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The Scope of Labour Law  
Requirements in Public  
Procurement - at the ILO, EU  
and Swedish Level

Master thesis  
30 credits

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Labour law

Semester 9

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# Summary

In 2008, public procurement made up 17-18 percent of the EU GDP. The issue of whether the disbursement of public funds can be used to promote social objectives, including preservation of labour law requirements or whether public authorities only shall take economic considerations into account when deciding what to purchase, has been subject to discussion. In this thesis, I have chosen to describe the scope of labour law requirements at an ILO, EU and Swedish level.

In 1949, the ILO Convention no. 94 on Labour clauses in public contracts was adopted. The rationale behind the Convention was partly to ensure that working costs were not used as a competitive mean and that the performance of a public contract should not entail a downward effect on wages and working conditions. Ratifying states have obliged themselves to impose clauses in public contracts, requiring tenderers to observe prevailing working conditions in the locality, region or state concerned.

At the EU level, the Directives governing the coordination of public procurement were revised in 2004. The primary rationale behind the coordination at the EU level is to promote the integration of the internal market by ensuring that tenderers from all Member States enjoy equal opportunities to bid for a public contract. Those procurements that do not meet the thresholds set out in the Directives are still subject to the provisions of the Treaty, provided that they possess a transnational interest. Public procurement touch upon other areas where the Union legislator lacks competence or only enjoys shared competence. In *Rüffert* and *Commission v Germany*, the ECJ struck the balance between economic efficiency and social considerations and the former was in these cases given precedence. The scope of labour law requirements in public procurement was increased through the entering into force of the new Directives but has albeit been subject to criticism and discussion.

At the Swedish level, the legislation implementing the EU public procurement Directives entered into force in 2008. In 2010, a target provision was adopted in order to increase the possibilities to take social considerations into account during the public procurement procedures. The provision is not mandatory and has been criticized both by those in favour of a purely procedural legislation on public procurement and by those who wish to include social and labour law requirements.

I have chosen to discuss the scope of labour law requirements at an ILO, EU and Swedish level in the light of the provisions regulating a social market economy (Article 3(3) TEU), the reinforcement of fundamental rights and the principle of subsidiarity (Article 4(2) TEU). The absence or the non-harmonisation of a social dimension and its implications on national labour law structures, as identified by Scharpf and Joerges in their ‘decoupling’

theory, constitutes the theoretical starting point of this thesis. The social aim of the ILO Convention no. 94 is clear. In comparison, the scope for labour law requirements in EU public procurement law appears rather vague. The social endeavours set out both by the Directives and the Treaty have sometimes clashed with the rulings of the ECJ. This lack of clarity could be seen as transposed to the Swedish level partly due to the quite literal implementation by the Swedish legislator.

# Sammanfattning

Under 2008 svarade EU:s offentliga upphandling för 17-18 procent av EU:s BNP. Huruvida offentliga medel skall kunna användas som instrument för att förverkliga politiska ambitioner eller om upphandlande myndighet endast skall ta hänsyn till ekonomiska aspekter har varit föremål för diskussion. Jag har valt att kartlägga de normgivande regelverk som reglerar arbetsrättslig hänsyn vid offentlig upphandling på en ILO, EU-rättslig och svensk nationell nivå.

År 1949 antogs konvention nr. 94 om arbetsklausuler i offentliga kontrakt av Internationella Arbetsorganisationen, ILO. Syftet bakom införandet var dels att garantera att arbetskostnader inte skulle kunna användas som ett konkurrensmedel, dels att utförandet av offentliga kontrakt inte skulle inneha en skadlig effekt på löner och arbetsvillkor. Det sagda ansågs kunna tillses genom att införa krav på arbetsrättsliga klausuler i offentliga upphandlingskontrakt där lokala, regionala eller nationella arbetsvillkor skall respekteras av anbudsgivarna.

På en EU-rättslig nivå antogs två nya direktiv på det offentliga upphandlingsområdet år 2004. Det primära syftet var att stärka den inre marknaden genom att säkerställa att anbudsgivare från alla medlemsstaterna innehade samma möjligheter. De upphandlingar som ej når upp till de i direktiven fastställda gränsvärdena, faller likväl under fördragsbestämmelserna, förutsatt att de innehar ett gränsöverskridande intresse. Offentlig upphandling tangerar flera rättsområden, även om områden där unionslagstiftaren helt eller delvis saknar kompetens. EU-domstolen hade i målen *Rüffert* och *Kommissionen mot Tyskland* att ta ställning till balansen mellan den ekonomiska och sociala dimensionen. De nya upphandlingsdirektiven ansågs till viss del stärka möjligheten att integrera sociala hänsyn i offentliga upphandlingskontrakt.

Den svenska implementeringen av de nya upphandlingsdirektiven trädde i kraft 2008 och omfattar samtliga upphandlingar i Sverige. 2010 infördes en så kallad främjandeparagraf i den svenska upphandlingslagstiftningen vilken föreskrev att upphandlande myndigheter bör ta social hänsyn vid upphandlingen. Förespråkare för integration av sociala och arbetsrättsliga hänsyn vid offentlig upphandling menar att den svenska lagstiftaren varit alltför försiktig medan konkurrensfrämjare anser att införandet av en främjandeparagraf leder till osäkerhet för upphandlande myndigheter och anbudsgivare med snedvriden konkurrens som följd.

Utrymmet för arbetsrättsliga krav vid offentlig upphandling diskuteras i ljuset av Lissabonfördragets bestämmelser om en social marknadsekonomi (Artikel 3(3) EU-fördraget), förstärkandet av de grundläggande mänskliga rättigheterna och subsidiaritetsprincipen betonad i Artikel 4(2) EU-fördraget. Icke-harmoniseringen av en social dimension inom EU och dess

implikationer för medlemsstaterna, såsom identifierad av Scharpf och Joerges, utgör den teoretiska utgångspunkten för min uppsats. Det sociala syftet bakom ILO konvention nr. 94 är tydligt framträdande i kontrast till den EU-rättsliga regleringen. De sociala strävanden som präglat den EU-rättsliga regleringen, både sekundär- och primärrätt, har vid ett antal tillfällen kolliderat med EU-domstolens avgöranden. Oklarheten kan anses ha överförts till svensk nivå då den svenska implementeringen ligger nära direktivens textuella utformning.



# Preface

This thesis is carried out at the section for Labour law, Faculty of Law, Lund University, during spring 2011. First, I wish to thank Mia Rönmar, my much dedicated and patient supervisor, for critical remarks, encouragement and intellectual and inspiring discussions. I am also very grateful to Samuel Engblom for providing me with topics and valuable suggestions for this thesis and for putting me in contact with Edoardo Ales, professor in Italian labour law, who supplied me with information regarding European and Italian procurement law. Further, I would like to express my appreciation towards Dan Holke, Ingemar Hamskär, Göran Söderlöf, Charlotta Frenander, Olof Erixon and Daniel Moius, for taking time to discuss the issues of this thesis, offering me an expositive description regarding the scope of labour law requirements at an ILO, EU and Swedish level.

Thank you all.

Lund, May 25<sup>th</sup> 2011.

# Abbreviations

AG	Advocate General
Bet.	Betänkande (Report)
BNP	Bruttonationalprodukt (GDP)
CFA	Committee on Freedom of Association
COM	the European Commission
Dir.	Directive
Dnr.	Diarienummer (recordal number)
EC	the European Community
ECHR	the European Convention of Human Rights
ECR	European Court Reports
ECtHR	the European Court of Human Rights
EEC	the European Economic Community
EEA	the European Economic Area
ECJ	the European Court of Justice
EFTA	the European Free Trade Association
e.g.	exempli gratia (for example)
ESA	the European Free Trade Association Surveillance Authority
ETS	European Treaty Series
Et seq.	Et sequentes (and the following)
Etc.	et cetera
EU	the European Union
GDP	Gross Domestic Product
GPA	Government Procurement Agreement
Ibid.	Ibidem (same place)
I.e.	id est (that is to say)
ILO	the International Labour Organization
IRLR	Industrial Relations Law Reports
Ltd	Limited Company
LO	the Swedish Trade Union Confederation
LOU	Lag (2007:1091) om offentlig upphandling (Swedish Act on Public Procurement)
LUF	Lag (2007:1092) om upphandling inom områdena vatten, energi, transporter och posttjänster (Swedish Act on Public Procurement operating in water, energy, transport and postal services sectors)
No.	Ordinal number
OJ	Official Journal
Para.	Paragraph
Prop.	Proposition (Governmental bill)
SFS	Svensk Författningssamling (Swedish Code of Statutes)
SKL	Sveriges Kommuner och Landsting (the Swedish Association of Local Authorities and Regions)

SME	Small and Medium Enterprises
SOU	Statens Offentliga Utredningar (Government Official Reports series)
SIEPS	Svenska Institutet för europapolitiska studier (Swedish Institute for European Political Studies)
TEC	the Treaty on the European Community
TEU	the Treaty on European Union
TCO	the Swedish Confederation for Professional Employees
TFEU	the Treaty on the Functioning of the European Union
UN	the United Nations
Vol.	Volume
WTO	the World Trade Organization

# 1 Introduction

## 1.1 Subject

The establishment of the European Economic Community (EEC) aimed to pursue a common market of free internal trade of goods, services, labour and capital. In time, the demands for social protection and increased living and working standards have increased. An upsurge of situations has been witnessed where the fundamental freedoms have been overlapping areas traditionally regarded as purely national. The substantial content of social policy has been brought into question by several contentious decisions in the European Court of Justice (ECJ). From a labour law perspective, imbrications in areas, characterized by a wide margin of discretion left to the national state, have not consistently been regarded as conflict-free. The rulings have been considered as questioning the sovereignty of the nation state.

The promotion of sustainable development contains consideration to a range of different components such as protection of the environment, a growing economy, and safeguards against social exclusion. The Lisbon Treaty marks a new legal order, both substantially and formally. However, its practical impact is yet to be revealed.

Public procurement law is of high relevance considering the newly revised Directives where the adoption of social requirements in public procurement procedures was emphasised as desirable. The main reason why I chose to examine the scope of labour law requirements in public procurement was the distinctive characteristics of the procedure. Public procurement contracts awarded by authorities or municipalities are financed by public funds, thus generating incentives to promote and uphold certain societal and labour law achievements. Authorities are also governed by domestic constitutional law, why constitutional fundamental rights are directly applicable on such authorities.

The two international normative frameworks in the area of public procurement and labour law requirements, the International Labour Organization (ILO) and the European Union, take on two different benchmarks as regards the regulation of public procurement. The EU is foremost holding an economic approach when formulating rules regulating public procurement, the growth and integration of the internal market. The possibilities to ascertain social and ethical requirements exist and, as we shall see, they have increased. The ILO on the other hand seizes a social and ethical perspective regarding public procurement, urging its members to ensure that national and local labour conditions are respected during the procurement procedures. This is done in order to combat distortion of competition where negligence of working conditions and wage claims are used as competitive weapons.

Questions arise whether economic efficiency or social requirements, including considerations to labour law requirements and conditions, shall be given preference when a conflict between those two interests occurs. If the latter is to be given precedence, there are risks for exclusion of tenders, unwilling or unable to meet the awarded conditions. This could be regarded as inconsistent with the cornerstones of Union law and the realisation of the internal market. On the other hand, it may be promoted by the public interest to lay down qualitative demands aiming to affect tenders to design their activities in conformity with the socio-economic aspirations as well as the protection of work rights, regardless of the existence of a direct link between such aspirations and the current procurement. Consider further, the possibility of laying down certain social requirements during a public procurement procedure may be encouraged from a competition law perspective. It could be seen as inadequate that tenders increase their competitiveness at the expense of labour standards for the employees. Social dumping, including wage dumping, might be counteracted by providing the awarding authority with opportunities to require tenders to pay wages in accordance with the prevailing wage rates in the locality where the work is carried out. It is against this background I will carry out my study.

## **1.2 Aim and research questions**

The overall purpose of my thesis is to describe the scope of labour law requirements in public procurement at an ILO, EU and Swedish level. The description and following analysis of the scope of labour law requirements at the different normative levels of governance will be made in the light of a potential conflict of interests. Is the promotion of economic efficiency and competitiveness inconsistent with labour law requirements or is it feasible to satisfy and balance those opposite interests? By contrasting the different frameworks at the ILO, EU and Swedish level, I will discuss the prospect of integrating requirements of economic efficiency with labour law aspirations. The inclusion of a social dimension or lack thereof, constitutes the theoretical account, serving as the starting point of this thesis and will be further elaborated below. The broad range of labour law requirements could involve health and safety conditions for workers, provisions of non-discrimination, observance of collective agreements. Although not forming the very core of labour law requirements, employment policies, such as the combating of unemployment and vocational training, will still have effect on the integration aspect.

Since my thesis is a study in labour law and ‘the ILO is and remains the organisation competent to set and deal with labour standards’,<sup>1</sup> I will scrutinize the ILO Convention no. 94 by describing the rationale behind the

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<sup>1</sup> Communication from the Commission to the European Parliament and the Economic and Social Committee, Promoting Core Labour Standards and Improving Social Governance in the context of Globalization, COM(2001) 416 final, p. 3.

Convention and what interests it aims to pursue. Due to limited textual space, other international organisations, such as the World Trade Organization (WTO), will not be dealt with. The ILO Convention no. 94 will be used as an indicator for the endeavours that have been found essential by the World community.

At the EU level, I will discuss the regulation of public procurement under primary and secondary law. To illustrate the reigning legal position, two judgments from the European Court of Justice (ECJ) concerning the compatibility of national law and EU law and additionally with effects on national labour law, namely *Rüffert*<sup>2</sup> and *Commission v Germany*<sup>3</sup>, will be thoroughly examined. My aim is to illuminate the collision between conflicting interests.

At the Swedish level, I will discuss the scope left for EU Member States to promote and preserve labour law requirements in public procurement. If there is a margin of discretion left to the EU Member States, how is this formulated and limited? I have chosen to focus on the Swedish legislation implementing the EU public procurement law. To some extent, I will discuss the legal technical issues arising from the examination of Swedish public procurement law. However, the main emphasis of the descriptive part concerns the potential scope of labour law requirements from a perspective of conflicting interests. Consequently, the Swedish Public Procurement Act (LOU),<sup>4</sup> in its capacity of the general legislation governing public procurement in Sweden, will be at the centre of attention.

### **1.3 Theoretical starting points – the introduction of a social dimension**

European integration has been characterised by an unbalanced relationship between economic and social policies, where the former has been Europeanised at a supranational level whilst the latter has been left to the national state to protect. Scharpf labels this the ‘decoupling’ of the social sphere from the economic and contends that welfare states are constrained by the primacy of Union rules regulating the economic integration. Due to diversities between the EU Member States regarding their economic developments and welfare aspirations, it is questionable if a uniform European social standard is desirable or even feasible.<sup>5</sup>

Such ‘decoupling’ of the social sphere and the lack of competences on behalf of the Union legislator has deepened, according to Joerges, Europe’s

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<sup>2</sup> Case C-346/06 *Dirk Rüffert v Land Niedersachsen* [2008] ECR Page I-1989.

<sup>3</sup> Case C-271/08 *Commission v Germany* [2010] ECR *n.y.r.*

<sup>4</sup> Lag (2007:1091) om offentlig upphandling.

<sup>5</sup> Scharpf, F.W., The European Social Model: Coping with the Challenges of Diversity, *Journal of Common Market Studies*, Vol. 40, 2002, pp. 646-670, p. 665 *et seq.*

social deficit.<sup>6</sup> The Treaty of Maastricht expanded the competences on behalf of the Union in spheres of labour and social policy, aiming to create a 'social Europe'.<sup>7</sup> Joerges and Rödl argue that the establishment of a European social model requires the acceptance of diversity and judicial deference when conflict occurs between the fundamental freedoms and national labour systems and rules. It is contended that the ECJ is not a constitutional court and is not legitimised to balance the value of different social models against the value of the free market. An opposite approach may lead to subordination of the social sphere to the economic, thus undermining national social endeavours.<sup>8</sup>

The globalisation of the world economy including the increased exposure of workers, supply and services to competition has led to enlarged regulation at supranational level. The substance of national labour law is determined through the contact between different actors such as legislators, courts, social partners, multinational enterprises and at different levels, i.e. national, regional and global. The multi-level governance, as regards actors and the substance of the law itself, sets the framework of both economic law and labour law. The interplay and territorial struggle between the different actors and interests will found the basis of this thesis.<sup>9</sup>

The entering into force of the Lisbon Treaty 1<sup>st</sup> December 2009 brought about possibilities to satisfy social objectives to a greater extent than before. According to Article 3(3) Treaty on the European Union (TEU),<sup>10</sup> the internal market shall now partially be founded on 'a highly competitive social market economy, aiming at full employment and social progress'. The terminology implies a new milestone of the European integration, indicating the need for coherence between economic and social interests. The newly enforced Article 4(2) TEU, promoting the respect for the Member States' national identity and political and constitutional fundamental structures, implies an enlargement of the principle of subsidiarity. Further, individual human rights have been given greater emphasis due to the increased status of the Charter of Fundamental Rights of the European Union as primary law. Article 6(2) TEU also supports such an assumption, imposing an obligation on the EU to accede to the European Convention on Human Rights (ECHR)<sup>11</sup>.

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<sup>6</sup> Joerges, C., *What is left of the European Economic Constitution?*, EUI Working Paper LAW No. 2004/13, Florence 2004, p. 16 *et seq.*

<sup>7</sup> Joerges, C. and Rödl, F., *Informal Politics, Formalised Law and the 'Social Deficit' of European Integration: Reflections after the Judgements of the ECJ in Viking and Laval*, *European Law Journal*, Vol. 15, No. 1, Blackwell Publishing Ltd, Oxford, January 2009, pp. 1-19, p. 5 *et seq.*

<sup>8</sup> Joerges and Rödl, 2009, p. 13 *et seq.*

<sup>9</sup> See project description for the ReMarkLab research programme at Stockholm University, [http://www.juridicum.su.se/social\\_civilratt/remarklab\\_english.htm](http://www.juridicum.su.se/social_civilratt/remarklab_english.htm)

<sup>10</sup> Consolidated Version of the Treaty on European Union, (TEU) (OJ 2008 C 115/13) May 9 2008.

<sup>11</sup> European Convention for the protection of Human Rights and Fundamental Freedoms of 4th November 1950.

The analytical viewpoint of this essay originates from a context where efforts aiming to increase employment and strengthen social security are being promoted. The Commission has held that a rebalancing of the global system should seek to reinforce the social pillar. There is a need to address the issues of economic growth and social development together.<sup>12</sup> The following assessment stipulates that European integration of social and economic spheres entails balance between those interests and not merely considerations of one of the conflicting interests. It is against this background, with the acceptance of the diversity among the Member States and the questionable extended competences on behalf of the ECJ, I will further develop my thesis.

## 1.4 Method and material

### 1.4.1 Method

I will use legal dogmatic method since I aim to systemise and interpret reigning labour law and public procurement law at an ILO, EU and Swedish level. Legal dogmatic method entails the examination and elaboration of the law and indicates the analysis of the objectives pursued by law. In order to contrast the fundamental rationale underpinning the Union legal order and the framework of the ILO, I wish to clarify the substance and application of the frameworks at issue.

The ILO Conventions are by far the main source of international labour law. Creating international law entails the collection of information on national legislation and practices. A comparative method is used in order to identify the concept of international standards.<sup>13</sup> The ILO is constrained in the sense that it cannot compel its members to adhere to certain standards. It is for the national government to decide whether to ratify the ILO Conventions or not.<sup>14</sup> There are eight fundamental ILO Conventions, all ratified by the EU Member States. The ratification has been promoted by the European Commission.<sup>15</sup> Some Conventions fall, wholly or partially, within the competence of the EU, which has led the Parliament to call upon the Commission to specify which Conventions are subject to the Union competence and which are left to the EU Member States' original competence. Of essential importance, to determine the limits of the EU *vis-à-vis* the right of the Member State to enter into bilateral agreements, is the

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<sup>12</sup> COM(2001) 416 final, p. 3 *et seq.*

<sup>13</sup> Blanpain, R.(ed.), *Comparative Labour Law and Industrial Relations in Industrialized Market Economies*, Xth and revised edition, Wolters Kluwer Law and Business, Alphen aan den Rijn, the Netherlands, 2010, p. 9 *et seq.*

<sup>14</sup> Bamber, G.J., Lansbury, R.D. and Wailes, N., *International and Comparative Employment Relations, Globalisation and the Developed Market Economies*, 4<sup>th</sup> edition, SAGE Publications Ltd, London 2004, p. 330 *et seq.*

<sup>15</sup> COM(2001) 416 final, p. 11 *et seq.*



provision laid down in Article 351 TFEU.<sup>16</sup> The relationship between the ILO and the EU is also a crucial matter as regards the material scope of labour rights at the international, EU and national level.

