabegesetz Nordrhein-Westfalen – TVgG – NRW).

¹⁹ Letter of formal notice to Norway for failure to ensure compliance with Article 36 EEA and Directive 96/71/EC, 15 July 2009.

²⁰ Høring - endringer i forskrift om lønns- og arbeidsvilkår i offentlige kontrakter.

Unlike Norway, *Denmark* obviously has not seen any reason to reconsider its rules implementing the ILO Convention No 94, and procuring authorities 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”.

Sweden has not pledged itself to give effect to the 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 with a slipshod analysis of *Rüffert*, a home-made summary of the Posting Directive and a conclusion that could easily be misinterpreted.²¹ 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*”).²² However, in a preliminary version of a guide on socially responsible procurement in July 2011, the Authority draws far reaching and directly misleading conclusions from *Rüffert* for purely national procurements. Also, it is symptomatic that the guide is angled from the perspective of what is forbidden, not what is permitted. If it is published in this state, it will cause new confusion and reinforce the “precautionary principle”.

The effects of *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

²¹ Konkurrensverkets beslut 2010-04-15.

²² 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.

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.²³

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 – differences compared to the German collective agreement, and seem decided not to do anything unless the Commission starts asking questions.²⁴

5. Conclusions

The focus of this presentation is the relation between the legal regime for public procurement in the EU and social policy and labour rights in the EU/EEA Member States. We have found that there is a clear tension within this relationship, since measures aimed at furthering labour rights may be regarded as obstacles or hindrances 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 early 2000s when the new 2004 Directives were negotiated, was marked by an attempt by the European lawmakers to adopt 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.

²³ Press release IP/11/287 Public procurement: Commission seeks Germany's compliance with Court judgment on pension schemes for local authority employees, Brussels, 14 March 2011.

²⁴ J. Kristiansen and M. Edling, 'Avvaktande reaktioner på tyska pensionsdomen: Stora skillnader mot danska och svenska system', EU & arbetsrätt nr 3/2010 p. r4.

Our main findings are that this neutrality approach has not been fully applied or implemented within the complicated and multilevel framework of public procurement. Although the picture is far from clear-cut it seems that the interaction between different levels and actors in many instances leads to national labour rights being more restricted or undermined. This outcome can in many instances be regarded as a spill-over effect of other policies and institutional settings and it can also come about as an unintended side-effect.

The problem seems to be that the unwanted effects for labour rights of the public procurement regimes are very difficult to estimate, trace and measure, as the system is complicated and it functions within this multilevel framework. 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 complicated 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 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, that can then be enforced nationally in administrative and legal practice and finally in the CJEU.