The EU legal method strives to identify the sources of law and the interpretation of those sources.<sup>17</sup> Primary Union law and mandatory secondary law are legally binding at national level. In addition, the general principles of Union law are of great importance when assessing Union law and will take precedence over secondary law. The role of the ECJ, as the final interpreter of Union law, serves both as supplement to the written law and as an elaborator of Union law.<sup>18</sup> Consequently, any institution requiring a preliminary ruling by the ECJ is bound by the judgement of the Court according from Article 266 TFEU. In order to ensure the full effectiveness of EU law, the Court uses a teleological interpretation of the rules in question.<sup>19</sup>

EU law takes precedence over national law and consequently, any national law not compliant with Union law must be set aside.<sup>20</sup> National law must be interpreted in conformity with Union law and if not possible, the national adjudicator must refrain from the application of such national law.<sup>21</sup>

At the Swedish national level, the preparatory works is of high rank within the hierarchy of legal sources, allowing the national legislator to specify and suggest the most suitable solution for applying requirements stemming from Union law. Further, it may be for the national adjudicator to determine the weight of such proposed solutions.<sup>22</sup> Interviews have been performed with practitioners at Swedish level, in order to illustrate the debate of the social partners and state representatives and to widen and confirm my findings.

Legal dogmatic method does not exclusively amount to a descriptive assessment without values.<sup>23</sup> I will therefore evaluate the result of my research. My own views on the legal scope of labour law requirements at an ILO, EU and Swedish level as well as the possible integration of such requirements with economic efficiency will be presented in my conclusion.

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<sup>16</sup> European Parliament resolution of 26 November 2009 on the Conventions that have been classified by the ILO as up to date, P7\_TA(2009)0101, 2010/C 285E/10. Collected from: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2010:285E:0067:0068:EN:PDF> March 23<sup>rd</sup> 2011.

<sup>17</sup> Hettne, J. and Otken Eriksson, I. (ed.), *EU-rättslig metod – Teori och genomslag i svensk rättslämning*, Nordstedts Juridik, Stockholm 2005, p. 24 *et seq.*

<sup>18</sup> *Ibid.*, 2005, p. 24 *et seq.*

<sup>19</sup> *Ibid.*, 2005, p. 30.

<sup>20</sup> See *inter alia*; Case 106/77 *Amministrazione delle Finanze dello Stato v Simmenthal SpA* [1978] ECR 629, para. 18 *et seq.*; Joined Cases C-188/10 and C-189/10 *Melki* [2010] n.y.r.; Case C- 409/06 *Winner Wetten* [2010] n.y.r., para. 53 *et seq.*; Case C-173/09 *Elchinov* [2010] n.y.r., para. 31.

<sup>21</sup> Hettne and Otken Eriksson, 2005, p. 167.

<sup>22</sup> *Ibid.*, 2005, p. 169 *et seq.*

<sup>23</sup> Peczenik, A., *Juridikens allmänna läror*, *Svensk Juristtidning* 2005, pp. 249-272, p. 250 *et seq.*

## 1.4.2 Material

At the ILO level, I will depict the ILO Convention no. 94 and Recommendation no. 84. In order to familiarise the reader with the nature of the ILO some preliminary remarks regarding the organisation and the rationale behind the Convention will be presented. I will also discuss the binding effects of ratification of the documents at issue.

The case law of the ECJ will be addressed to identify the legal position for labour law requirements in EU public procurement law. I will further describe the rationale of the new revised Directives, including relevant doctrine. For the sake of simplicity, my focus will be on Directive 2004/18/EU and the provisions regulated therein, since that is the general Directive.

Illustrating the scope of labour law requirements left at national level in order to ensure the observance of work and wage conditions, I have interviewed practitioners with ample and diversified knowledge within the area of public procurement law. Those interviews will be contrasted below.

The scope of labour law requirements, at both the EU and Swedish level, is indeterminate. The magnitude of the doctrine is quite modest considering the topical issues that are being raised in this thesis. Nevertheless, at the EU level Arrowsmith and Kunzlik have discussed the scope of secondary policies. At Swedish level, a thoroughgoing study of, *inter alia*, the scope of social considerations was authored by Bruun and Ahlberg in 2010. My perception is that there is a clear desire among practitioners to clarify the scope of labour law requirements.

My aim is to formulate a versatile, objective and unbiased description of the legal position and the characterizing norms at an international, European and national level. I seek not merely to portray such a position but to evaluate and convey my perception on the possibilities of coherence between economic and social interests, and foremost labour rights requirements.

## 1.5 Outline

The thesis consists of five main chapters; an introduction of the thesis, followed by the scope of labour law requirements in public procurement contracts from an ILO, EU and Swedish level and a conclusive analysis presenting final remarks.

Chapter 1 essentially concerns the presentation of the composition, including a display of the subject (1.1), aim and research questions (1.2),

conceptual starting points (1.3), method and material (1.4) and an outline of the thesis (1.5).

Chapter 2 sets out the rationale of the regulations regarding public procurement at an ILO level. I describe the organisation and its characterising features (2.1), the background and forward-looking remarks of the ILO Convention no. 94 (2.2), the content and aims pursued by the Convention (2.3) and some conclusive clarifications (2.4).

In chapter 3, I identify public procurement at the EU level. Firstly, I synoptically retail the aims and content of EU public procurement law (3.1). I distinguish primary law (3.2) from secondary law (3.3). To illustrate the relationship between the ILO and EU, a brief report of the Norwegian ratification of Convention no. 94 will be presented in section (3.2). The close interface between EU public procurement law and Directive 96/71/EC on Posting of Workers' proposes a need to briefly describe the implications stemming from the application of that Directive (3.4). The case law of the ECJ is addressed (3.5) with final remarks presented in section (3.6).

The implementation at national level, i.e. the Swedish level, is discussed in chapter 4. I examine the legislation in force (4.1) through an interpretation of national legal sources, the implementation including preparatory work (4.2) and case law (4.3) at Swedish level. I present the interviews performed and some of the issue area of doctrine (4.4) and concluding remarks (4.5).

In the conclusive analysis set out in chapter 5, I address the issues raised concerning the norms shaping the legal frameworks and the potential reconciliation of such at the Swedish level. Starting with summary (5.1), answering the aim and research questions, I examine the possibility of parallel application of the frameworks of the ILO and the EU (5.2), implications of the case of the ECJ (5.3), the interface between the EU and Sweden (5.4), balance and conflict at the Swedish level (5.5) and future prospects (5.6). This chapter is dedicated to my views regarding the scope of labour law requirements in public procurement and the possible reconciliation of the conflicting interests related to this area.

# 2 The Scope of Labour Law Requirements in Public Procurement at the ILO Level

## 2.1 Introductory remarks concerning the ILO

### 2.1.1 The organisation and its history

The ILO is a UN organisation responsible for drawing up and overseeing international labour standards.<sup>24</sup> The ILO was created in 1919 by the signatory nations of the Treaty of Versailles in recognition of the fact that a globalised economy needed clear regulations in order to guarantee that economic progress would be developed hand-in-hand with social justice, prosperity and peace for all.<sup>25</sup> The organisation has ever since promoted international labour standards through Conventions and Recommendations. Ratified Conventions are legally binding in the ratifying state whilst Recommendations are advisory in the sense that they are intended to assist the ILO Member States in applying the Convention at issue to their own local situation.<sup>26</sup> Only states can become members of the ILO.<sup>27</sup>

In 1998, the ILO, aiming to reinforce its position in a context of globalised economy, extracted international labour standards to a set of core labour standards in the *Declaration on Fundamental Principles and Rights at Work and its Follow-up*.<sup>28</sup> Those standards were introduced as a Declaration, which made it legally binding for all members of the ILO, regardless of whether the state at issue had ratified the Convention coupled with the standard at issue or not. Members of the ILO that have not ratified the Conventions are obliged to report on their implementation process.<sup>29</sup>

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<sup>24</sup> SOU 2006:28 Nya Upphandlingsregler 2, p. 318.

<sup>25</sup> International Labour Organisation (ILO) *Rules of the Game: A Brief Introduction International Labour Standards*, Revised Edition, Geneva 2009, p. 9.

<sup>26</sup> Bamber, G. J., Lansbury, R. D. and Wailes, N., *International & Comparative Employment Relations Globalisation and Change*, 5<sup>th</sup> Edition, London 2011, p. 30.

<sup>27</sup> SOU 2006:28, p. 318.

<sup>28</sup> Macklem, P., The Right to Bargain Collectively, in Alston, P. (ed.) *Labour Rights as Human Rights*, Oxford University Press, New York 2005, pp. 61-84, p. 68 *et seq.* See also the Core Labour Standards Conventions; Convention no. 87 (Freedom of Association and Protection of the Right to Organise); Convention no. 98 (Right to Organise and Collective Bargaining); Convention 29 (Forced labour); Convention no. 105 (Abolition of Forced labour); Convention no. 138 (Minimum Age); Convention no. 182 (Worst Forms of Child Labour); Convention no. 100 (Equal Remuneration); Convention no. 111 (Discrimination, Occupation and Employment).

<sup>29</sup> Bamber, Lansbury, and Wailes, 2011, p. 31 *et seq.*

The ILO *Decent Work Agenda* aims to achieve decent work for all by promoting social dialogue, social protection and employment creation, as well as the respect for international labour standards.<sup>30</sup> The principal values expressed therein are contained in the *Declaration on Social Justice for a fair Globalization*.<sup>31</sup> The *Decent Work Agenda* has been viewed as an effort to extend the activity of the ILO as regards to non-traditional forms of work and to integrate its ambitions in one single framework. Critical voices have argued that the focus of promoting only certain Conventions will be elaborated at the expense of other important standards and rights. Albeit, others argue that the change of regime of international labour governance may very well lead to positive outcomes.<sup>32</sup>

## 2.1.2 Tripartism

The ILO is characterised by its tripartite decision making structure where representatives of worker and employers' organisations are able to vote on the adoption of ILO Conventions alongside the national governments and to participate in determining the agenda of the International Labour Conference through the ILO Governing Body.<sup>33</sup> This tripartite arrangement is claimed to be the strength of the ILO, balancing the power of bargaining between two diverse parties. Further, the prerequisite of consensus before the adoption of any regulatory measures is considered to reinforce the authority of such measures. The issue of ensuring that the workers' and employers' delegates are sufficiently represented in the state at issue, is solved through the Credentials Committee, measuring and reporting on the amount of representation.<sup>34</sup>

## 2.1.3 Monitoring and sanctions

There are two main bodies which together constitute the regular system of supervision on behalf of the ILO; the Committee of Experts on the Application of Conventions and Recommendations and the International Labour Conference's Tripartite Committee on the Application of Conventions and Recommendations. These bodies examine reports on the application of law and practice in the ILO Member States.<sup>35</sup> The role of the

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<sup>30</sup> International Labour Organisation (ILO) (2009) *Rules of the Game: A Brief Introduction International Labour Standards*, Revised Edition, Geneva, p. 9.

<sup>31</sup> *Declaration on Social Justice for a fair Globalization* adopted by the International Labour Conference, 97th Session, Geneva, 10<sup>th</sup> June 2008.

<sup>32</sup> Bamber, Lansbury, and Wailes, 2011, p. 32 *et seq.*

<sup>33</sup> ILO Constitution, Articles. 3, 7, 14 and 19.

<sup>34</sup> Novitz, T., The European Union and International Labour Standards: The Dynamics of Dialogue between the EU and the ILO, in Alston, P. (ed.) *Labour Rights as Human Rights*, Oxford University Press, Volume XIV/1 2005, pp. 214-241, p. 224 *et seq.*

<sup>35</sup> See ILO homepage, section 'How the ILO works', subsection 'ILO supervisory system/mechanism', <http://www.ilo.org/global/about-the-ilo/how-the-ilo-works/ilo-supervisory-system-mechanism/lang--en/index.htm> Collected April 27 2011.

Committee of Experts is mainly to provide impartial and technical evaluation of the application of international labour standards.<sup>36</sup>

In addition to the regular supervision procedures, there are three special supervisory procedures, based on the submission of a representation or a complaint.<sup>37</sup> The Committee on Freedom of Association (CFA) is one of those special bodies and was introduced in 1951, due to the conclusion drawn by the ILO that freedom of association needed special supervision to ensure the compliance among the ILO Member States.<sup>38</sup> The CFA is the governing body for observation of compliance with the Constitution and to ensure that collective bargaining is performed under voluntary conditions and does not contain compulsory measures challenging such voluntarism.<sup>39</sup>

A party, an employers' or a workers' organisation can file a complaint to the executive board of the ILO if it concludes that the Convention state has not fulfilled its obligations stemming from the Convention. The board will thereafter evaluate the complaint and then notify the Convention state in order to let them answer to the complaint. In case the Convention state does not answer or the answer is found unsatisfactory, the board can publish the complaint in accordance with Articles 24-26 ILO Constitution. For an omission to correctly satisfy the requirements imposed, there is no other sanction but condemnation.<sup>40</sup> It therefore appears plausible to assume that, in spite of the continued promotion of labour standards, the authority and influence on behalf of the ILO is questionable. It is argued that workers' groups tend to be more defensive than proactive as regards to protection of workers' rights. The lack of effective supervisory procedures and effective impact of the ILO Conventions is shown through the alleged nonchalant response to non-compliance criticism by the EU Member States.<sup>41</sup>

There is no obligation to ratify the instruments of ILO. However all members of the ILO must take all reasonable steps to facilitate ratification according to Article 19(5) ILO Constitution. A ratification of a Convention

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<sup>36</sup> See ILO homepage, section 'Labour Standards', subsection 'Applying and promoting International Labour Standards', subsection 'Committee of Experts on the application of Conventions and Recommendations', <http://www.ilo.org/global/standards/applying-and-promoting-international-labour-standards/committee-of-experts-on-the-application-of-conventions-and-recommendations/lang--en/index.htm> Collected April 27 2011

<sup>37</sup> See ILO homepage, section 'About the ILO', subsection 'How the ILO works', subsection 'ILO supervisory systems/mechanisms', <http://www.ilo.org/global/about-the-ilo/how-the-ilo-works/ilo-supervisory-system-mechanism/lang--en/index.htm> Collected April 27 2011.

<sup>38</sup> See ILO homepage, section 'Labour Standards', subsection 'Applying and promoting International Labour Standards', subsection 'Committee of Freedom of Association', <http://www.ilo.org/global/standards/applying-and-promoting-international-labour-standards/committee-on-freedom-of-association/lang--en/index.htm> Collected April 27 2011.

<sup>39</sup> Macklem, 2005, p. 65.

<sup>40</sup> Novitz, T., International Promises and Domestic Pragmatism: To What Extent will the Employment Relations Act 1999 Implement International labour Standards Relating to Freedom of Association, *The Modern Law Review Limited*, Vol. 63, Issue 3, May, Blackwell Publishers, Oxford 2000, pp. 379-393, p. 383.

<sup>41</sup> Novitz, 2005, p. 237 *et seq.*

shall in no case affect any law, custom or agreement, which ensures more favourable conditions to workers than the provisions set out in Convention or Recommendation at issue (Article 19(8) ILO Constitution). In connection, it shall however be emphasised that Declarations are binding in spite of whether the standards at issue have been ratified or not, imposing an obligation on the ILO Member States to report on the process of implementation.<sup>42</sup>

## 2.1.4 The ILO and the EU

The relationship between the ILO and the EU is alleged to be characterised by cooperation, where the EU should play an important role in encouraging the steps towards ‘greater effectiveness’ for ILO instruments.<sup>43</sup> The conception of the relationship has been identified as a reciprocal link where the EU draws inspiration from the ILO and its work whilst contributing to a more enlarged enforcement.<sup>44</sup> Further, the EU has obliged itself to consider and urge its Member States to increase their financial support for the ILO.<sup>45</sup>

This constructive dialogue between the ILO and the EU in its joint efforts to promote international labour standards has been argued to be naive. Even though the internal implementation of ILO normative provisions in the EU social field has increased, it is said to be far from complete. One explanation could be the limited competence on behalf of the Union legislator in the social sphere, leading to modest regulation of core international labour standards.<sup>46</sup> Through Generalised Systems of Preferences, a scheme providing market access to developing countries, third countries are offered certain tariffs if they commit themselves to comply with core labour standards.<sup>47</sup> This is suggested as a measure taken by the EU aiming to enforce ILO labour standards and thus part of the dynamic dialogue between the EU and ILO.<sup>48</sup>

The EU is not a member of the ILO and therefore cannot be held responsible for negligence to comply with the standards on behalf of its Member States. Today, representatives of the Commission may act as observers at the International Labour Conference.<sup>49</sup>

Examples of the potential influences between the two normative bodies are that the principle of tripartism has taken a prominent role in the discussions concerning the relationship between the ILO and the EU, where the former might have impact on the latter’s development of a social dimension.

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<sup>42</sup> Bamber, Lansbury and Wailes, p. 31.

<sup>43</sup> COM(2001) 416, p. 13.

<sup>44</sup> Novitz, 2005, p. 215.

<sup>45</sup> COM(2001) 416, p. 15.

<sup>46</sup> Novitz, 2005, p. 216 *et seq.*

<sup>47</sup> COM(2001) 416, p. 16.

<sup>48</sup> Novitz, 2005, p. 230 *et seq.*

<sup>49</sup> *Ibid.*, p. 238.

Additionally, the EU might have influenced the ILO to shift from the former strong emphasis on the adoption on international agreements to the promotion of using soft regulative measures, such as campaigns aiming to raise public awareness and codes of conduct.<sup>50</sup>

## 2.2 Background of Convention no. 94

### 2.2.1 In general

Labour law requirements of public procurement were first addressed by the Labour Clauses (Public Contracts) Convention no. 94,<sup>51</sup> adopted by the ILO in 1949.<sup>52</sup> The Convention, requiring awarding authorities to include clauses in public contracts ensuring certain working conditions, was ratified by several EU Member States during the 1950s.<sup>53</sup> Norway, member of the EEA, has also ratified the Convention.<sup>54</sup>

### 2.2.2 The Review

The ILO Convention no. 94 was reviewed in 2008. The conclusion drawn by the Committee, based on the review of national law and practices, was that inclusion of labour clauses in public procurement contracts was not generally accepted among the members of the ILO. On the contrary, non-ratifying states and even some ratifying states appeared to be of the opinion that public procurement law was not aimed for regulating labour issues. The rationale behind the Convention, namely that the State should act as a model employer offering the most advantageous conditions to workers remunerated indirectly by public funds, seemed to be lacking support. On this notion, the Committee recalled the simple structure of the Convention thus offering clear, concrete and effective solutions on how to guarantee the protection of workers' rights. By adjusting standards within public contracts to the highest prevailing standards applicable in the industry and district concerned as well as extending such standards to the subcontractors, the Convention makes sure that public procurement is not to be used as ground for 'socially unhealthy competition'.<sup>55</sup>

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<sup>50</sup> Novitz, 2005, p. 239 *et seq.*

<sup>51</sup> Labour Clauses (Public Contracts) Convention no. 94, adopted 29<sup>th</sup> June 1949.

<sup>52</sup> Nielsen, R., *EU Public Procurement and Nordic Labour Law*, Stockholm Institute for Scandinavian Law 1957-2010, p. 210.

<sup>53</sup> Belgium (1952), Denmark (1955), Finland (1951), France (1951), Italy (1952), Netherlands (1952), Spain (1971), Austria (1951) and the United Kingdom (1950). See ILO homepage, section 'Statistics and Databases', subsection 'ILOLEX', subsection 'Conventions', subsection 'C94', subsection 'See the ratifications for this Convention', <http://www.ilo.org/ilolex/cgi-lex/ratifce.pl?C094> collected May 11<sup>th</sup> 2011.

<sup>54</sup> Ahlberg, K., Danmark och Norge försvarar arbetsklausuler i offentliga kontrakt, *EU och arbetsrätt*, No. 2, 2008, p. 1.

<sup>55</sup> Labour Clauses in public contracts, International Labour Conference 87<sup>th</sup> Session, 2008, Report III (Part 1B), paras. 174-177.



The Committee further expressed its disapproval and concern in terms of the development of public procurement laws recommended for developed countries. The promotion of international competition, performed under transparent procedures and in the context of a globalised economy, is either silent as regards to social aspects or limits the scope of considering such aspects. Thereby, according to the Committee, such promotion fails to comply with the solid principles of the Convention.<sup>56</sup>

The Convention comes to its fullest potential where collective bargaining is establishing the working conditions instead of national legislative regulation. The dilemma of such utilisation could occur where collective bargaining is absent or weak since there will be no need for integrating labour clauses in public procurement contracts. The Committee howbeit submitted that in countries where collective agreements are more favourable than national legislation, it is important to make the national governments understand the concrete requirements of the Convention and thus take measures to ensure full implementation of its provisions. It is not sufficient that the application of national labour law is enough to implement the Convention.<sup>57</sup>

Considering the increased global competition, the Committee deemed the objectives of the Convention even more well founded today than when first adopted in 1949. The Committee expressed its concern as regards the few mandatory rules in national systems governing the inclusion of a social dimension in public contracts. Where such obligations exist, the vague wording contributed to obstructed enforcement.<sup>58</sup> The fact that the Convention does not apply to transnational procurements, has been discussed as a ground for a revision in this aspect. However, the Committee maintained that the purpose of the Convention was still valid even without a revision.<sup>59</sup>

To conclude, the ILO Convention no. 94 was defined as an ‘underused’ instrument. In a time where ILO core labour standards are increasing its importance in the area of international human rights and trade law, the Committee considered Convention no. 94 and the objectives pursued therein to constitute a normative platform. A platform on which the ILO can further build standards promoting reasonable labour conditions in public procurement contracts.<sup>60</sup>

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<sup>56</sup> Labour Clauses in public contracts, 2008, Report III (Part 1B), para. 178.

<sup>57</sup> Ibid., para. 281.

<sup>58</sup> Ibid., paras. 308-309.

<sup>59</sup> Bruun, N. and Ahlberg, K., *Upphandling och Arbete i EU*, SIPEPS 2010:3, p. 124.

<sup>60</sup> Labour Clauses in public contracts, 2008, Report III (Part 1B), para. 314.

## **2.3 Content of the Convention**

### **2.3.1 Aims of the Convention**

The objectives put forward by Convention no. 94 are dual. The adoption of the instrument aims firstly to eliminate labour cost being used as a competitive component among tenderers and secondly, to ensure that public contracts are not exercised in a way which may have a descending effect on wages and working conditions, by placing standard clauses in the contract.<sup>61</sup> The Convention does not entail any minimum standards for wages or working conditions, but merely prescribes that national, regional or local conditions shall be respected.<sup>62</sup>

Since the overall purpose of the Convention is to ensure that domestic and local working conditions are safeguarded, work performed under a public procurement contract shall be subject to prevailing labour conditions where such work is performed. Wage and other working conditions may not be less advantageous than the representative collective agreement in force applicable to the work at issue. Conditions stemming from arbitration and national legislation are also included in the category of prevailing labour conditions. If such conditions have not been regulated by any of the aforementioned measures, the Convention states that the standard prevailing in the sector at issue shall be determinant. The awarding authority is responsible for guaranteeing that the prevailing working conditions are provided for in the contract. In the absence of applicable rules concerning working protection and welfare measures, the awarding authority shall take actions in order to ensure the workers fair and reasonable conditions of health, safety and welfare (Articles 2-3).

### **2.3.2 The overall scope of application**

The scope of application of the ILO Convention no. 94 is defined in Article 1. According to that provision, the Convention is applicable to contracts where at least one of the two contracting parties is a public authority, the execution of the contract involves the expenditure of public funds and that the other contracting party employs the workers. The Article further stipulates what sort of contracts that are covered by the Convention, i.e. the construction of public works, the use of materials, shipment or supplies or the performance or supply of services. Lastly, a member of the ILO for which the Convention is in force must conform with the provisions of the Convention (Article 1(1)(a)-(d)).

Hence, contracts that fulfil the cumulative conditions and thus are covered by the Convention, must, according to Article 2, include clauses guaranteeing that the working conditions are not less favourable than those

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<sup>61</sup> Labour Clauses in public contracts, 2008, Report III (Part 1B), Summary, p. XIII.

<sup>62</sup> Nielsen, 2010, p. 211.

recognised for the same type of work in the trade or industry concerned as well as in the district where the work is carried out. The definition of what constitutes a public authority is left to the national state since an international definition could raise a number of difficulties with respect to different national systems and structures.<sup>63</sup>

### **2.3.3 Exemptions from application**

It is for the competent authority to determine to which extent and in what manner the Convention should be applied (Article 1(2)). This is further developed by Article 1(4) – (5) where stated that the competent authority may exempt contracts albeit involving the spending of public funds if that contract does not exceed a limit fixed by that authority or exclude certain positions where the employment conditions are not regulated at national level, in consultation with employers' and workers' organisations (Article 1(4)-(5)). The former was introduced in order to reach a Convention that could be ratified, even though some views stated that the reason behind imposing labour clauses in public contracts was the expenditure of public funds. Accordingly, the national competent authority can narrow or broaden the material and personal scope of the application within the limits of Articles 1(4)-(5).<sup>64</sup>

### **2.3.4 Subcontractors**

The Convention is further applicable to subcontractors, the reason for this is to ensure the proper implementation of the clauses in practice. The definition of a subcontractor is subject to the margin of discretion left to the Convention state. The contracting authority is responsible for taking adequate measures to assure the correct application of the Convention.<sup>65</sup> Some Convention states have chosen to make the clauses directly applicable to subcontractors, others have made the principal contractor responsible for ensuring the compliance with the labour clauses in the awarded contract.<sup>66</sup>

### **2.3.5 Labour clauses**

Article 2(1) of the Convention stipulates that public contracts must include clauses on wages, including allowances, hours of work and other conditions of labour which may not be less favourable than the conditions established by collective agreement, arbitration award or by national laws or regulations for work of the same character in the trade or industry concerned in the

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<sup>63</sup> Labour Clauses in public contracts, 2008, Report III (Part 1B), para. 59.

<sup>64</sup> Ibid., paras. 82-84.

<sup>65</sup> See Article 1(3) Convention no. 94; Labour Clauses in public contracts, 2008, Report III (Part 1B), para. 77.

<sup>66</sup> Labour Clauses in public contracts, 2008, Report III (Part 1B), paras. 80-81.

district where the public work is carried out. Absent applicable instruments of regulation, the instruments of the nearest district shall be applied.<sup>67</sup>

Article 2 of Recommendation no. 84 specifies Article 2 (1)-(2) of the Convention, by defining the substantial content of labour clauses. The detailed provisions were laid down in the Recommendation since many members contended that the Convention should concern the general principles whilst the Recommendation should provide for more detailed regulation.<sup>68</sup>

Confirming the need for tripartite discussion, Article 2(3) of the Convention prescribes that the content of labour clauses in public contracts shall be set after consultation between the competent authority and the employers' and workers' organisations. However, the procedure in which such consultations are carried out is left to the ratifying state.<sup>69</sup>

In order to ensure sufficient publicity of the content of the labour clauses, Article 2(4) of the Convention imposes an obligation on the competent authority to take appropriate measures for ensuring that the tenderers are familiar with the terms of the clauses. The elaboration of means for consolidating satisfactory transparency is albeit left to the national authorities.<sup>70</sup> Nevertheless, the lack of publicity does not affect the commitment stemming from Article 2(1), requiring labour clauses to be integrated into public contracts.<sup>71</sup>

### **2.3.6 Provisions of working environment**

Article 3 calls for the competent authority to take measures aiming to ensure workers, performing under public contracts, reasonable conditions of health, safety and welfare. The provision is triggered only when national laws or regulations, collective agreements or arbitration awards are not satisfactory for the workers at issue. The ILO Committee has contended that 'mere compensation' for an occupational accident or injury is not sufficient in order to satisfy the requirements stemming from Article 3.<sup>72</sup>

## **2.4 Concluding remarks**

The overall objectives of Convention no. 94 are to ensure that labour costs shall not be used as a competitive element in public procurement and that public contracts are not exercised in a way, which might have a negative

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<sup>67</sup> Labour Clauses in public contracts, 2008, Report III (Part 1B), para. 98.

<sup>68</sup> See to this effect Article 2 Recommendation no. 84 and Labour Clauses in public contracts, 2008, Report III (Part 1B), paras. 99 – 100.

<sup>69</sup> Labour Clauses in public contracts, 2008, Report III (Part 1B), para. 122.

<sup>70</sup> *Ibid.*, para. 125.

<sup>71</sup> *Ibid.*, para. 128.

<sup>72</sup> *Ibid.*, paras. 130-133.

effect on wages and working conditions. According to Article 1 of Convention no. 94, the scope of application concerns services or works. There are no material minimum standards provided for by the Convention, only dictations saying that the national, regional or local conditions shall be respected. The State shall function as a model employer. The working and wage conditions referred to are national legislation, collective agreements in force applicable to the work at issue or conditions stemming from the arbitration. The awarding authorities are responsible, even in the absence of such conditions, to ensure that workers enjoy fair and reasonable conditions of health, safety and welfare. To ensure the proper implementation of labour law requirements, the Convention is applicable to subcontractors.

The ILO promotes the consultation with employers' and workers' organisations, through its structure and through explicit formulation in Convention no. 94. The overall purpose of the ILO Convention no. 94 and the strive to reinforce its rules, is that public procurement shall not be used as grounds for unhealthy competition. According to the Committee, the regulations of the Convention are even more crucial today than when first adopted in 1949.

# 3 The Scope of Labour Law Requirements in Public Procurement at the EU Level

## 3.1 Aims of EU procurement law

The principal objective of the Union to coordinate public procurement law is mainly to secure the proper functioning of the internal single market.<sup>73</sup> EU public procurement law ensures that suppliers and service providers from other EU Member States are not excluded from the market, thus guaranteeing non-discriminatory access to public tenders. A review of public procurement rules has albeit been promoted, seeking for simplified rules and integration of requirements relating to political ambitions. According to a report presented for the European Commission, there is a probable room for greater use of public procurement as a tool for achieving certain policy objectives at the EU level. Suggesting the adoption of mandatory requirements related to policy objectives would, *inter alia*, promote social cohesion.<sup>74</sup> The rationale behind such a position is that the frictions between market integration at supranational level and social protection at national level could cause impediments to the integration of the single market.<sup>75</sup>

The performance of public procurement is subject to two arrays of provisions. Firstly, the provisions of free movement apply, enshrined in the Treaties and more specifically the freedom of goods enshrined in Article 34 and 35, freedom of establishment in Article 49 and freedom of services in Article 56 TFEU<sup>76</sup>. Secondly, the larger public contracts are covered by secondary legislation formalised by Directives, requiring the public authorities to award contracts using transparent procedures set therein. This ensures that awarding authorities do not use their power of contracting to favour national tenderers and thereby directly or indirectly discriminate foreign tenderers.<sup>77</sup>

When assessing the scope of policies not primarily covered by EU procurement law it may be of importance to identify what objectives lies behind the coordination of public procurement law at Union level.

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<sup>73</sup> Bercusson, B. and Bruun, N., Labour Law Aspects of Public Procurement in the EU in Nielsen, R. and Treumer, S.(ed.), *The New EU Public Procurement Directives*, Djøf Publishing, Copenhagen 2005, pp. 97-116, p. 97.

<sup>74</sup> Monti, M., *A New Strategy for the Single Market*, Report to the President of the European Commission, 9 May 2010, p. 76 *et seq.*

<sup>75</sup> *Ibid.*, p. 68.

<sup>76</sup> Consolidated version of the Treaty on the Functioning of the European Union (TFEU) (OJ 2008 C 115/47) 9 May 2008.

<sup>77</sup> Bercusson and Bruun, 2005, p. 97.

According to Arrowsmith and Kunzlik, the prohibition of discrimination is essential, set out both in the Treaty and in the preamble of the Directive. Secondly, the requirement of a transparent procedure limits the national authorities from covering discriminatory conduct. Thirdly, the procurement rules aim to remove or at the very least, reduce disproportionate restrictions on access to the free market.<sup>78</sup> Within the Union, policies aiming to pursue other objectives than the realisation of the internal market, have been referred to as secondary policies. This is so since the main purpose of public procurement is to increase the competitiveness regarding the purchase of a product, work or service, whilst the secondary policies do not relate to the primary objective.<sup>79</sup>

Even though the primary objective of EU public procurement law is to eliminate barriers to free movement of goods and services,<sup>80</sup> it shall be emphasised that Union law does not require Member States to guarantee that the most economic efficient tender is chosen. Arrowsmith and Kunzlik accentuate that the Union does not have competence to evaluate the disbursement of public funds, this assessment shall be left to the national state.<sup>81</sup>

The interaction and collision between labour law and competition law is of great importance. Competition law is of profound influence on the development of labour law. Through the globalisation of economy, enterprises enjoy greater mobility as regards capital and workers, putting pressure on the national state to reduce labour costs and to attract and keep investors.<sup>82</sup> The overall purpose of labour law is to enable men and women is to cope with the ups and downs of what the market generates.<sup>83</sup> Additionally, labour law strives to ensure that the returns of progress are shared as well as investing in further progress.<sup>84</sup>

It is submitted that labour conditions and employment protection can form an integral part of public procurement contracts, albeit not constituting the primary interest of public procurement law at the EU level. According to Bercusson and Bruun, it is further possible to impose responsibility on a contractor to ensure that subcontractors comply with such labour standards. Nonetheless, this will be dealt with at the national level.<sup>85</sup>

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<sup>78</sup> Arrowsmith, S. and Kunzlik, P., *Social and Environmental Policies in EC Procurement Law – New Directives and New Directions*, Cambridge University Press 2009, p. 30 *et seq.*

<sup>79</sup> *Ibid.*, p. 14.

<sup>80</sup> See, *inter alia*, Case C-513/99 *Concordia Bus Finland Oy Ab, formerly Stagecoach Finland Oy Ab v. Helsingin kaupunki and HKL-Bussiliikenne* [2002] ECR I-7213, para. 56.

<sup>81</sup> Arrowsmith and Kunzlik, p. 34 *et seq.*

<sup>82</sup> Macklem, P., *The Right to Bargain Collectively*, in Alston, P. (ed.) *Labour Rights as Human Rights*, Oxford University Press, New York 2005, pp. 61-84, p. 62.

<sup>83</sup> Servais, J-M., *Working Conditions and Globalization*, in Blanpain, R. (ed.), *Comparative Labour Law and Industrial Relations in Industrialized Market Economies*, Wolters Kluwer Law & Business, Alphen aan den Rijn, 2010, pp. 361-391, p. 386

<sup>84</sup> See project description for the ReMarkLab research programme at Stockholm University, [http://www.juridicum.su.se/social\\_civilratt/remarklab\\_english.htm](http://www.juridicum.su.se/social_civilratt/remarklab_english.htm)

<sup>85</sup> Bercusson and Bruun, 2005, p. 114 *et seq.*

## 3.2 Primary law

### 3.2.1 General principles governing public procurement

The award of contracts concluded by the State, regional or local authorities and other bodies governed by public law entities, is subject to the provisions of the Treaty, in particular the fundamental freedoms of establishment and services and the principles derived thereof, such as the principle of non-discrimination, the principle of mutual recognition, the principle of proportionality and the principle of transparency.<sup>86</sup> A restriction to the fundamental freedoms may be justified, provided that it is suitable for the objective pursued by the measure at issue and that it does not go beyond what is necessary to attain such an objective.<sup>87</sup>

Contracts not falling within the ambit of the Treaty due to lacking transnational interest and thus not of interest for the integration of the internal are not subject to EU law. The establishment of a transnational interest has been developed through the case law of the ECJ (see discussion below).<sup>88</sup>

### 3.2.2 Article 351 TFEU

According to Article 351 (former 307 EC); ‘the rights and obligations arising from agreements concluded before 1 January 1958 or, for acceding States, before the date of their accession, between one or more Member States on the one hand, and one or more third countries on the other, shall not be affected by the provisions of the Treaties’. Nonetheless, if such obligations are incompatible with the Treaties, Member States are, according to the Article, required to take appropriate action to eliminate such inconsistencies. Conclusively, certain bilateral agreements between a Member State and another state or organisation shall not be affected by the requirements stemming from the Treaties inasmuch as they are compatible with the Treaties.

In the case of *Levy*,<sup>89</sup> the ECJ ruled that it is for the national courts to establish the ambit of an international agreement in order to determine to what extent that agreement could constitute an impediment to Union law.<sup>90</sup> A national court is obliged to refrain from applying any national legislation contrary to Union law, unless such legislation is necessary in order for the

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<sup>86</sup> Recital 2 Directive 2004/18/EC.

<sup>87</sup> Case C-234/03 *Contse SA, Vivisol Srl & Oxigen Salud SA v. Instituto Nacional de Gestión Sanitaria* [2005] ECR I-9315, para. 25.

<sup>88</sup> Case C-507/03 *Commission of the European Communities v Ireland*, [2007] ECR I-9777, para. 33.

<sup>89</sup> Case C-158/91 *Criminal proceedings against Jean-Claude Levy* [1993] ECR I-4287.

<sup>90</sup> *Ibid.*, para. 21.



Member State to fulfil its obligations stemming from a prior agreement with a non-member country.<sup>91</sup>

If a Member State were to submit itself to obligations stemming from a Treaty with a third country, inconsistent with EU law, that would be a breach to the EU Treaty. In a situation of exclusive Union competence or shared competence, such an agreement would be found invalid due to lacking competence.<sup>92</sup>

The *Levy* case has been argued to display the binding nature of the ILO Conventions. This could result in a dividing line between EU Member States that have ratified the Convention no. 94 and those who have not, as regards their ability to impose clauses in public contracts making collective agreements mandatory labour standards.<sup>93</sup> No explicit and evident conflict exists between the Convention and EU law. Rules of unfair competition has been put forward as questioning whether the use of different wages and working conditions could be considered as acts falling within that category.<sup>94</sup>

On this notion, Norway, a member of EFTA, has been criticised by the supervising body ESA, as regards the Norwegian regulation aiming to satisfy the obligations stemming from the ILO Convention no. 94. The regulatory provision at issue required public authorities to impose obligations in their awarding contracts stating that contractors or subcontractors are compelled to apply wage and working conditions that are not less favourable than those stemming from the nationwide collective agreement in force or by the prevailing conditions in the locality and sector concerned. The ESA contended that the regulation was not sufficiently precise as regards what wages and working conditions the employees were entitled. Considering the ruling of *Rüffert*, the regulation additionally constituted an unlawful impediment to the free movement of services since it only applied to the public sector.<sup>95</sup>

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<sup>91</sup> Case C-158/91 *Levy*, para. 22.

<sup>92</sup> Krüger, K., Nielsen, R. and Bruun, N., *European Public Contracts in a Labour Law Perspective*, Djøf Publishing, Copenhagen 1998, p. 42.

<sup>93</sup> Bercusson, p. 448 *et seq.*

<sup>94</sup> Krüger, Nielsen and Bruun, 1998, p. 209 *et seq.*

<sup>95</sup> Ahlberg, K., Norges regering beredd ändra regler om arbetsvillkor i offentliga kontrakt, *EU & Arbetsrätt*, No. 3, 2010, p. 1 *et seq.*

## 3.3 Secondary legislation

### 3.3.1 The Directives – introductory remarks

The current Directives in the area of public procurement are Directive 2004/18/EC<sup>96</sup> covering most major public contracts and Directive 2004/17/EC<sup>97</sup> governing contracts in certain services sectors.<sup>98</sup> The Directives contain procedural provisions, aiming to ensure the transparency and equal treatment among the tenders. The award of a contract will be made on basis of either the lowest price or the economically most advantageous tender. Additionally there are three Directives governing the legal remedies of public procurement at the EU level,<sup>99</sup> seeking to guarantee possibilities of restitution for tenderers where the awarding authority has not followed the procedural provisions.<sup>100</sup>

According to recital 1 of Directive 2004/18/EC and Directive 2004/17/EC the Directives are based upon the case law of the ECJ, especially the case law on award criteria. Thus, clarifying the conditions for contracting authorities to meet the needs of the public concerned, including needs in the environmental and/or social area provided that such criteria are linked to the subject matter of the contract and do not confer unrestricted freedom to the contracting authority when choosing tender. Such criteria must further be explicitly mentioned and comply with the fundamental principles laid down. The principles referred to are the provisions of the Treaty concerning goods, establishment and services and the principles derived thereof, i.e. the principle of non-discrimination, the principle of mutual recognition, the principle of proportionality and the principle of transparency. The rationale behind the coordination of public procurement is to guarantee the opening-up of such procedures to competition.<sup>101</sup> So-called contract performance conditions are legitimate given that they apply in a non-discriminatory

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<sup>96</sup> 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. OJ L 34 30.1.4.2004, pp. 114-240.

<sup>97</sup> 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. OJ L 134/1 30.4.2004, pp. 1-113.

<sup>98</sup> Arrowsmith and Kunzlik, 2009, p. 29 *et seq.*

<sup>99</sup> 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, OJ L 395, 30.12.1989, pp. 33-35; 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, OJ L 76, 23.3.1994, p. 14-20; Directive 2007/66/EC of the European Parliament and of the Council of 11 December 2007 amending Council Directives 89/665/EEC and 92/13/EEC with regard to improving the effectiveness of review procedures concerning the award of public contracts. OJ L 335, 20.12.2007, pp. 31-46.

<sup>100</sup> Sundstrand, A., *Offentlig upphandling – LOU och LUF*, Studentlitteratur AB, Lund 2010, p. 33 *et seq.*

<sup>101</sup> Recital 2 Directive 2004/18/EC.

manner and are expressly indicated in the contract notice or in the contract documents. Such criteria may be intended to support vocational training, fight against unemployment and to comply with the basic ILO Conventions.<sup>102</sup>

Directive 2004/18/EC concerning public works, is applicable to works, supply or service contracts between a contracting authority, including bodies governed by public law, and an economic operator (Article 1(8)-(9)). A public contract, provided that it is of a type that is not excluded from the Directive, falls within the scope of the Directive if it meets or exceeds certain value thresholds, explicitly set out in Article 7. Those thresholds will be reviewed every two years in order to align them with the WTO's Agreement on Government Procurement (GPA), ensuring that non-EU nationals are not benefitting from more advantageous thresholds than EU-nationals.<sup>103</sup> The thresholds, laid down in Article 7, vary depending on the sector at issue.

Excluded contracts and contracts below the thresholds are still subject to the provisions of the Treaty. Examples of such are certain sensitive services such as broadcasting (Article 16(b)), and contracts concluded with other public bodies (Articles 11 and 18). Contracts lacking transnational elements and not of interest of the internal market are excluded from the provisions of the Treaty.<sup>104</sup> As regards compliance with generally applicable labour law requirements, the Commission made, in its Interpretative Communication in 2001,<sup>105</sup> a distinction between national situations and cross-border situations. In the former, contracting authorities, tenderers and awarded contractors must comply with the obligations relating to employment protection and working conditions, including those obligations deriving from collective or individual rights, applicable labour law, case law or collective agreements, given that those are in compliance with EU law. In a cross-border situation, requirements justified by overriding reasons to the general interests must be observed. Even more favourable conditions to workers are applicable, provided that they are compatible with EU law.<sup>106</sup>

A tenderer can be excluded on four different grounds, which are explicitly provided for in the Directive; the lack of financial standing (Article 47), technical or professional ability to perform (Article 48), lack of professional honesty, solvency and reliability (Article 45). Lastly, authorities may

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<sup>102</sup> Recitals 33 of Directive 2004/18/EC and 44 of Directive 2004/17/EC.

<sup>103</sup> Arrowsmith and Kunzlik, 2009, p. 98 *et seq.*

<sup>104</sup> See *inter alia*, C-52/79 *Procureur du Roi v Marc J.V.C. Debaeve and others* [1980] ECR 00833, para. 9; Ahlberg, K., and Bruun, N., *Expertyttrande med anledning av Konkurrensverkets beslut 2010-04-15 angående krav på kollektivavtalsenliga villkor vid offentlig upphandling*, annex 1, published in *TCO och LO:s referensgrupps ledamöters yttrande angående upphandlingsutredningens arbete med möjligheten att ställa sociala krav vid offentlig upphandling*, April 3rd 2011, p. 5.

<sup>105</sup> Interpretative Communication of the Commission on the Community law applicable to public procurement and the possibilities for integrating social considerations into public procurement, COM(2001) 566 final, Brussels, October 15<sup>th</sup> 2001 final.

<sup>106</sup> *Ibid.*, p. 20

require tenderers to be registered in the country of establishment (Article 46). The new Directives provide a possibility to reserve contracts for sheltered workshops or to require the performance of the contracts to the context of sheltered employment programmes for disabled (Article 19).

### 3.3.2 Background

Before the revision of the reigning EU public procurement law there were four Directives coordinating the tender procedures in respect of supplies, works, services and utilities.<sup>107</sup> Two additional Directives regulated the remedies of such procedures.<sup>108</sup> The revision of the secondary legislation regulating public procurement law was initiated partly because of the absence of provisions regulating so-called horizontal policies, i.e. policies not related to the subject matter of the contract. Due to changes in society, for example issues related to environment, globalisation and fair trade, the situation was found unsatisfactory. The propositions put forward by the Commission allowed for conditions in awarding contracts aiming to combat unemployment and promoting employment of disabled. The current Directives impose requirements on Member States to promote the use of horizontal policies.<sup>109</sup>

According to recital 28 of the Directive, employment and occupation are key elements in guaranteeing equal opportunities for all and contribute to integration in society. Member States may therefore reserve rights to participate in procedures for public contracts for sheltered workshops or employment programmes to facilitate integration of people with disabilities into the labour market.<sup>110</sup>

The Parliament agreed on several amendments to the Commission's proposals allowing for, *inter alia*, the exclusion of certain tenderers who have not fulfilled their obligations regarding employment protection and labour law rights in accordance with applicable legal provisions, including those in legislation, collective agreements and contracts.<sup>111</sup> The amendments proposed entailed mandatory labour law requirements such as the exclusions of enterprises guilty of non-compliance with collective agreements or other

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<sup>107</sup> Council Directive 92/50/EEC of 18 June 1992, relating to the coordination of procedures for the award of public services, OJ L 209, 24.7.1992, p. 1-24, Council Directive 93/36/EEC of 14 June coordinating procedures for the award of public supply contracts, OJ L 199, 9.8.1993, p. 1-53; Council Directive 93/37/EEC of 14 June 1993 concerning the coordination of procedures for the award of public works contracts, OJ L, 9.8.1993, pp. 54-83; Council Directive 93/38/EEC of 14 June 1993 coordinating the procurement procedures of entities operating in water, transport and telecommunication sectors, OJ L 199, 9.8.1993, p. 84-138.

<sup>108</sup> Dir. 89/665/EEC and Dir. 92/13/EEC.

<sup>109</sup> Arrowsmith and Kunzlik, 2009, p. 95 *et seq.*

<sup>110</sup> Recital 28 Directive 2004/28/EU.

<sup>111</sup> Position of the European parliament adopted at the first reading on 17 January 2002 with a view to the adoption of European Parliament and Council Directive on the coordination of procedures for the award of public supply contracts, public service contracts and public works contract, OJ 2002 No. C271/E/176, Article 53(2)(e).

employment related aspects in the state in which they were established or in another relevant country.<sup>112</sup> However, those amendments were subsequently excluded from the final text of the Directives.<sup>113</sup>

The placement of social consideration in the preambular provisions show, according to Kilpatrick, the conflict between the EU institutions during the legislative process, resulting ‘in a variegated set of relationships between the social recitals and the main body of the Directive’.<sup>114</sup> The struggle between those who considered social policies incorporated in the public contracts as necessary and those who considered that such policies should to be excluded in principle, concerned not only, according to Bercusson, sectional interests. In essence, the struggle touched upon the very characteristics of the Union itself; whether the EU should merely be concerned with the promotion of the integration of the internal market or if it also should pursue social policy objectives. Public procurement has been recognised as a powerful tool to enforce labour standards.<sup>115</sup> To visualise, in 2008 the EU public procurement accounted for 17-18% of EU GDP.<sup>116</sup>

### **3.3.3 Different phases of the public procurement procedure**

#### **3.3.3.1 Qualification criteria**

If a tender does not fulfil the requirements stipulated for allowing participation in the tender process, that tender is excluded from the procedure.<sup>117</sup> Exclusion of a tenderer could be administered due to grave professional misconduct (Article 45(2)), serious misrepresentation or lacking solvency and reliability (Article 45(2)(a)-(g)).

Criteria of qualification may also address the financial standing of the tenderer (Article 47) and technical specifications (Article 48).<sup>118</sup> Social considerations may be imposed at this stage, since grave misconduct could relate to non-compliance with obligations in the social area, including observance of national labour law or collective agreements.<sup>119</sup> The grounds

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<sup>112</sup> Position of the European parliament, OJ 2002 No. C271/E/176, Article 53(2)(d).

<sup>113</sup> Bruun and Ahlberg, 2010, p. 36 *et seq.*

<sup>114</sup> Kilpatrick, C., *Internal Market Architecture and the Accommodation of Labour Rights: As Good As it Gets?*, EUI Working Paper, 20011/04, Florence 2011, p. 11.

<sup>115</sup> Bercusson, B., *European Labour Law*, Second Edition, Cambridge University Press, New York 2009, p. 432 *et seq.*

<sup>116</sup> Monti, 2010, p. 76.

<sup>117</sup> Bercusson, B. and Bruun, N., Labour Law Aspects of Public Procurement in the EU, in Nielsen, R. and Treumer, S.(ed.), *The New EU Public Procurement Directives*, Djøf Publishing 2005, Copenhagen, p. 97-116, p. 111 *et seq.*

<sup>118</sup> See *inter alia*, C-31/87 *Gebroeders Beentjes BV v Netherlands* [1988] ECR 4635, para. 17.

<sup>119</sup> See *inter alia* COM(2001) 566 and Bruun and Ahlberg, 2010, p. 35 *et seq.*

for exclusion are exhaustive, albeit the limits for imposing social considerations or so called secondary or horizontal policies are not clear.<sup>120</sup>

Further, the Directive prescribes that laws, regulations and collective agreements in force as regards employment protection and safety at work, apply during the performance of a public contract given that such regulations comply with Union law. According to recital 34 of the preamble, in a cross border situation, where workers from one Member State perform services in another Member State, Directive 96/71/EC<sup>121</sup> on posting of workers applies and lays down the minimum conditions to be observed in the host Member State. Non-compliance with such obligations could constitute grave misconduct.<sup>122</sup> However, the preambular provision at issue does not say anything about compliance with higher standards than the hard nucleus in Article 3(1) of Directive 96/71/EC.<sup>123</sup>

### 3.3.3.2 Award criteria

This stage indicates the phase where the contracting authority is selecting among the candidates who have passed the initial stage of participation.<sup>124</sup> The authority may base its decision on two grounds, either the lowest price or the most economically advantageous tender (Article 53(1)(b) and 53(1)(a)). The latter criterion implies the possibility to take into account quality and environmental considerations, cost-effectiveness etc. provided that such considerations are linked to the subject matter of the contract (Article 53(1)(a)). The relative weighting of criteria used when determining the most advantageous tender must be specified.<sup>125</sup>

Regarding discrimination, the ECJ has stated that the mere fact that award criteria may exclude some providers do not infringe the fundamental freedoms. Factors that are not purely economic may still have effect on the value of the tender.<sup>126</sup> Hence, the provisions laid down in the Directive impede any criterion addressing the conduct of a tenderer outside the contract. However, specifications in general are not to be considered as restrictions to trade.<sup>127</sup>

Social criteria can be economically advantageous but still need to be related to the manner in which the contract or the work at issue is carried out. The list of criteria to use when determining the most advantageous tender, set out in Article 53(1)(a) of Directive 2004/18/EC, is not exhaustive but rather

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<sup>120</sup> Arrowsmith, S., An Assessment of the Legislative Package on Public Procurement, *Common Market Law Review*, Vol. 41, Issue 5, 2004, pp. 1277-1325, p. 1319.

<sup>121</sup> 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, OJ L 18, 21.1.1997, pp. 1-6.

<sup>122</sup> Recital 34 Directive 2004/18/EC.

<sup>123</sup> Kilpatrick, 2011, p. 7.

<sup>124</sup> Bercusson and Bruun, 2005, p. 113 *et seq.*

<sup>125</sup> See to this effect, recital 46 Directive 2004/18/EC.

<sup>126</sup> Case C-513/99 *Concordia Bus Finland*, para. 55.

<sup>127</sup> Case C-6/05 *Medipac-Kazantzidis AE v Venizelio-Panania* [2007] ECR I-4557, para. 55.

illustrative.<sup>128</sup> In the case of *Bentjees*, the Court found that conditions requiring tenderers to hire a certain quota of unemployed persons could be considered lawful under Union law. Although not constituting an award criterion but an additional special condition, which must be specified in the contract notice, it was found legitimate.<sup>129</sup>

The award criteria must be linked to the subject matter of the contract according to Article 53 Directive 2004/18/EC, constituting an important restriction to the possibility to take social considerations.<sup>130</sup> The jurisprudence has developed certain other conditions that may limit the scope of social criteria in the awarding phase. The additional conditions governing award criteria must not give unrestricted discretion to the awarding authority,<sup>131</sup> they must be objective and quantifiable,<sup>132</sup> and the application of such conditions must be verifiable.<sup>133</sup> Nevertheless, it has been suggested that states enjoy a broad discretion in the weighting of criteria, a principle extendable to social criteria.<sup>134</sup>

The link between the subject matter and the criteria used has been argued to leave room for interpretation. To what extent labour law requirements can be integrated in awarding decisions is not clear.<sup>135</sup> Bercusson argues that social criteria may but *need not* [author's emphasis] concern the subject matter of the contract or the manner in which the work is carried out, provided that such criteria do not violate the fundamental freedoms and the principle of non-discrimination. Bercusson therefore submits that social criteria can be used in addition to the most economically advantageous tender.<sup>136</sup>

### 3.3.3.3 Abnormally low tenders

Abnormally low tenders (Article 55) may additionally constitute a ground for exclusion. The awarding authority shall, before rejecting the tender at issue, request in writing for details of the constituent elements of the tender, which it considers relevant. Such details may in particular include compliance with provisions relating to employment and working conditions in force where the work, service or supply is carried out (Article 55(1)(d)). According to Bruun and Ahlberg, the term 'particular' implies that the list set out in Article 55 is illustrative, rather than exhaustive.<sup>137</sup>

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<sup>128</sup> Arrowsmith, 2004, p. 1316.

<sup>129</sup> C-31/87 *Bentjees*, para. 36.

<sup>130</sup> Arrowsmith, 2004, p. 1316.

<sup>131</sup> C-31/87 *Bentjees*, para. 26; Case C-19/00 *SIAC* [2001] ECR I-7725, para. 37.

<sup>132</sup> Case C-513/99 *Concordia Bus Finland*, para. 66.

<sup>133</sup> Case C-448/01 *EVN AG and Wienstrom GmbH v. Republik Österreich* [2003] ECR I-14527, paras. 51-52.

<sup>134</sup> Arrowsmith, S., Application of the EC Treaty and directives to horizontal policies: a critical review, in Arrowsmith, S. and Kunzlik, P., *Social and Environmental Policies in EC Procurement Law – New Directives and New Directions*, Cambridge University Press 2009 2009, p. 189 *et seq.*

<sup>135</sup> Bercusson and Bruun, 2005, p. 113 *et seq.*

<sup>136</sup> Bercusson, 2009, p. 440 *et seq.*

<sup>137</sup> Bruun and Ahlberg, 2010, p. 44.

Kilpatrick contends that the rejection of abnormally low tenders is important in a situation of interface between public procurement and posted workers, as it signals the possibility of rejecting a tender set in accordance with notably lower wages and labour standards in the home-state to when a tenderer is posting workers to carry out the public contract.<sup>138</sup>

### 3.3.3.4 Contract performance criteria

An awarding authority is allowed to demand the awarded tenderer to comply with certain requirements as regards the performance of the contract given that such requirements are in compliance with Union law and explicitly enunciated in the contract notice. According to Article 26, such requirements can comprise social considerations. The rationale behind this is that criteria aiming to influence the performance of the contract can be used to combat unemployment and to fulfil requirements stemming from the core ILO Conventions, provided that the criteria are not directly or indirectly discriminatory.<sup>139</sup>

Prior to 2004, the performance phase was not regulated by the public procurement Directives. Thus, Article 26 is essential as regards clarifying the scope left for public authorities to impose conditions at this stage.<sup>140</sup> According to Bercusson and Bruun, contract performance criteria may be imposed in the contract after being used as either qualification or award criteria or both. In addition, such criteria may serve as elements for demanding certain mandatory labour law conditions in the area where the contract is to be performed.<sup>141</sup>

Moreover, a contracting authority could provide tenderers with information about where the tenderer can receive information about, *inter alia*, working conditions and employment protection in force in the Member State, region or locality where the works or services are performed. If the contracting authority does provide the tenderers with such information it shall further request the tenderers to show that they have considered such requirements in their tender (Article 27(1)-(2)).

Contract performance criteria limited to the performance of the contract does not necessarily have to be considered as a restriction to trade. However, there are criteria that go beyond the performance of the contract and thus are considered hindrances to trade and must therefore be justified. This arguably goes for both discriminatory and non-discriminatory measures.<sup>142</sup> The principle of equal treatment is also of great importance when determining conditions of performance of the contract, non-compliance with such conditions must lead to exclusion in order to not

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<sup>138</sup> Kilpatrick, 2011, p. 9.

<sup>139</sup> Recital 33 Directive 2004/18/EU.

<sup>140</sup> Kilpatrick, 2011, p. 9 *et seq.*

<sup>141</sup> Bercusson and Bruun, 2005, p. 115 *et seq.*

<sup>142</sup> Arrowsmith, 2009, p. 178.



infringe the principle of equal treatment.<sup>143</sup> Kilpatrick submits that the rationale underpinning Article 26 allows for additional obligations on public contractors ensuring higher worker protection than those obligations that generally apply. However, Kilpatrick contends that this rationale sits poorly with the reasoning in *Rüffert* (see discussion below).<sup>144</sup>

In respect of conditions relating to the workforce, it has been argued that the concepts of ‘relating to the subject matter’, used during the awarding phase, and ‘relating to the performance of the contract’ are different. The scope of imposing social objectives as award criteria could be seen as more narrow as regards to the conditions relating to the performance of the contract. Possibly this is so due to the aspiration of not giving unimpeded discretion to the contracting authorities. The concepts of ‘subject matter of the contract’ and ‘relating to the performance of the contract’, would, if interpreted broadly, allow Member States to implement different kinds of measures, even such connected with workforce matters. According to Arrowsmith and Kunzlik, an extensive interpretation is consistent with the jurisprudence and the case law of the ECJ.<sup>145</sup>

### 3.3.4 Subcontracting

According to Article 25 Directive 2004/18/EC, a contracting authority may ask or be required by the national legislation of the Member State at issue, to ask tenderers to indicate in the tender to what extent he or she intend to subcontract to third parties and to submit any proposed subcontractors. Such a request or requirement must appear in the contract notice. This shall however not constitute indications as regards the economic liability of the principal economic operator. The possibility to ask or demand tenderers to specify to what extent they intend to assign to third parties also applies to concession contracts (Article 60). According to the recitals, in order to encourage the involvement of small and medium-sized undertakings in the public procurement market, it is advisable to include provisions on subcontracting.<sup>146</sup> Subcontracting is considered to be the most important and realistic way of including and promoting SME’s participation in public procurement. Enterprises lacking technical knowledge, economic resources or experience can benefit from taking part in public procurement.<sup>147</sup>

An indication of what proportion of a service contract a tenderer intends to possibly subcontract may be used as contract performance criteria, and more precisely, to determine the technical ability of a tenderer (Article 48(2)(i)).

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<sup>143</sup> COM(2001) 566 final, p. 16.

<sup>144</sup> Kilpatrick, 2011, p. 10.

<sup>145</sup> Arrowsmith, 2009, p. 241 *et seq.*

<sup>146</sup> Recital 32 Directive 2004/18/EC.

<sup>147</sup> Hatzis, N., The legality of SME development policies under EC procurement law, in Arrowsmith, S. and Kunzlik, P., *Social and Environmental Policies in EC Procurement Law – New Directives and New Directions*, Cambridge University Press 2009, p. 345-368, p. 357 *et seq.*

The ECJ has held that there is a difference between restrictions to use subcontracting at the phase of the assessment of a suitability of a tenderer and those related to the performance of the contract after the awarding phase.<sup>148</sup> Thus, the use of subcontractors is not a ground for exclusion. However, the contracting authority may examine the proposed subcontractors. The liability to show that those subcontractors are reliable lies with the tenderer.<sup>149</sup>

## 3.4 Directive 96/71/EC on Posting of Workers

### 3.4.1 The aims and scope of the Directive

Directive 96/71/EC on Posting of Workers applies to a situation where employers temporarily post workers within the territory of another Member State (Article 1).<sup>150</sup> The objectives pursued by the Directive are the promotion of fair competition of services of transnational nature whilst ensuring the respect for workers' rights.<sup>151</sup> The Directive is based on the principle of the host Member State (Article 1(1)),<sup>152</sup> thus requiring Member States to extend certain working conditions to workers posted within its territory.<sup>153</sup>

The Directive is aimed to coordinate the legislation in the EU Member States and to impose obligations on undertakings when posting workers in another Member State to respect a hard core of mandatory EU rules. The debate on social dumping came to the fore in the case of *Rush Portuguesa*<sup>154</sup> where French authorities were permitted to extend certain conditions to Portuguese workers posted in French territory.<sup>155</sup> The ruling gave green light to Directive 96/71/EC on Posting of Workers stating that the extension of certain conditions did not constitute an infringement of Article 56 TFEU.<sup>156</sup> The Directive on Posting of Workers goes further the ECJ in the case of *Rush Portuguesa* by requiring, instead of permitting, the Member States to extend certain conditions to posted workers within their territory.<sup>157</sup>

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<sup>148</sup> See, *inter alia*, Case C-176/98 *Holst Italia SpA v Comune di Cagliari* [1999] ECR I-8607, paras 26-31.

<sup>149</sup> Hatzis, 2009, p. 357 *et seq.*

<sup>150</sup> See also recital 3 Directive 96/71/EC.

<sup>151</sup> Recital 5 Directive 96/71/EC.

<sup>152</sup> See also recital 8 Directive 96/71/EC.

<sup>153</sup> Barnard, C., *EC Employment Law*, Third Edition, Oxford University Press, New York 2006, p. 280 *et seq.*

<sup>154</sup> Case C-113/89 *Rush Portuguesa Ltda v Office Nationale d'Immigration* [1990] ECR I-1417.

<sup>155</sup> *Ibid.*, para. 18.

<sup>156</sup> Barnard, 2006, p. 39.

<sup>157</sup> *Ibid.*, p. 280 *et seq.*

Stemming from Article 3, the undertakings posting workers in another Member State must ensure that the host state's terms and conditions in respect of maximum work periods and minimum rest periods, minimum paid holidays, minimum rates of pay (defined by the host's state law or practice, including overtime), condition of out-hiring workers, health, safety and hygiene at work, terms and conditions of employment in respect of pregnant women or women who recently have given birth, children and young people and equality between men and women and other provisions of non-discrimination. Those rules constitute the hard core of mandatory rules to be observed and can, according to Article 3(1), be laid down by law, regulation or administrative provision. In building work situations, the terms and conditions referred to in Article 3 can be laid down by law, regulation, administrative provision and/or collective agreement or arbitration awards, which have been declared universally applicable.<sup>158</sup> The Directive on Posting of Workers provides for minimum standards and thus allows for the application of more favourable terms and conditions for the workers (Article 3(7)). Member States that lack a system of declaring collective agreements universally applicable may instead use collective agreements, which are either, generally applicable to all undertakings in one geographical area or concluded between the most representative employers' and labour organisations at national level, given that such are applied nationwide (Article 3(8)).

The exception in Article 3(10) Directive 96/71/EC opens up for Member States to apply terms and conditions outside the 'hard nucleus' in Article 3, including those terms and conditions laid down in collective agreements and arbitration awards other than those related to building work, in the case of public policy. Nevertheless, the higher standards imposed, based on Article 3(10), must comply with Article 56 TFEU.<sup>159</sup>

The Directive is adopted on the basis of the freedom of establishment Article 53 TFEU (ex. Article 47 TEC) and freedom to provide services Article 62 (ex. Article 55 TEC).<sup>160</sup> The Directive 96/71/EC is a product of coordination between the Member States and does not intend to harmonize the mandatory conditions laid down in the Directive but simply identify which conditions are to be observed by the posting undertaking. The harmonization is limited to what mandatory requirements the posted workers shall benefit from, not the content of such.<sup>161</sup> The fulfilment of the objectives pursued by the Directive has been brought up to question. If the objective is to promote the freedom to provide services, the Directive may, by imposing additional requirements on undertakings posting workers in another Member State, impede the free movement. Albeit, if the objective of Directive 96/71/EC is to stop social dumping, it is argued that this cannot be

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<sup>158</sup> Barnard, 2006, p. 282 *et seq.*

<sup>159</sup> *Ibid.*, p. 283.

<sup>160</sup> Davies, P., The Posted Workers Directive and the EC Treaty, *Industrial Law Journal*, Vol. 31, Issue 3, September 2002, pp. 298-306, p. 300.

<sup>161</sup> Davies, P., Case C-346/06, *Rüffert v Land Niedersachsen* [2008] IRLR 467 (ECJ), *Industrial Law Journal*, Vol. 37, Issue 3, September 2008, pp. 293-295, p. 294.

achieved by merely requiring minimum standards. If enterprises, established in the host state, pay workers higher wages than the minimum rate while undertakings posting workers in that Member State will pay minimum wages, the latter will enjoy a competitive advantage. Lastly, if the objective, pursued by Directive 96/71/EC, is to ensure a minimum protection of the workers, it may very well succeed.<sup>162</sup>

### 3.4.2 The case law and the Laval Quartet

The case of *Laval*<sup>163</sup> has been argued to contain several implications as regards the nature of Directive 96/71/EC. The case concerned a Latvian construction company (Laval un Partneri Ltd) that posted Workers on Swedish building sites. A collective agreement was reached between Laval and a Latvian trade Union. The Swedish trade Union (Byggnads) decided to take actions towards Laval aiming to make the latter sign a Swedish Collective agreement. The Swedish Electricians' Trade Union subsequently took sympathy actions.<sup>164</sup> The ECJ pondered upon whether standards exceeding the minimum requirements of the Directive were lawful. The outcome of the judgment could be regarded as even though the Directive provides for minimum harmonization as regards mandatory requirements to be extended to posted workers, Article 3 additionally regulates the maximum requirements the host state may impose.<sup>165</sup> The Swedish wage rates, established through collective agreements, were found not transparent enough.<sup>166</sup>

In *Commission v Luxembourg*,<sup>167</sup> the Court ruled that public policy is a derogation from the fundamental freedoms and thus must be interpreted narrowly. The same holds for the derogation in 3(10) since this constitutes a derogation from the mandatory rules in Article 3(1).<sup>168</sup> Any derogation must be accompanied by appropriate evidence or at the very least, evidence substantiating the argumentation put forward by the state.<sup>169</sup>

The Laval Quartet (*Laval*, *Viking*,<sup>170</sup> *Rüffert* and *Commission v Luxembourg*) has had several implications as regards national labour law. The acknowledgment by the ECJ has narrowed the scope of national

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<sup>162</sup> Barnard, 2006, p. 288 *et seq.*

<sup>163</sup> Case C-341/05 *Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet, Svenska Byggnadsarbetareförbundet, avd. 1, Svenska Elektrikerförbundet*, [2007] ECR I-11767.

<sup>164</sup> Rönnmar, M., Laval returns to Sweden: The Final Judgment of the Swedish Labour Court and Swedish Legislative Reforms, *Industrial Law Journal*, Vol. 39, Issue 3, September 2010, pp. 280-287, p. 280 *et seq.*

<sup>165</sup> Davies, 2008, p. 294 *et seq.*

<sup>166</sup> Bruun and Ahlberg, 2010, p. 127.

<sup>167</sup> Case C-319/06 *Commission of the European Communities v Grand Duchy of Luxembourg* [2008] ECR I-04323.

<sup>168</sup> *Ibid.*, paras. 30-31.

<sup>169</sup> *Ibid.*, para. 51.

<sup>170</sup> Case C-438/05 *International Transport Workers' Federation and Finnish Seamen's Union v Viking Line ABP and OÜ Viking Line Eesti*, ECR [2007] p. I-10779.

measures and trade union actions, aiming to combat social dumping and low wage competition. This has resulted in the strengthening of competitive gain of foreign service providers.<sup>171</sup> The Court leaves theoretical room for exceptions, but in substance, the host Member State is able to apply its national labour law only if the two cumulative requirements are met; the subject matter of the rules must be set out in Article 3(1) and the rules must stem from the legal sources laid down in Article 3(1) and (8), i.e. laws or universally applicable collective agreements.<sup>172</sup> The Court turned the minimum floor of Directive 96/71/EC into a ceiling and appears to have interpreted Article 3(7) as allowing more favourable home-state rules to apply to the posted workers.<sup>173</sup> The significance of the provisions laid down in Article 3 and in particular Article 3(7), was once again brought to the fore in the case of *Rüffert* where a public authority required that a locally negotiated collective agreement, albeit not universally applicable, should be observed in its public procurement contract (see discussion below).<sup>174</sup>

### 3.5 Case law of the ECJ

The ECJ stated in its judgement in the case of *Cambridge University*<sup>175</sup> that the purpose of coordinating the procedures for the award of public contracts at Union level (then Community level) is to eliminate barriers to the freedom to provide services and goods and to protect the interests of tenderers established in a Member State who wishes to offer goods or services to contracting authorities established in another Member State. The overall aim was therefore claimed to be both the exclusion of the risk that national tenderers may be given preference by the contracting authority and of the possibility that an awarding authority may be steered by other considerations than purely economic ones.<sup>176</sup>

Bercusson contends that the ruling in *Cambridge University* shall be interpreted as economic considerations are incorporated into the aim of the EU policy regulating public procurement, therefore constraining non-economic considerations. Restrictions on non-economic considerations are albeit brought to the fore only when such considerations lead to barriers to the free movement. The same should, according to Bercusson, be held for economic considerations.<sup>177</sup>

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<sup>171</sup> Dølvik, J. E. and Visser, J., Free movement, equal treatment and workers' rights: Can the European Union solve its trilemma of fundamental principles? *Industrial Relations Journal*, Vol. 40, Issue 6, Blackwell Publishing Ltd. 2009, pp. 491–509, p. 500 *et seq.*

<sup>172</sup> Krebber, S., Case C-319/06 Commission v. Luxembourg, Judgment of the Court (First Chamber) of 19 June 2008, [2008] ECR I-4323, *Common Market Law Review*, Vol. 46, Issue 5, Kluwer Law International, printed in the Netherlands, 2009, pp. 1725-1735, p. 1730 *et seq.*

<sup>173</sup> Kilpatrick, 2011, p. 11.

<sup>174</sup> See also Bruun and Ahlberg, 2010, p.125 *et seq.*

<sup>175</sup> Case C-380/98 *The Queen v H.M. Treasury, ex parte The University of Cambridge* [2000] ECR I-08035.

<sup>176</sup> *Ibid.*, paras. 16-17.

<sup>177</sup> Bercusson, 2009, p. 431.

The ECJ precedents are only applicable to public contracts, which are of importance to the integration of the internal market. When not covered by the Directives, it is for the competent national authority to determine whether there is a transnational interest, i.e. whether economic actors in other Member States would be interested in offering their services in the relevant Member State.<sup>178</sup> The establishment of a certain transnational interest has been developed through the case law of the ECJ.<sup>179</sup> The existence of such interest is in principle left to the contracting authority to establish although it is permissible for the national legislator to lay down objective criteria indicating whether such an interest is at hand. Considerations to be taken into account could be, *inter alia*, the amount of the contracts and the location where the work is carried out. A modest economic interest could suggest that there is no transnational interest. On the other hand, account must be taken of the fact that when the borders straddle conurbations, which are situated in different Member States, even contracts of low amounts could be of transnational interest.<sup>180</sup> However, a mere condition that a contract relates to services falling within the scope of sectors described in the annexes of the Directives does not automatically cause a transnational interest.<sup>181</sup>

The earlier mentioned case of *Beentjes* concerned a condition laid down in by a public authority saying that the contract workforce should consist of 70 percent of long-term unemployed persons, engaged through the local unemployment office. The ECJ found the condition as a not lawful ground for exclusion, since such a condition was not listed in the Directive at issue. Such a condition could further infringe the principle of non-discrimination, if it is liable to only be satisfied by tenderers in the Member State concerned or if foreign tenderers have difficulties complying with such a condition.<sup>182</sup> In *Beentjes*, the ECJ further argued that the Directives regulating public procurement do not 'lay down a uniform and exhaustive body of Community rules'. Member States remain free to keep or adopt rules regulating public procurement, provided that such rules respect the relevant provisions of Union law.<sup>183</sup>

As regards permitted award criteria, the ECJ found in the case of *Nord pas de Calais*<sup>184</sup> that a provision aspiring to combat unemployment could be

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<sup>178</sup> Ahlberg and Bruun, *Expertyttrande med anledning av Konkurrensverkets beslut 2010-04-15 angående krav på kollektivavtalsenliga villkor vid offentlig upphandling*, annex 1, published in *TCO och LO:s referensgrupps ledamöters yttrande angående upphandlingsutredningens arbete med möjligheten att ställa sociala krav vid offentlig upphandling*, April 3rd 2011, p. 7.

<sup>179</sup> Case C-507/03 *COM v Ireland*, para. 33.

<sup>180</sup> Joined cases C-147/06 and Case C-148/06 *SECAP SpA (C-147/06) and Santorso Soc. coop. arl (C-148/06) v Comune di Torino* [2008] ECR I-3565, para. 31.

<sup>181</sup> Case C-507/03 *COM v Ireland*, para. 33.

<sup>182</sup> C-31/87 *Bentjees*, para. 28 -30.

<sup>183</sup> *Ibid.*, para. 20.

<sup>184</sup> Case C-225/98, *Commission of the European Communities v French Republic (Nord pas de Calais)* [2000] ECR I-07445.

regarded as legitimate award criteria, provided that such a criterion was in compliance with the fundamental principles.<sup>185</sup> In the subsequent decision of *Concordia Bus Finland*, the Court ruled on the possibility to use non purely economic award criteria. The case concerned the award of a contract of bus networks operations and the ECJ found that it is legitimate to give out points for emissions and external noise below a certain level since such criteria relate to the subject matter of the contract.<sup>186</sup> Nonetheless, it is argued as not permitted under EU law to award points related to the environmental background of the tenderer when such a condition lacks relevance as regards the contract in question. According to Arrowsmith, this restrictive approach could also apply to social criteria but it is not clear whether workforce issues are considered as linked to the subject matter of the contract. Further, the restrictive position on behalf of the ECJ in *Concordia* could be contrasted against the broader approach the ECJ had taken on earlier.<sup>187</sup>

### 3.5.1 Ruffert

The case of *Ruffert* concerned a national legislation prescribing a contracting authority to designate only tenders who agree in writing to pay their employees at least the wage provided for in the collective agreement in force in the locality where the services are to be performed.<sup>188</sup> In the present case, the national authority Land Niedersachsen in Germany awarded the tender Objekt und Bauregie a contract for structural work in building a prison. The Objekt und Bauregie used a subcontracted company, established in Poland. During the contractual period, suspicion emerged that the contractor had engaged Polish workers at the building site, who were paid less than half of the wage provided for in the 'Building and public works' collective agreement. Consequently, The Land Niedersachsen terminated the contract since the Objekt und Bauregie allegedly had failed to fulfil its contractual obligations by not complying with the provisions of the prevailing collective agreement.<sup>189</sup>

The national court of first instance held that Objekt und Bauregie had been compensated through the contractual provision of reparation. Therefore, the company appealed to the higher regional court, which decided to stay the proceedings and refer the questions to the ECJ for a preliminary ruling.<sup>190</sup>

The Court found the legislation falling within the scope of Directive 96/71/EC on Posting of Workers, stating that the mere fact that the objective of a national legislation was not aimed to govern the posting of workers did

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<sup>185</sup> Ibid., para. 50.

<sup>186</sup> Case C-513/99 *Concordia Bus Finland*, paras. 59 and 65.

<sup>187</sup> Arrowsmith, 2004, p. 1317.

<sup>188</sup> Case C-346/06 *Ruffert*, para. 10.

<sup>189</sup> Ibid., para. 11.

<sup>190</sup> Ibid., paras. 12-13.

not preclude a situation to come into the scope of that Directive.<sup>191</sup> Pursuant to Directive 96/71/EC, in a situation of transnational services, posted workers are to be guaranteed the same conditions of employment, including minimum wages, provided that such conditions may be fixed by law, regulations or collective agreements declared universally applicable. In absence of a system of declaring collective agreements universally applicable, collective agreements generally applicable to similar undertakings in the industry concerned or agreements concluded by representative organisations at national level are also allowed. The ECJ found the 'Building and Public works' collective agreement not covered by the provisions of the Directive.<sup>192</sup> According to the Court, the level of protection for workers laid down in that Directive was limited to the protection provided for in collective agreements covered by the Directive. A rate of pay as provided for in the 'Building and public works' was found not compatible with Directive 96/71/EC.<sup>193</sup>

The Court further reasoned that a law requiring public authorities to designate only tenders who agree to pay the minimum wage according to 'Buildings and public works' agreement is liable to prohibit, impede or render less attractive the provision of their services in the host state. Therefore, such a legislative measure can constitute a restriction to the freedom to provide services within the meaning of article 56 TFEU (then Article 49 EC).<sup>194</sup> Such a restriction could neither be justified by ensuring the protection of workers nor by the protection of independence in the organisation of working life by the trade unions.<sup>195</sup> A restriction to Article 56 must be justified due to an overriding reason of public interest. Since the national legislation only concerned public contracts and therefore was not generally applicable to all workers, it was found not suitable for the objective pursued. Concerning the contention on behalf of the German Government that the effectiveness of the social security system depends on the level of the salaries of the workers, which could serve as a justification, the Court responded that a national legislation such as the one at issue did not appear to be necessary in order to preclude the risk of undermining the social security system. Thereby the German legislation was found incompatible with Directive 96/71/EC, interpreted in the light of freedom to provide services.<sup>196</sup>

The provisions laid down in the collective agreements were found going beyond what was required by the Directive. Minimum wages are listed in Article 3 of the Directive, however, only minimum wages laid down in legislation or collective agreements extended through governmental action.<sup>197</sup> The Advocate General Bot came to a somewhat diverse

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<sup>191</sup> *Ibid.*, para. 20.

<sup>192</sup> Case C-346/06 *Rüffert*, paras. 26-32.

<sup>193</sup> *Ibid.*, paras. 33-34.

<sup>194</sup> *Ibid.*, para. 37.

<sup>195</sup> *Ibid.*, paras. 38-41.

<sup>196</sup> *Ibid.*, paras. 42-43.

<sup>197</sup> Davies, 2008, p. 295.



conclusion in his opinion, stating that there is not necessarily a contradiction between the objective of upholding fair competition on the one hand and ensuring worker protection on the other. Further, the AG argued, the guarantee of ensuring higher wages for posted workers is undeniably an appropriate mean to protect such workers. According to the AG, the contract performance criteria to apply a certain collective agreement applies equally to national and foreign undertakings, it is in compliance with the principle of non-discrimination on grounds of nationality. Moreover and with reference to *Bentjees*, the AG submitted that the national measure was given sufficient publicity by being explicitly stated in the contract notice and thus in conformity with the principle of transparency. To conclude, a requirement such as the one at issue should be considered compatible with Union law.<sup>198</sup>

It is apparent that *Rüffert* did not only concern the cross border situation of workers but also aspects relating to public procurement law. The opportunity to formulate an awarding of a public works contract conditional on social considerations was not referred to, by neither the German Government nor by the Court. Directive 2004/18/EC states that non-compliance with obligations related to Directive 96/71/EC may be considered as grave misconduct.<sup>199</sup> Within the doctrine it has been argued that the ECJ subordinated the permission for social clauses in public procurement contracts in order to protect collective agreements to the abolition of impediments to intra-Union trade. The *Rüffert* case has been argued to be inconsistent with the earlier case law of the ECJ as well as activating conflicts with both EU law and international labour law.<sup>200</sup> Kilpatrick contends that the judgement is ‘marked by a total absence of consideration of the public procurement social *acquis*, the directives and its own progressive jurisprudence’.<sup>201</sup>

### 3.5.2 COM v Germany

The case concerned the question whether German law regulating old age pensions within employment relationships fell within the scope of public procurement law. The German law prescribed that the scheme of payment of an employee’s right to pension was to be regulated by an agreement. Such an agreement was concluded between the Vereinigung der kommunalen Arbeitgeberverbände (Federation of Local Authority Employer Associations, hereafter the VKA) and the Vereinte Dienstleistungsgewerkschaft eV (United Service Sector Union).<sup>202</sup> The agreement stated that an employer may converse the earnings by adopting

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<sup>198</sup> Opinion of Mr Advocate General Bot delivered on 20 September 2006, *Dirk Rüffert v Land Niedersachsen* [2008] ECR I-1989, paras. 108, 121, 134.

<sup>199</sup> Franzén, M. and Richter, C., Case C-346/96 *Rechtsanwalt Dr. Dirk Rüffert, in his capacity as liquidator of Objekt und Bauregie GmbH & Co. KG v Land Niedersachsen*, [2008] ECR I-1989, *Common market Law Review*, Vol. 47, Issue 2, Kluwer Law International. Printed in the United Kingdom, 2010, pp. 537-554, p. 542.

<sup>200</sup> Bercusson, 2009, p. 446 *et seq.*

<sup>201</sup> Kilpatrick, 2011, p. 15.

<sup>202</sup> Case C-271/08 *COM v Germany*, paras. 23-26.

implementation methods offered by local authority insurance companies.<sup>203</sup> A similar agreement was also concluded between VKA and another Union.<sup>204</sup>

The Commission stated that the omission to call for tenders at European level could constitute an infringement of the former Directive 92/50/EEC<sup>205</sup> and in any event, a violation of the fundamental freedoms. The German Government objected, submitting that local authorities performing as employers as regards to occupational old-age pension were not to be covered by ‘contracting authorities’ within the meaning of Directive 92/50/EEC. Further, pension insurance did not constitute a public contract since it fell within the employment relationship.<sup>206</sup> According to the Commission, the responses on behalf of the German Government did not serve as a justification and thus decided to bring action.<sup>207</sup>

In its judgment, the Court recognised the right to collective bargaining as a fundamental right, enshrined *inter alia* in Article 28 on the Charter of Fundamental Rights of the European Union and Article 6 of the European Social Charter<sup>208</sup>. However, this did not imply that local authority employers were automatically excluded from the obligations to comply with requirements stemming from the former Directive 92/50/EEC and the then recently entered in to force, Directive 2004/18/EC. With a reference to *Viking* and *Laval*, the Court held that the right to collective bargaining could be subject to certain restrictions. Even if collective agreements are not *per se* regarded as restrictions to the internal market (Article 101(1) TFEU),<sup>209</sup> and therefore not subject to the provisions of the Treaty, Directives implementing the principles of the fundamental freedoms cannot be automatically prejudiced.<sup>210</sup> The objective in the present case, pursued by the parties of the collective agreement, the improvement of the pension level for local authority employees, was not considered to affect the essence of the right to collective bargaining. Neither could compliance with the Directives be regarded as irreconcilable with the attainment of the objective pursued by the collective agreement parties.<sup>211</sup>

The German government, supported by Denmark and Sweden, argued that the exception for application of the Directive on employment contracts (Article 16(e)) should be interpreted as extended to any provision of services based on such contracts or by collective agreement that forms an integral part of such contracts. Due to the subject matter and material content of the contract, it should be covered by labour law provisions.

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<sup>203</sup> Ibid. para. 28.

<sup>204</sup> Ibid. para. 26.

<sup>205</sup> Dir. 92/50/EEC.

<sup>206</sup> Case C-271/08 *COM v Germany*, paras. 30-31.

<sup>207</sup> Ibid., para. 35.

<sup>208</sup> European Social Charter (revised) ETS no. 163, Strasbourg, May 3<sup>rd</sup> 1996.

<sup>209</sup> See also Joined Cases C-67/96, C-115/97, C-116/97 and C-117/97 *Albany International BV v Stichting Bedrijfspensioenfonds Textielindustrie* [1999] ECR I-5751, para. 60.

<sup>210</sup> Case 271/08 *COM v Germany*, paras. 45-48.

<sup>211</sup> Ibid., paras. 49 and 66.

Nevertheless, the Court dismissed this line of argumentation, stating that the exception in Article 16(e) was a derogation from the scope of application of the Directive and should therefore be interpreted narrowly. A contract, such as the one at issue in the main proceedings, was not comprised by the exemption in Article 16(e) since it constituted a contract between an employer and an undertaking. Further, the contract did not relate to any of the particular concerns laid down in recital 28 of the Directive 2004/18/EC.<sup>212</sup>

To conclude, the Court submitted that the total value of the contract was equal or above the relevant threshold, triggering the application of the Directive.<sup>213</sup> Germany had therefore failed to fulfil its obligations of correctly awarding public contracts in accordance with the provisions of the Directive.<sup>214</sup>

### 3.6 Concluding remarks

Provided that the procuring entity respects EU law, it may impose social clauses and labour law requirements in public contracts at all stages of public procurement. Qualification criteria may be used to implement labour law requirements. For example, grave misconduct is a ground for exclusion and it could be argued that non-compliance with national labour law requirements, including the observance of collective agreements, could constitute grave misconduct.

Further, as regards award criteria, there is a scope of considering labour law requirements, albeit limited due to the mandatory requirement that the criteria must relate to the subject matter of the contract. Additionally, the ECJ has developed certain conditions governing the award criteria, most presumably limiting the scope of labour law requirements during this stage. These are conditions are, *inter alia*, aiming to restrain the discretion left to the awarding authorities, further they must be objective, quantifiable and verifiable. The scope of labour law requirements has been argued to be somewhat more limited as regards contract performance criteria. There is some disparity as regards the case law of the ECJ, where a restrictive approach had been used in *Concordia Bus Finland vis-à-vis* the ruling in *Nord pas de Calais*. Whether criteria aiming at the workforce are connected to the subject matter of the contract or not is somewhat unclear according to critics.

Contract performance criteria may include labour law requirements, given that such criteria comply with Union law and explicitly enunciated in the contract notice or similar documents. Contract performance criteria must not be discriminatory, either directly or indirectly. Examples of possible

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<sup>212</sup> Ibid., paras. 81-82.

<sup>213</sup> Case C-271/08 *COM v Germany*, para. 93.

<sup>214</sup> Ibid., para. 105.

objectives pursued by using contract performance criteria are *inter alia* fighting unemployment and requiring fulfilment of the ILO Core Conventions.

Affirmed by the ECJ in *Nord pas de Calais*, additional award criteria aiming to combat unemployment, were found legitimate, given that they were compatible with the fundamental principles. However, what is compatible with the fundamental principles is not clear. In *Rüffert*, the demands for collective agreements were found contrary to the freedom to provide services, since the requirements went beyond what was required by Directive 96/71/EC and the foreign contractor lost its competitive advantage. The allowance for social and labour law requirements in public contracts was secondary to the free movement. Somewhat surprisingly, the Court did not recognise the regulations of public procurement, but used Directive 96/71/EC to limit the scope of labour law requirements in public procurement.

On the other hand, the ECJ stated in the case of *Bentjees*, that the Union does not lay down an exhaustive list of Union rules governing public procurement. Consequently, Member States remain free to impose additional rules, provided that such rules respect Union law.

Concerning the issue of subcontracting, contracting authorities may ask or require tenderers to specify if and to what extent they intend to assign parts of the contract to subcontractors.

Higher national labour standards may be imposed on foreign undertakings, given that they are compatible with the provisions stemming from Directive 96/71/EC and the freedom to provide services. A preambular provision of Directive 2004/18/EC refers to the minimum standards of Directive 96/71/EC, which must be observed by the tenderers and awarded contractors. In national situations, applicable labour law regulation applies to all tenderers and awarded contractors. In a situation lacking transnational interest, the provisions of the Treaty do not apply.

# 4 The Scope of Labour Law Requirements in Public Procurement at the Swedish level

## 4.1 The current legislation

### 4.1.1 Introductory and historical remarks

Chapter 1 section 9 of Act (2007:1091) on Public Procurement (LOU) prescribes the principles governing public procurement procedures. The awarding authorities or entities shall treat all tenderers equally and non-discriminatory. They are further required to carry out the procurements in an open way and to respect the principles of mutual recognition and proportionality. In the following paragraph (Chapter 1 section 9 a), an awarding authority may consider environmental and social aspects during a public procurement procedure if the nature of that procurement implies such incentives.

Social and environmental considerations may be observed during every stage of the public procurement procedure. As regards to qualification criteria, Chapter 6 section 1 subsection 2 LOU lays down provisions stating that when an awarding authority is creating its technical specifications it may take into account social and environmental considerations. In section 12 of the same Chapter the awarding authority may request the tenderers to provide the authority with information regarding, *inter alia*, working conditions and safety at work. Chapter 12 concerns award criteria and section 1 reflect what criteria an awarding authority may use when evaluating the most advantageous tender. Regarding the performance of the contract and criteria related thereto, Chapter 10 further regulates on what grounds a tenderer may be excluded from the procurement procedure. Chapter 6 section 13 stipulates that an awarding authority may demand tenderers to comply with social and environmental requirements. In addition, requirements must appear in the contract notice or equivalent documents. Collectively, all criteria, qualification, award or performance of the contract, must observe the principles laid down in Chapter 1 section 9.<sup>215</sup> The obligations stemming from the principle of proportionality results in that a condition, targeting the performance of the contract, is only applicable to the work of the tenderer, which is relevant for the contract.<sup>216</sup>

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<sup>215</sup> Prop. 2009/10:180 Nya rättsmedel på upphandlingsområdet, p. 268 *et seq.*

<sup>216</sup> Prop. 2006/07:128 Ny lagstiftning om offentlig upphandling och upphandling inom områdena vatten energi, transporter och posttjänster, p. 200.

Public procurement in Sweden has been regulated to some extent since the beginning of 1900s. The principles governing the procedures were initially aiming to ensure publicity and legal security. Further, there were orders of preference, giving priority to Swedish products. In 1952, the demands for increased economic considerations were raised, resulting in the abolishment of preferences for Swedish products. During the 1970's the rules governing public procurement were extended to comprise services. The Governmental decree (1986:366)<sup>217</sup> was in all essentiality governed by the earlier regulation, allowing for great self-determination among the awarding authorities.<sup>218</sup> Regulations were, in principle, considered as dispositive.<sup>219</sup> Public procurement could be enforced through either closed procurement, negotiated procurement or direct procurement. The awarding authorities were free to choose which procedure that was the most adequate, considering the commercial and economic aspects.<sup>220</sup>

Due to the Swedish membership of the European Economic Area (EEA) and the agreement between the EU and the EEA, Sweden was under the obligation to implement and comply with the EU secondary regulations governing public procurement. As a result, new provisions regulating Swedish public procurement were introduced in 1994. When Sweden became a member of the EU in 1995, compelled by the *acquis communautaire*, the fundamental principles governing public procurement also became applicable. The Swedish legislator chose to enforce all six Directives governing EU public procurement in one legislative act.<sup>221</sup> The result, LOU (1992:1528), was mandatory and extended the number of authorities bound by the rules.<sup>222</sup> It further contained new legal remedies in the form of appeal of decisions and compensation for damages caused.<sup>223</sup>

## 4.1.2 Procurements outside the Directives

Services covered by the regulation of public procurement are categorised as either A- or B-services. A-services contain services traditionally regarded as suitable for transnational trade, such as computer services, revisions, transports, real estate management etc. B-services on the other hand, are services, according to the Union legislator, considered less suitable for transnational trade. Which services that fall within the latter category are indicated in Annex 3 of the LOU and Act (2007:1092) on Public Procurement operating in water, energy, transport and postal services sectors (LUF). Examples of B-services are services performed within the

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<sup>217</sup> Upphandlingsförordning (1986:366).

<sup>218</sup> Prop. 1992/93:88 om offentlig upphandling, p. 34 *et seq.*

<sup>219</sup> Sundstrand, 2010, p. 24.

<sup>220</sup> Prop. 1992/93:88, p. 35.

<sup>221</sup> Sundstrand, 2010, p. 24 *et seq.*

<sup>222</sup> Prop. 1992/93:88, p. 37.

<sup>223</sup> *Ibid.*, p. 45 *et seq.*

sector of hotels and restaurants, railway transports, transport services in general, legal services etc.<sup>224</sup>

Chapter 15 of the LOU and LUF regulate public procurement not covered or partially covered by the provisions of the Directives. The provisions laid down therein indicate what other alternative procedures are available for procurements not falling within the scope of the Directives.<sup>225</sup> The general principles of Union law will apply to any procurement of transnational interest, i.e. relating to the internal market.<sup>226</sup> As discussed above, at the EU level, the existence of a transnational interest has been elaborated through the case law of the ECJ.<sup>227</sup> At large, the establishment of such interest is left to the contracting authority although the national legislator remains free to lay down objective criteria signifying whether such an interest is at hand.<sup>228</sup> The Swedish legislator has nevertheless chosen to make fundamental principles governing public procurement at the EU level applicable to all procurements in Sweden. Since the scope of observing those principles has not been limited, it is presumed that even procurements falling outside of the EU framework are covered by the principles set out in Chapter 1 section 9 LOU.<sup>229</sup>

The general provisions laid down in Chapter 1 section 9 apply to the procurements regulated in Chapter 15 (Chapter 15 section 2 LOU).<sup>230</sup> However, through the entering into force of Chapter 1 section 9 a, a provision urging awarding authorities to require tenderers to comply with environmental and social considerations, given that this is called for by the nature of the procurement, must also be observed in procurements regulated in Chapter 15.<sup>231</sup>

## 4.2 The implementation at Swedish level

### 4.2.1 The Public Procurement Committee

#### 4.2.1.1 Compliance with EU law

The Governmental Inquiry Report, preceding the Governmental Bill and prepared by the Public Procurement Committee, found that a specification on what requirements that were to be considered as compatible with Union law, would carry certain difficulties. The suggestion proposed implied that the scope of social requirements should be allowed in as much as it was

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<sup>224</sup> Prop. 2009/10:180, p. 92 *et seq.*

<sup>225</sup> Prop. 2009/10:180, p. 95.

<sup>226</sup> Joined cases C-147/06 and Case C-148/06 *SECAP SpA (C-147/06) and Santorso Soc. coop. arl (C-148/06) v Comune di Torino* [2008] ECR I-03565, para. 20.

<sup>227</sup> Case C-507/03 *COM v Ireland*, para. 33.

<sup>228</sup> Joined cases C-147/06 and Case C-148/06 *SECAP SpA*, para. 31.

<sup>229</sup> Sundstrand, 2010, p. 48.

<sup>230</sup> Prop. 2009/10:180, p. 95.

<sup>231</sup> Lag (2010:571) om ändring i lagen (2007:1091) om offentlig upphandling.

necessary, considering the nature of the procurement. The Committee further suggested that the new legislation should entail provisions, calling for awarding authorities to integrate social requirements in public procurement contracts.<sup>232</sup>

The Committee contended that there was a difference between environmental and social requirements. In the case law of the ECJ environmental requirements have been considered as one of the criteria used when determining the most advantageous tender, whilst social requirements have been regarded as a parallel category to such criteria. Another distinction between the two categories of criteria was that there is a clear connection between the environmental requirements and the political views of the Union. A similar link has not been expressly addressed as regards social requirements. According to the Committee, this could serve as an indication for the fact that the EU public procurement provisions allow for Member States to apply national social rules provided that they respect Union law.<sup>233</sup> It had previously been argued that the scope of social requirements in public procurement procedure is primarily a matter of internal Swedish legal and political ambitions.<sup>234</sup>

The Public Procurement Committee submitted that criteria originating from desirable objectives which the awarding entity wishes to pursue through public procurement and which go further than the national legislation were sought-after. Examples of such are the ambitions to achieve labour market effects by hiring long term unemployed, youths, immigrants, elderly, persons with disabilities or of the underrepresented sex or by not signing deliverers paying their employees unacceptably low wages. According to the Committee, it could be generally determined which demands that were to be considered as acceptable. That must be decided on a case-by-case basis. With a reference to the case law of the ECJ,<sup>235</sup> it was further contended that the demands at issue must have some sort of link to the subject matter of the procurement. Further, it was not considered possible to export certain demands. Thus, an awarding authority should not be allowed to require foreign product manufacturers to comply with rules regarding fabrication or transports or other activities performed outside of the national state.<sup>236</sup>

The downside of implementing a rule, prescribing that an awarding authority should demand for environmental and social considerations in public procurement contracts is that such a rule is merely recommendation. A non-mandatory rule cannot be relied upon neither by the awarding authorities nor by the tenderers. The Committee submitted that it was questionable whether public procurement legislation should be used as demanding for ethical codes of conduct or other political ambitions. A

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<sup>232</sup> SOU 2006:28, p. 23 *et seq.*

<sup>233</sup> *Ibid.*, p. 184 *et seq.*

<sup>234</sup> SOU 2001:31 Mera värde för pengarna, p. 286 *et seq.*

<sup>235</sup> See to this effect, Case C-448/01 *EVN Wienstrom*, paras.51-52.

<sup>236</sup> SOU 2006:28, p. 226.



regulation, such as the one at issue, could further be interpreted as an obligation by the addressees, thus risking to create uncertainties about the present legal position.<sup>237</sup>

The possibility to call for social requirements in a public procurement procedure is at its most when the procurement concerns construction works or services since, in the context of such contracts, the awarding authority can stipulate conditions for the performance of the contract.<sup>238</sup>

#### **4.2.1.2 Possible accession to the ILO Convention no. 94?**

The Public Procurement Committee also addressed the issue of a possible ratification by Sweden of the ILO Convention no. 94. The assignment was limited to examine if there were any legal impediments for Sweden to ratify and apply the Convention.<sup>239</sup> This question had been raised in 1950 but was subsequently dismissed as regards the material content of the Convention was claimed to be regulated and satisfied through collective agreements.<sup>240</sup>

According to the Committee, the Convention aims to protect the employees. Such an objective has also been recognised as a legitimate public interest by the ECJ. The case law of the ECJ does not, however, imply that such an objective automatically justify restrictions to the fundamental freedoms. The principle of mutual recognition can lead to the conclusion that the public interest has already been satisfied through the legislation of the country of establishment in a situation containing cross-border elements. To conclude, according to the inquiry, it appeared clear that Sweden did not enjoy exclusive competence in the material area covered by the Convention. In a situation of shared competence, the Member States are obliged to collaborate under the principle of cooperation.<sup>241</sup>

### **4.2.2 The implementation of Directives 2004/18/EC and 2004/17/EC**

In the Swedish regulation preceding the implementation of Directives 2004/18/EC and 2004/17/EC, an awarding authority was allowed to require tenderers to comply with certain conditions regarding the performance of the contract. In the Governmental bill for implementing the above-mentioned Directives, the Swedish government held that such requirements, concerning the performance of the contract, were not to be regarded as technical specifications, qualifications criteria or award criteria but instead additional contractual criteria. It was emphasised that tenders that do not

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<sup>237</sup> SOU 2006:28, p. 230.

<sup>238</sup> *Ibid.*, p. 190.

<sup>239</sup> *Ibid.*, p. 340 *et seq.*

<sup>240</sup> Prop. 1950:188 s. 9.

<sup>241</sup> SOU 2006:28, p. 354 *et seq.*; Article 5 TEU.

meet the requirements specified by the awarding authority in the contract notice or similar documents shall be excluded from the awarding process.<sup>242</sup>

Special requirements must be in compliance with the principle of non-discrimination and other fundamental principles of public procurement, i.e. the principle of equal treatment, transparency, foreseeability, mutual recognition and proportionality and moreover, the rules stemming from the provisions of the Treaty. Consequently, the specified requirements must be proportionate to the rest of the contract and can only relate to the part of provider's activity, which is comprised by the procurement. The absence of a link between the requirement and the contract could challenge the principle of proportionality.<sup>243</sup>

Further, the Swedish government contended that a requirement laid down in the public procurement contract must be verifiable and *de facto* verified by the awarding authority or entity. The requirements may, *inter alia*, involve social considerations, exemplified by anti-discrimination clauses and demands for availability for disabled persons. Following the provisions of decree (2006:260)<sup>244</sup> on anti-discrimination clauses in public procurement contracts, some authorities are required to lay down conditions aiming to combat discrimination in their awarding contracts. Contract performance criteria shall be controllable and combined with a sanction. By explicitly allowing for social considerations within public procurement contracts, the government asserted that the clarification and weight of such requirements were shown. Against this background, the government contended, that awarding authorities and entities enjoy ample possibilities to lay down social contract criteria.<sup>245</sup>

The central trade union organisations claimed that the formulation of the provision allowing for social considerations was not clear and submitted that when the subject matter of public procurement concerns services and goods it should be evident from the wording of the preparatory works that the core Conventions of the ILO must be observed.<sup>246</sup>

In this aspect, the questions regarding on what grounds a tenderer may be excluded from the procurement was brought up. According to Chapter 10 section 2, a tenderer may be excluded due to grave misconduct. The provision corresponds to Article 45(2)(d) and (c) Directive 2004/18/EC. However, as regards what constitute grave misconduct, the Government did not refer to the preambular provision in recital 34 and 43 Directive 2004/18/EC prescribing, *inter alia*, that non-compliance with requirements stemming from the Posting of Workers Directive, omission to observe national laws, decrees or collective agreements concerning employment

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<sup>242</sup> Prop. 2006/07:128 Ny lagstiftning om offentlig upphandling och upphandling inom områdena vatten, energi, transporter och posttjänster, p. 200 *et seq.*

<sup>243</sup> *Ibid.*, p. 200 *et seq.*

<sup>244</sup> Förordning (2006:260) om antidiskrimineringsvillkor i upphandlingskontrakt.

<sup>245</sup> Prop. 2006/07:128, p. 200 *et seq.*

<sup>246</sup> *Ibid.*, p. 195.

conditions and safety at work or certain criminal activities can constitute grave misconduct.<sup>247</sup>

According to the Governmental bill, the provision laid down in chapter 10 section 2 corresponded to the prior provision regulating exclusion due to grave misconduct.<sup>248</sup> The Government later on, in the following Governmental bill implementing the Directive on remedies, specified that although the provision did not explicitly mentioned environmental and social considerations, the provision was still applicable to breaches of such legislation as well as grave misconducts in the exercise of the profession.<sup>249</sup> The concept of grave misconduct was clarified and was not limited to breach of environmental legislation, illicit collaboration and other restraining activities as regards competition.<sup>250</sup>

Regular Swedish collective agreements do not meet the requirements for collective agreements to be extended to posted workers. In 2009, a governmental bill was decided upon, suggesting legislative changes in, inter alia, the Act (1999:678) on Posting of Workers.<sup>251</sup> The Swedish implementation of the Directive on Posting of Workers is based on the autonomous collective bargaining system and the right of trade unions to take industrial action. However, this right is restricted. Sweden does not have a system of declaring collective agreements universally applicable or by legislation determined minimum wages.<sup>252</sup> Nevertheless, in practice the coverage of collective agreements is in principle complete due to high organisation rates, both by employers and employees, and extensive legally binding effects of collective agreements.<sup>253</sup> The Swedish implementation of obligations stemming from the Directive 96/71/EC are based on Article 3(8)(2)(i), which states that in the absence of a system of declaring collective agreements universally applicable, the Member States may rely on collective agreements which are either generally applicable to all similar undertakings in a specific geographical area or concluded by the most representative employers' and employees' organisation at national level and applied throughout the national territory.<sup>254</sup>

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<sup>247</sup> Bruun and Ahlberg, 2010, p. 49.

<sup>248</sup> Prop. 2006/07:128, p. 241.

<sup>249</sup> Prop. 2009/10:180, p. 269.

<sup>250</sup> Prop. 2006/07:128, p. 390.

<sup>251</sup> Prop. 2009/10:48 Åtgärder med anledning av Laval-domen, p. 1 *et seq.*

<sup>252</sup> Rönmar, 2010, p. 285.

<sup>253</sup> Rönmar, M., Labour Law in the Courts. The Role of European Case Law on Fundamental Trade Union Rights in an Evolving EU Industrial Relations System, in, Neergaard, U., Nielsen, R., Roseberry, L. (eds.), *The Role of the Courts in Developing a European Social Model – Theoretical and Methodological Perspectives*, Djøf Publishing, Copenhagen 2010, pp. 169-194, p. 175.

<sup>254</sup> Rönmar, 2010, p. 285.

### 4.2.3 The target provision

The regulation of the possibility of requiring tenderers to comply with environmental and social considerations entered into force 1<sup>st</sup> July 2010.<sup>255</sup> Initially the provision at issue was intended to come into effect in connection to the implementation of the Directives of public procurement.<sup>256</sup> The government found that there were reasons for incorporating a regulation designed as a target prescription, especially so due to the increased emphasis on environmental and social aspects within the Union and the advanced approach on behalf of Sweden in such issues. Against this background, there were strong reasons to create incentives for awarding authorities and entities to use the possibility to integrate such aspects in their contracts.<sup>257</sup>

Some consultative bodies submitted that the provision prescribing authorities to incorporate social and environmental requirements in their contracts should be made mandatory. The government however insisted that authorities would not be able to control and follow up such a rule. The requirement of verifiable criteria would thereby not be satisfied and consequently, the target provision could not be compulsive.<sup>258</sup>

Stemming from the case law of the ECJ,<sup>259</sup> requirements of social considerations in public contracts must be followed up and controlled by the awarding authority or entity. Unverifiable award criteria are contrary to the principle of equal treatment since it cannot ensure transparency and objectivity in the tender procedure.<sup>260</sup> The absence of the possibility to verify and measure award criteria could lead to an arbitrary and subjective assessment of the value of the tender. However, it has been argued in the doctrine that such a requirement must not be understood as absolute, demanding for full and detailed verification in every situation. Rather, the verification shall be made as long as it is reasonable and realistically feasible.<sup>261</sup>

Further, the awarding authorities or entities must have ensured themselves that the demands contemplated are in compliance with the fundamental principles.<sup>262</sup> The provision, allowing for integration of social and environmental requirements, was formulated in accordance with the proposal put forward by the Legislative Council.<sup>263</sup>

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<sup>255</sup> SFS (2010:571).

<sup>256</sup> Prop. 2009/10:180, p. 268 *et seq.*

<sup>257</sup> *Ibid.*, p. 271 *et seq.*

<sup>258</sup> Prop. 2009/10:180, p. 271 *et seq.*

<sup>259</sup> See to this effect, C-448/01 *EVN Wienstrom*, paras. 51-52.

<sup>260</sup> Case C-448/01, para. 47-52.

<sup>261</sup> Henriksson, L., *Restrictive Use of Award Criteria in Public Procurement*, *Swedish Studies in European Law*, Vol. 1, chapter 6, 2006, pp. 157–190, p. 168.

<sup>262</sup> Prop. 2009/10:180, p. 273.

<sup>263</sup> *Ibid.*, p. 272 *et seq.*

#### 4.2.4 Subcontracts

At the Swedish level, an awarding authority is allowed to request tenderers to indicate if and to what extent they intend to use subcontractors for the performance of the contract. Since there is no private law contract between the contracting authority and the subcontractor, an awarding authority cannot directly require a subcontractor to comply with certain conditions. Instead, the contracting authority can demand the contractor to ensure that the subcontracting parties assigned fulfil such conditions. To exemplify, contractors can be obliged by penalty or other sanctions to ensure that subcontractors performing work under the awarded contract comply with relevant laws and regulations, when performing such work. To extend the obligations outside the awarded contract could however be found in breach of the principle of proportionality.<sup>264</sup>

### 4.3 Case law and decisions at the national level – the Municipality of Botkyrka

In a decision<sup>265</sup> by the supervising authority of public procurement in Sweden, Swedish Competition Authority (Konkurrensverket), the Municipality of Botkyrka was found in breach of national legislation, specifically Chapter 1 section 9 of LOU. The procurement at issue concerned the award of an entrepreneurship contract of land management. In the public contract was a contract performance criterion, requiring the awarded tenderer to commit itself to hire one unemployed youth per contractor area. The Municipality of Botkyrka also applied a certain condition requiring awarded contractors to apply Swedish collective agreement or equivalent conditions.<sup>266</sup>

The Municipality referred to the Commission's communication on social considerations (COM(2001) (566)) and national legislation, arguing that there was scope of considerations such as the one at issue. In addition, the Municipality emphasised that the rationale behind the inclusion of social requirements was the extensive and serious social problems among youths in the area.<sup>267</sup>

According to Konkurrensverket, social requirements in public procurement contracts were permissible according to the public procurement Directives and Chapter 6 section 13 LOU. However, any criteria set in a public procurement contract must comply with the principles laid down in Chapter 1 section 9, imposing obligations for the awarding authorities to treat the tenderers in an equal and non-discriminatory manner and perform the

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<sup>264</sup> Sundstrand, 2010, p. 131 *et seq.*

<sup>265</sup> The Swedish Competition Authority governs public procurement in Sweden and gives out information about the legal position, albeit not practical guidance.

<sup>266</sup> Beslut 2010-04-15, Konkurrensverket, Dnr. 259/2009, p. 6.

<sup>267</sup> *Ibid.*, p. 2 *et seq.*

procedure in a transparent way. Moreover, the authorities or entities must respect the principles of proportionality and mutual recognition.<sup>268</sup>

Konkurrensverket started off by stating that the possibility of requiring the use of certain collective agreements or corresponding conditions in public procurement procedures has not specifically been addressed by the ECJ. Although, the conclusion to be drawn from the case of *Rüffert* and Directive 96/71/EC on posting of workers, is that legislation, universally applicable collective agreements or national collective agreements could found the basis of a fixation of minimum wages. Criteria set out in a public procurement contract requiring the awarded tenderer to meet ‘collective agreements or corresponding conditions’ will not satisfy the prerequisite of foreseeability. Thus, the requirement in the contract awarded by Botkyrka was found inconsistent with public procurement law.<sup>269</sup>

Regarding the requirement of hiring unemployed youths, Konkurrensverket contended that it is possible to combat unemployment through certain conditions in public procurement contracts. Such measures must however observe the principles of equal treatment, non-discrimination, proportionality, transparency as well as the Treaty provisions on freedom of establishment and freedom to provide services. According to the conditions of the contract at issue, the unemployed youths were to be hired by the accepted tenderer. Other forms of engaging workforce had been excluded. In accordance with the principle of proportionality, a tenderer must not, unnecessarily, be prevented from conducting its business. An awarding authority must therefore always consider if there are any less intrusive measures available to realise the aims pursued.<sup>270</sup>

The Municipality of Botkyrka was found in breach of Chapter 1 section 9 LOU by applying criteria stipulating that a tenderer who has not signed a Swedish collective agreement, was still required to apply corresponding conditions as regards to his employees. The omission to scrutinize the availability of less intrusive measures to combat unemployment could additionally be in breach of the principle of proportionality.<sup>271</sup>

#### **4.4 Debating the Swedish model – reflections of social partners, state representatives and legal doctrine**

There are different opinions on what is the primary rationale behind the coordination of public procurement at the EU level. Dan Holke, The Legal Bureau of Swedish Trade Union Confederation (LO-TCO Rättsskydd), and

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<sup>268</sup> Konkurrensverket, Dnr. 259/2009, p. 5.

<sup>269</sup> *Ibid.*, p. 6.

<sup>270</sup> *Ibid.*, p. 7.

<sup>271</sup> *Ibid.*, p. 6 *et seq.*

Ingemar Hamskär, the Swedish Confederation for Professional Employees (Tjänstemännens Centralorganisation) contend that the overall purpose of public procurement rules is to provide the taxpayers with the best value as regards the disbursement public funds. Thus, there is a scope of taking into account other types of considerations than purely economic ones.<sup>272</sup> According to Göran Söderlöf, the Swedish Association of Local Authorities and Regions (SKL), the objective pursued by public procurement law is competition and cost-effectiveness. Nonetheless, public procurement brings about labour law related issues.<sup>273</sup>

The entering into force of the target provision laid down in Chapter 1 section 9 a, signals, according to Holke and Hamskär, a clear political will on behalf of the government to awarding authorities to impose social requirements in their procurement contracts.<sup>274</sup> The provision constitutes the principle dividing line between public procurement rules as a straight-out procedural legislation and as a legislation allowing for different aspects to be taken into account.<sup>275</sup> Social considerations may be imposed during all phases of the procurement procedure, provided that they are sufficiently precise and appear in the contract notice or equivalent documents. Daniel Moius, The Legal, Financial and Administrative Services Agency (Kammarkollegiet) and Charlotta Frenander, Konkurrensverket, are critical towards the adoption of Chapter 1 section 9 a since it creates uncertainty and ambiguity in the legal framework, partially due to the fact that the provision does not provide neither tenderers nor authorities with legal remedies.<sup>276</sup> Political ambitions shall be left out of the public procurement legislation; a distinction between what is lawful and what is suitable is desirable.<sup>277</sup> This position is supported by Olof Erixon, Confederation of Swedish Enterprise, who contends that failures in other areas shall not be corrected by rules governing public procurement.<sup>278</sup> According to Söderlöf, (SKL), the target provision is not appropriate and may jeopardise the municipal self-determination.<sup>279</sup>

There is a scope of social and labour law requirements in public procurement but the legality of such requirements is dependent on the type of such requirements. According to Frenander, in any event, the criteria must be verifiable. Nevertheless, wages and employment protection

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<sup>272</sup> Interview with Holke, D., the Legal Bureau of Swedish Trade Union Confederation (LO-TCO Rättsskydd), April 6<sup>th</sup> 2011 and Hamskär, I., the Swedish Confederation for Professional Employees (Tjänstemännens Centralorganisation (TCO)) April 15<sup>th</sup> 2011.

<sup>273</sup> Interview with Söderlöf, G., the Swedish Association of Local Authorities and Regions (Sveriges Kommuner och Landsting (SKL)), April 8<sup>th</sup> 2011.

<sup>274</sup> Holke, April 6<sup>th</sup> 2011 and Hamskär, April 15<sup>th</sup> 2011.

<sup>275</sup> Holke, April 6<sup>th</sup> 2011.

<sup>276</sup> Interview with Frenander, C., the Swedish Competition Authority (Konkurrensverket), April 6<sup>th</sup> 2011.

<sup>277</sup> Interview with Moius, D., the Legal, Financial and Administrative Services Agency (Kammarkollegiet), April 8<sup>th</sup> 2011.

<sup>278</sup> Interview with Erixon, O., the Confederation of Swedish Enterprise (Svenskt Näringsliv), April 7<sup>th</sup> 2011.

<sup>279</sup> Söderlöf, April 8<sup>th</sup> 2011.

requirements are generally easy to follow up.<sup>280</sup> This view is shared by Hamskär and Holke.<sup>281</sup> According to the labour law researchers, Bruun and Ahlberg, there is nothing preventing Swedish authorities to use contract performance criteria requiring tenderers to pay clearly defined minimum wages in accordance with nationwide collective agreements. Albeit, conditions requiring tenderers to be bound by collective agreement would, supposedly, violate the negative freedom of association of employers.<sup>282</sup>

Concerning the qualm for social and wage dumping, Holke submits that even though the risks of such should not be exaggerated, it is plausibly growing and especially in labour-intensive sectors.<sup>283</sup> According to Frenander, the risks of social dumping shall be curbed by extension of the provisions of the Directive 96/71/EC on Posting of Workers to public procurement.<sup>284</sup> Erixon contends that there is a distinction between the term wage dumping, implying the use of deceptive and illegal means, and merely the usage of the comparative advantage of lower wage levels than the Swedish.<sup>285</sup>

Regarding the case of Botkyrka, Frenander emphasises that the trainee-model was in compliance with the law, albeit the Municipality had not examined whether less intrusive measures were available. Konkurrensverket did not perform its own proportionality test, but merely assessed the case in the light of the provisions of LOU. Nevertheless, the condition of observing collective agreements or equivalent conditions, did not fulfil the requirement of transparency.<sup>286</sup> The decision of Konkurrensverket is unclear and unfortunate, Hamskär and Holke argue, requesting a more motivated and elaborated decision.<sup>287</sup>

The Swedish implementation has been argued to be characterised by a radical precautionary principle combined with lacking political will to use the scope of integrating social considerations. The Swedish legislator has taken on a ‘safety first’ approach, when the provisions of the Directives at the EU level open up for the preference between ‘shall’ or ‘may’ as regards for the integration of social considerations, the Swedish legislator has consistently chosen the non-binding option.<sup>288</sup>

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<sup>280</sup> Frenander, April 6<sup>th</sup> 2011.

<sup>281</sup> Hamskär, April 15<sup>th</sup> 2011 and Holke, April 6<sup>th</sup> 2011.

<sup>282</sup> Bruun and Ahlberg, 2010, p. 138 *et seq.*

<sup>283</sup> Holke, April 6<sup>th</sup> 2011.

<sup>284</sup> Frenander, April 6<sup>th</sup> 2011.

<sup>285</sup> Erixon, April 7<sup>th</sup> 2011.

<sup>286</sup> Frenander, April 6<sup>th</sup> 2011.

<sup>287</sup> Hamskär, April 15<sup>th</sup> 2011 and Holke, April 6<sup>th</sup> 2011.

<sup>288</sup> Bruun and Ahlberg, 2010, p. 12 and 46 *et seq.*



## 4.5 Concluding remarks

As put forward in the latest Governmental Bill, social considerations may be imposed during all stages of public procurement. The provision laid down in Chapter 6 section 13 LOU is not to be regarded as qualification criteria, technical specifications or award criteria, but an additional criteria relating to the performance of the contract. The criterion is designed as a condition that the tenderer must accept and which must comply with the principle of non-discrimination, equal treatment, transparency, mutual recognition and proportionality. In addition, the criteria must answer to the provisions regulating the integration of the single market.

As regards the newly enforced chapter 1 section 9 a LOU, the awarding authorities should incorporate social requirements in the awarding contracts. Albeit formulated as a target provision the rule aims to incentivize awarding authorities to include such requirements in their public procurement contracts. The practical impact of such a provision has been questioned, some call for a mandatory rules, others advocate that political ambitions and the rules governing procurement procedures should be separated.

Concerning subcontracting, contracting authorities may request tenderers not only to indicate whether they intend to subcontract to third parties but also to what extent and if possible specify which subcontractors. Further, the contracting authority may ask the tenderer to guarantee the fulfilment of certain conditions on behalf of the subcontractor.

There is a scope of labour law requirements in public procurement at Swedish level. However, what and to what extent labour law requirements may be imposed in public contracts is debatable. A trainee position for unemployed youths in Botkyrka was a lawful criterion, albeit potentially not proportionate, whilst a condition requiring tenderers to comply with Swedish collective agreements or equivalent conditions was found not compatible with the principle of foreseeability and thus not in compliance with EU law. It appears obvious is that there is no consensus among practitioners as regards the magnitude of the scope of labour law requirements at national level. Further, it seems as if a transnational interest does not need to be established at the Swedish level for the EU framework on public procurement to apply, since all procurements are subject to the fundamental principles set out in Chapter 1 section 9 LOU.

# 5 Analysis and Conclusions

## 5.1 The scope of labour law requirements at the ILO, EU and Swedish level – de lege lata

In 2008, the EU public procurement accounted for 17-18% of the EU GDP. However, public procurement is alleged to be of great importance not only due to its economic impact on the market, but it also constitutes an instrument to implement and promote labour law standards. Whether this is desirable or not is however debatable. Public procurement is an example of 'multi level governance', formed by different frameworks, by soft law and hard law, by collective agreements concluded between private parties as well as by different actors interoperating at supranational, national, regional and local levels. I have in this thesis chosen to focus on the regulation at an ILO, EU and Swedish level. By comparing and contrasting those multi-levels of governance, I wish to identify the scope of labour law requirements in public procurement and to provide the reader with some conclusive and conceptual remarks.

At the ILO level, the social aim of Convention no. 94 is clearly evident. The aim is further described as dual. Firstly, to aspire to eliminate labour costs as being used as competitive advantages among tenderers and secondly to guarantee that public contracts are not performed in a manner, which could have a downward effect on wages and working conditions. The plain social objective of Convention no. 94 leads to a well-defined scope of labour law requirements in public procurement. Local, regional or national collective agreements are to be observed according to Convention no. 94. The Convention is further applicable to subcontractors. It appears apparent that tripartism constitutes a core element in the work of the ILO. The social partners provide the instruments of the ILO and the provisions laid down therein with greater legitimacy and facilitate and consolidate its implementation.

There is a distinction at the EU level between public procurements falling within the ambit of the Directives and those falling outside. The public procurement Directives apply only to those public procurement contracts whose value equals or exceeds the relevant thresholds laid down in the Directives. In principle, a contracting authority is free to use public contracts to pursue certain objectives, provided that they respect the fundamental principles of EU law. Albeit, a procurement, lacking a transnational interest, does not necessarily have to be made subject to the reigning principles of Union law due to its lack of interest from the point of view of the internal market.

In procurements covered by the public procurement Directives, social considerations, including labour law requirements, may be taken into account during all phases of the procedure. Firstly, public authorities may satisfy certain social objectives when construing the subject matter of the contract. EU Member States may further take social considerations into account by imposing obligations on tenderers to comply with national social legislation. Given that non-compliance with such national provisions is considered as grave professional misconduct in the Member State in question, such non-compliance could constitute a ground for exclusion. During the awarding phase, public authorities evaluating tenders by using the criteria of the most advantageous tender may take social criteria into account. Such criteria must nevertheless be indicated in the contract notice or the contract documents as well as relate to the subject matter of the contract at issue. The list of award criteria in the Directive 2004/18/EC is not exhaustive, indicating that other sort of criteria than those explicitly mentioned could be legitimate. However, the fact that award criteria must be related to the subject matter of the contract is liable to constitute an important restriction to the scope of labour law requirements as award criteria.<sup>289</sup> Through the case law of the ECJ, indicators have been developed to limit this scope, stating *inter alia* that the criteria must not give unrestricted discretion to the awarding authority, the criteria must be objective and quantifiable and the application of such must be verifiable. Nonetheless, it has been submitted that states enjoy broad margin of discretion as regards the weighting of criteria and this principle is argued to be extendable to social criteria. Confirmed by the ECJ in *Beentjes*, additional criteria promoting social objectives are allowed under EU law, provided that they are in compliance with the relevant principles of Union law. Moreover, social considerations may be integrated in criteria related to the performance of a contract. The limitation on what sort of labour law requirements that may be imposed in public procurement contract is unclear and is, at large, subject to the decisions of the ECJ and the national competent authorities.

It has been argued that the scope could differ depending on the interpretative position of what constitute the subject matter or criteria relating to the performance of the contract. If, for example, the subject matter of a public contract is to be interpreted broadly, a criterion related to the workforce could be found as legitimate during the public procurement phase. The same could be argued to apply to criteria relating to the performance of the contract. A broad interpretative approach as regards the 'subject matter of the contract' and 'criteria relating to the performance of the contract' could open up for Member States to pursue social objectives, whilst satisfying the relevant principles of Union law.<sup>290</sup> A wide margin of discretion left at the national level would additionally fulfil the visions pursued by the drafters of the Treaty, securing the principle of subsidiarity and the acknowledgment of national sovereignty. On the contrary, if the notion of the 'subject matter of the contract' or 'criteria related to the performance of the contract' would be

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<sup>289</sup> Arrowsmith, 2009, p. 238 *et seq.*

<sup>290</sup> See discussion by Arrowsmith, 2009, p. 241 *et seq.*

interpreted narrowly, it appears questionable if conditions relating to the workforce could be considered to fall within those categories. Essentially, due to the primary objectives of public procurement law at the EU level, i.e. the preservation and promotion of the internal market and the free movement, the scope of labour law requirements is restricted. This is especially so in comparison with the scope of labour law requirements at ILO level.

At Swedish level, all public procurements are subject to the fundamental principles laid down in Chapter 1 section 9 LOU. The Swedish legislator appears, in this aspect, to have gone further than required by Union law since all procurements in Sweden are covered by the provision in question. Social considerations should be integrated into public procurement contracts, according to Chapter 1 section 9 a LOU. The use of the term 'should' does not provide either authorities or tenderers with legal remedies, as the provision is merely stating a political ambition. According to some, the target provision is liable to create uncertainty among awarding authorities and they argue that the provisions governing public procurement shall not pursue political endeavours.<sup>291</sup> Others have contended that the target provision should have been made mandatory in order to provide awarding authorities and entities with means of legal redress. In essence, the Swedish implementation is characterised by a strict and noteworthy literal interpretation of the public procurement Directives.<sup>292</sup> The scope of labour law requirements at Swedish level could, in principle, be regarded as more narrowly construed than the scope allowed for at the EU level, since the Union legislator leaves room for the Member States to impose mandatory requirements concerning social considerations in public procurement. The Swedish legislator has nevertheless chosen to formulate the much debated provision in Chapter 1 section 9 a as target provision, allowing and encouraging the integration social requirements albeit not demanding the integration of such requirements.

A contracting authority may ask or demand for tenderers to specify if they intend to use subcontractors for the fulfilment of the awarded contract. To ensure the fulfilment of certain conditions stemming from the contract, the authorities may demand the awarded contractors to answer for the subcontractors, in order to guarantee the achievement of such conditions. The extent of the responsibility of the principal contractor is albeit subject to the principle of proportionality and thus, an authority cannot ask for compliance with conditions not covered by the contract.

The Swedish implementation has been criticised as being governed by a precautionary principle combined with the absence of a political motivation to enforce social considerations in public procurement. Where EU law leaves the Member States with possibilities to implement mandatory rules as regards integration of social considerations, the Swedish legislator has, in all

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<sup>291</sup> See interviews performed with Moius, Frenander and Erixon.

<sup>292</sup> See discussion by Bruun and Ahlberg, 2010, p. 49.

essence, kept a consistent cautious profile by using the non-binding alternative.<sup>293</sup>

## 5.2 The ILO and the EU – parallel application or collision?

The above referred to case of *Levy* case has been considered to show the mandatory nature of the ILO Conventions. If an EU Member State has ratified a Convention prior to 1958, the provisions of the Treaty shall not apply. However, in case such agreements are found incompatible with the Treaties the Member State is obliged to take appropriate steps to eliminate such inconsistencies. In practice, the provision set out in Article 351 TFEU could result in a division between those EU Member States who have ratified the Convention no. 94 and those who have not. The former enjoy the ability and perhaps more importantly, are under the obligation to impose clauses in public contracts securing the observance of collective agreements. Article 351 TFEU aims to solve the potential normative conflict between different frameworks. What conclusions are to be drawn from this? There is a potential or, in my view, even plausible, conflict if certain Member States will use clauses requiring tenderers to comply with collective agreements, whilst others will not. This could result in making the former Member States less attractive to foreign entrepreneurs and enterprises offering its services or supplies in that state and thus creating impediments to the integration of the internal market. The provision laid down in Article 351 TFEU read in connection with the principle of supremacy, suggests that Member States are obliged to set aside any national legislation contrary to EU law. The present dilemma is that it is not clear what EU law on the matter is. Albeit, in the case of *Levy*, the Member State at issue was able to retain and satisfy the obligations stemming from an ILO Convention. Nevertheless, it is evident that Article 351 TFEU does not alter anything as regards the possibility for Sweden to ratify Convention no. 94.

The ILO has profoundly influenced international labour law, mainly through its Conventions and Recommendations. This has been recognised by the EU legislator, exemplified, *inter alia*, through the preambular provision in recital 33 of Directive 2004/18/EC. Additionally, voices stressing the importance of an integration of the social dimension as regards the internal market have been taken more seriously. The negligence of a social dimension is no longer durable if the EU is sincere about its ambitions to reinforce human rights and develop a social market economy, preventing social exclusion. The relationship between the ILO and the EU is of crucial importance as regards to the reinforcement of labour law standards. At a formal level, the earlier mentioned Article 351 TFEU aims to solve the issue of conflicting provisions stemming from international agreements and commitments. Materially, it is of significant importance that the institutions

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<sup>293</sup> See discussion by Bruun and Ahlberg, 2010, p. 46 *et seq.*

of the EU seem willing to deepen its dialogue with ILO, acknowledged as the most prominent legal source for international labour law.

Since only states can become members of the ILO, there are no sanctions, not even condemnation, available for the ILO to enforce upon the EU. In practice, the impact the ILO may have on the development of the alleged reinforced EU labour law policy appears questionable. As an example, the EU has limited itself in the preambular provision of Directive 2004/18/EC to promote the core Conventions of the ILO, leaving out, among others, Convention no. 94 governing the same area as the Directives. The placement of the provision regulating the observance of the ILO core Conventions in the preamble and not in the main body of the Directive could indicate that the dialogue between the ILO and the EU is yet operating as a political formality, still in need of practical enforcement. The omission to mention Convention no. 94, a framework operating the same material area as the Directive 2004/18/EC, could additionally support such an argumentation. By this observation, I am not suggesting that political statements, such as the declarations on increased cooperation between the two normative bodies, lack practical effect. I merely wish to raise the issue of whether there might be a material deficit as regards a clear observance on behalf of the EU legislator to embrace the labour law endeavours promoted by the ILO.

Disparity in the case law of the ECJ does not provide for a clear and unanimous answer to whether labour law requirements are permitted at the national and EU level. The inconsistency I am referring to is mainly the restrictive approach the ECJ took in *Concordia Bus Finland vis-à-vis* the more broad approach in *Nord pas de Calais*. Those cases concerned legitimate criteria to be used when determining the most advantageous tender. According to the Union legislator, the list of award criteria is not exhaustive. Guidance concerning the limitations on what criteria that are legitimate has been developed through the case law of the ECJ, i.e. the requirement of objective and quantifiable criteria, not to give unrestricted discretion to the public authority and verifiable application of such criteria. This is, according to Arrowsmith, liable to restrict the scope for social considerations in public procurement. It appears questionable whether the enforcement of the new Directives satisfies the objective pursued by the revision of the Directives, i.e. to clarify and facilitate the public procurement procedures. The ambit of the social *acquis* of the Directives, partly due to its subordinated position to the integrations of the internal market, is yet to be determined. In comparison, the social aim of Convention no. 94 and thus the scope of labour law requirements appear clear. The ILO does support the integration of labour law requirements in public procurement contracts, including those stemming from collective agreements. The Convention no. 94 is silent concerning the status such collective agreements must possess. This is blatant considering the rationale behind the instrument, i.e. to guarantee the observance of local and regional working conditions and thus preventing the usage of such conditions as a competitive advantage. The formal status of the source of the labour standards is secondary to

Convention no. 94, which clearly is shown by the term used in the Convention, i.e. 'prevailing labour conditions'. Included in this category are representative collective agreements in force, national legislation or conditions stemming from arbitrations. If no labour conditions have been regulated through any of the mentioned measures, the existing standard in the sector shall be decisive. Convention no. 94 aims to combat social dumping and using low labour standards as competitive weapon. In my opinion, this also serves to protect the sovereignty of the national state and preservation of national labour standards, in line with the principle of subsidiarity. Further, the competent national authority can narrow or broaden the scope of application of the Convention, given that this is done in consultation with employers' and workers' organisations. This also demonstrates the emphasis the ILO puts on tripartism.

### 5.3 Implications of the case law of the ECJ

Stemming from the Court's reasoning in *Beentjes*, the design of public procurement law is not exhaustive. Member States remain free to lay additional requirements provided that such requirements respect EU law. Therefore, labour law requirements could be allowed in public procurement procedures. Are requirements stemming from national collective agreements considered in compliance with Union law? According to the judgement in *Riiffert*, the ECJ seems to take the view that in a situation of posted workers, such requirements are not allowed since they are not part of the mandatory rules laid down in Directive 96/71/EC on posting of Workers. Such an assumption could be seen as supported by the subsequent decision of the Swedish Competition Authority in the case of Botkyrka.

Provided that conditions laid down by the national regulation are in compliance with Union law, and in particular, the principle of equal treatment and transparency and thus, satisfying the requirement of foreseeability, such conditions should be considered as legitimate. This was confirmed in respect of additional criteria, by the ECJ in *Nord Pas Calais*. The case of *Riiffert* can be seen as having several implications as regards, *inter alia*, the principle of equal treatment and the social framework of the public procurement Directives. The Court could be seen as using Directive 96/71/EC to limit the scope of labour law requirements in public procurement.<sup>294</sup> The issue of the case was not lack of foreseeability or non-compliance with the principle of equal treatment, but that the requirements provided for by the German public authority went beyond the provisions laid down in Article 3 of Directive 96/71/EC as well as depriving foreign undertakings its competitive advantage regarding lower working costs. This was explicitly enunciated by the ECJ in its judgment and could be seen as clashing with the social aim of the ILO, namely to counteract the use of

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<sup>294</sup> Davies, 2008, p. 295 and Kilpatrick, 2011, p. 15.

labour costs as a competitive element among tenderers. The collision demonstrates the difficulty to reconcile the aims pursued by public procurement law at the ILO level on the one hand and at the EU level on the other. This is also illustrated by the criticism of ESA towards Norway as regards the latter's efforts to satisfy the obligations set out by ILO Convention no. 94.

The Court's reasoning in *Rüffert* raises several questions. In my opinion, the ruling can be questioned both in the light of fair competition and in the light of the endeavour for combating the social deficit of the EU, as identified by the 'decoupling' theory. In respect of fair competition, it is noteworthy that the Court accepts that domestic enterprises are governed and bound to observe locally negotiated collective agreement. The fundamental principle of equal treatment seems to work only one way, in favour of the market freedoms. It appears as if requiring both domestic and foreign tenderers or contractors to comply with certain conditions would not to treat them equally if this is liable to restrict the fundamental freedoms. It might be bald to say, but nevertheless important to point out, that reversed discrimination on grounds of nationality seems to be legitimate considering the Court's reasoning in case of *Rüffert*. The subcontractor was not required to comply with the obligations stemming from a collective agreement, even though the German contractors were obliged to do so. Concerning the attempts at Union level to promote a social agenda through, *inter alia*, the portal provision 3(3) of the Lisbon Treaty, the reinforcement of fundamental rights by the giving the Charter the same status as the Treaty and the increased respect for national sovereignty in Article 4(2) TEU, I believe it is possible to question the outcome of *Rüffert* if it was to be determined today. As put forward in the Monti-report, mandatory requirements related to EU social policy objectives could be important tools to achieve such objectives.<sup>295</sup> A social market economy, evidently, entails an inclusion of social considerations.

Some remarks regarding the ruling of the ECJ in *COM v Germany* are also required. The subject of the dispute concerned the running of occupational pension schemes and whether such schemes were to be covered by public procurement law. The ECJ concluded that the right to collective bargaining had to be reconciled with fundamental freedoms set out in the Treaty. Even though the agreement itself was not subject to the provisions of the Treaty according to Article 101 TFEU, it still had to comply with requirements stemming from the Directives on public procurement. The Court interpreted the exemption set out in the Directive, excluding employment contracts from the application of the Directive, very strictly. The resemblance between the ruling in *Rüffert* and *COM v Germany* could be reluctance on behalf of the Court to acknowledge *inter alia* the principle of subsidiarity, respect for national sovereignty and national labour systems and fundamental rights, such as the right to collective bargaining. Rather than giving any material weight to the social aspects, the ECJ seemed to rely on

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<sup>295</sup> See further discussion, Monti, 2010, p. 68 *et seq.*



the promotion of the internal market and the principle of supremacy, i.e. national law breaching EU law must be set aside. Thus, the balancing of conflicting interests was avoided, which, I argue, risks of leaving the national labour law systems quite exposed.<sup>296</sup>

## 5.4 The EU and Sweden – a pragmatic and/or precaustious relationship?

The conclusion to be drawn, as regards, the scope of labour law requirements in public procurement at the Swedish level, is that it is unclear. The Swedish implementation of EU secondary law is, in principle, made *verbatim*. Thus, uncertainty and vaguely defined scope for labour law requirements governing the legal position at the EU level, partly explained due to the EU inter-institutional struggles during the legislative process of the Directives,<sup>297</sup> could be seen as transposed to the Swedish level. What appears clear is that there is a scope at Swedish level, albeit limited by the obligation in Chapter 1 section 9 LOU to observe the fundamental principles in a situation of public procurement. The problem of integrating a clause of labour law requirements in a public contract is not solved by the Swedish implementation. On the contrary, it is merely transferred to the appliers of law. As a result, the undetermined legal position could result in bold moves on behalf of awarding authorities using labour law requirements in their contracts and thus risking to pay enormous amounts in compensation costs, if such requirements are found contrary to the fundamental principles. Alternatively, the vagueness could also result in awarding authorities thinking that they are better safe than sorry and subsequently ending up not using the scope of labour law requirements in their contracts. The open structure of the wording of the legislation, at EU and thus also at Swedish level, aggravates a consistent interpretation and allows for the imposition of other implications than those originally intended.

The Swedish legislator has gone further than required by Union law, making the national legislation applicable to all public procurements, even those falling outside the EU legal framework. The issue discussed above, that the vagueness of the legislative text is passed on from the legislator to the legal enforcement authorities, appears quite significantly even in this context. Should the awarding authorities consider the principles stemming from Union law even though a transnational interest has not been established and thus the Treaty provisions are *de facto* not infringed? This seems to be the case according to Sundstrand. However, I am not suggesting that the case of Botkyrka lacked transnational interests. By examining the case law of the ECJ, the requirement of a transnational interest is relatively easy to satisfy. Nevertheless, this does not deprive the need for establishing a transnational

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<sup>296</sup> Davies, 2008, p. 295; See for further discussion on balancing conflicting interests by the ECJ, Davies, P., Market Integration and Social Policy in the Court of Justice, *Industrial Law Journal*, Vol. 24, No. 1, March 1995, pp. 49-77.

<sup>297</sup> See for further discussion, Kilpatrick, 2011, p. 11.

interest in the pursuit for a clear and comprehensive, if not formulation of the law, then at least application of the law.<sup>298</sup>

Is a positive description of what labour law requirements that may be legitimately permitted under EU law and thus at Swedish level desirable? I would support such a solution. The discrepancy between the rulings of the ECJ and the objectives put forward by the Union legislator as regards the promotion of principle of subsidiarity and the respect for the Member States' national identity in Article 4(2) TEU, the endorsement of a social market economy in Article 3(3) TEU and the recognised need for a European social model, has to be addressed. The rulings of the ECJ in the *Laval*-quartet can be seen as opposing the rationale behind the new legal order. Such an approach is not only liable to challenge the drafters of the Lisbon Treaty clear desire to promote such endeavours but also to confront the principle of foreseeability, a principle of prominent position in EU public procurement law.

## 5.5 Balance and conflict – application at the Swedish level

It has been discussed whether a Swedish ratification of the ILO Convention no. 94 is possible. The answer to this question has been answered in the affirmative by the Public Procurement Committee. However, the main issue is whether such ratification is appropriate. In accordance with the discussion above, Sweden cannot rely on Article 351 TFEU since such a ratification has not been made prior to 1958. The case of *Rüffert* seems to suggest that collectively negotiated conditions, which do not meet the requirements stemming from the Directive 96/71/EC on Posting of Workers, cannot be used towards foreign undertakings. This could hold true, albeit the fact is that far from all public procurements at national level entail a cross border element, which is essential in order for the Directive on Posting of Workers to apply. The Swedish Governmental inquiry, preceding the implementation of Directives 2004/18/EC and 2004/17/EC, concluded, that Sweden did not enjoy exclusive competence in the material area covered by the ILO Convention no. 94. Sweden is obliged under the principle of cooperation to comply with the provisions stemming from EU law. The Convention has not been ratified by Sweden, possibly suggesting a precautionary and pragmatic approach on behalf of the Swedish government as regards the risks of violating EU law.<sup>299</sup>

As regards subcontracting, the ILO Convention no. 94 explicitly states that the contracting authority is responsible for ensuring the correct application of the obligations stemming from the Convention. This could be achieved

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<sup>298</sup> See to this effect, Ahlberg and Bruun in *TCO och LO:s referensgrupps ledamöters yttrande angående upphandlingsutredningens arbete med möjligheten att ställa sociala krav vid offentlig upphandling*, April 3rd 2011.

<sup>299</sup> See to this effect, Bruun and Ahlberg, 2010, p. 46 *et seq.*

either by making the clauses directly applicable to subcontractors or by making the principal contractor responsible for compliance with the obligations set out in the Convention on behalf of the subcontractors. At the EU and Swedish level, this is also the case, albeit subject to certain restrictions as we have witnessed in the case law of the ECJ. The ruling in *Rüffert*, seems to suggest that foreign undertakings working as subcontractors cannot be required to comply with conditions stemming from local collective agreements, which are not expressed in Article 3 of Directive 96/71/EC, since that would deprive such undertakings of its competitive advantage. This position contradicts the ILO Convention no. 94, aiming to ensure that subcontracting cannot be used to evade prevailing working conditions. Even if Swedish legislation allows for the contracting authority to request the contractor to ensure that subcontractors comply with obligations of the awarded contract, the limitation on what requirements that may be imposed on foreign undertakings stemming from the ruling of *Rüffert*, is worthy of attention.

The question has been raised whether the LOU is a suitable legislation for integrating labour law requirements. I have not specifically addressed this issue as regards other technical possibilities to include labour law requirements. Whether the LOU should be a purely procedural legislation and other political ambitions should be left outside has been discussed by the Governmental inquiry and practitioners and has briefly been described in the section (4.4). The argumentation put forward by those insisting to keep LOU as a purely procedural regulation has been that the imposition of other objectives could risk creating uncertainty among tenderers and authorities, ultimately risking to cause distortion of competition. Those who argue in favour of LOU to allow for labour law requirements, contend that public funds shall not be used in a way inconsistent with societal endeavours, especially considering the magnitude of the financial means public procurement entails. Firstly, there is a scope, I argue, at national level to integrate labour law requirements in public procurement contracts. Secondly, that scope could be seen as not only suitable but necessary in order to protect the Swedish model, to fully implement the principles stemming from the Charter of fundamental rights and Lisbon Treaty. It is possible that the integration of social considerations in public procurement can have a descending effect on the internal market integration, by, *inter alia*, excluding some tenderers from the procedure. However, this could be counteracted with a fair competition argumentation, where working costs are not used as a competitive advantage. Such a line of argumentation could be seen as in line with the obligations stemming from the new legal order of the Lisbon Treaty. In my opinion, it is time to shift emphasis. As argued above, a social market economy entails, by necessity, the observance of other considerations than purely economic. Formally, the provisions of the Lisbon Treaty could be seen as ending the ‘decoupling’ of the social sphere. Materially, it appears debatable.

## 5.6 Future prospects

In my opinion, the central rationale as regards permitting labour law requirements in public procurement contracts is that rights do not operate in the formal. A right calls for substantial content and not merely formal protection. Not allowing for conditions in public procurement contracts requiring national collective agreements or the equivalent of such conditions will, in practice, undermine the overall function of the collective agreement. In the extended, this could lead to the subversion of the right to collective bargaining, a right recognised as a fundamental right, by *inter alia* the ECJ, the Union legislator, the ILO and the European Court of Human Rights (ECtHR). The essence of the right to collective bargaining is not specified by the ECJ in *COM v Germany*, albeit stating that the pension scheme negotiations did not form part of that core. Further, the case of *Rüffert* also seems to limit the use of collective agreements. So, what are the practical implications of such a statement? Does the right of collective bargaining exist as long as it does not restrict foreign employers' possibilities to offer services in a Member State? The right of collective bargaining is protected, given that it does not have a potential negative impact on the free movement or at least, does not have a disproportionate impact on the free movement. Noting that the right of collective bargaining is not absolute I, nevertheless, question the substantial content and effective protection of a right that is observed only if the promotion of the internal market is not disturbed, potentially or actually, or if there is a market restriction, the purpose of the restrictive measure is justified. The purpose of a measure with restrictive effect on the internal market is essential in determining a potential justification of such a measure. If the purpose of a measure is to defend the conditions negotiated through national collective agreement by imposing labour law requirements in public procurements contracts, that could be regarded as of protectionist nature and thus not justifiable. As we have seen in the precedents of the ECJ, any derogation from the fundamental freedoms must be interpreted restrictively.

The Lisbon Treaty marks a milestone as regards increased social considerations as well as the respect for the national state and its fundamental and constitutional structure. The text of the newly imposed Article 4(2) TEU suggest that the Treaty was intended to promote a dialogue between the EU and its Member States, characterised by pluralism rather than monism and interaction rather than hierarchy.<sup>300</sup> It is not only important, but also indispensable, that the *acquis communautaire* does not overlook the value diversity among the EU Member States. In accordance with the 'decoupling' theory of Scharpf and Joerges, the lack of competence in social spheres on behalf of the Union legislator as well as the respect for constitutional pluralism and integrity, imply exercise of judicial

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<sup>300</sup> This line of thinking was inspired by MacCormick, N., *The Maastricht Urteil: Sovereignty Now*, *European Law Journal*, Vol. 1, Issue 3, Blackwell Publishers Ltd, Oxford 1995, pp. 259-266.

deference.<sup>301</sup> To conclude, the fact that we are now under a new legal order that provides the EU institutions with legal means for the introduction of a social dimension, whilst taking account to the national identity and structure of the Member States, suggests the cessation of the EU social deficit. Nevertheless, the manifestations on behalf of the ECJ in, *inter alia*, *Rüffert* and *COM v Germany*, fit, as also contended by Kilpatrick,<sup>302</sup> poorly with the endeavours expressed by the social framework of the public procurement Directives as well as by the Treaty. A balance between economic efficiency and protection of labour law requirements requires equal observance and weight to both of those competing interests. Considering the discrepancy between the economic and social sphere within the EU, as expressed and developed in the ‘decoupling’ theory, it is crucial to give effect to the labour law policies and systems of each Member State. The tension between the promotion of the internal market and economic efficiency on the one hand and the encouragement of a European social model and the combating of social dumping on the other, cannot be eliminated simply by reducing the scope of labour law requirements in public procurement, in favour of the promotion and integration of the internal market.

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<sup>301</sup> This line of thinking was additionally inspired by Lenaerts, K. and Guiéterrez-Fons, J.A., The Constitutional Allocation of Powers and General Principles, *Common Market Law Review*, Vol. 47, Issue 6, *Kluwer Law International*, Printed in the United Kingdom, 2010, pp. 1629-1669, p. 1663.

<sup>302</sup> Kilpatrick, 2011, p. 7 *et seq.*

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