

Renaissance of Pay Clauses in German Public Procurement and the Future of the ILO Convention 94 in Europe

by Thorsten Schulten

Public procurement is of high economic importance. In many countries it covers up to one fifth of the annual national GDP. Public authorities have always used their market power as a contracting entity to promote certain social and labour standards. The ILO had even adopted a separate Convention on Labour Clauses in Public Contracts (Convention 94 from 1949). In order to promote fair competition and to avoid downward pressure on wage and working conditions in the tendering process, the ILO Convention 94 wants to ensure that workers hired in contracting companies do not receive less favourable conditions than those laid down in the appropriate collective agreements.

More recently, however, the European Court of Justice (ECJ) made a rather contested assessment which sets some serious limitations on the use of pay clauses in public procurement. According to the so-called Rueffert judgment (*C-346/06*) from April 2008, which dealt with the public procurement law of the German federal state of Lower-Saxony, public authorities are no longer allowed to oblige companies under public contract to pay their workers at least the rates set by collective agreements. The ECJ ruled that such a provision would be in breach of the freedom to provide cross-border services as laid down in the EU treaty. Following a rather narrow interpretation of the European Posted Workers Directive (*96/71/EC*) the court pointed out that public authorities can only impose labour provisions on foreign companies if they are based either on statutory regulation or on extended collective agreements. In the case of German public procurement laws, however, reference was made to collective agreements which were not generally applicable. Despite the ECJ ruling, in practice pay and other social clauses have nonetheless seen a broad renaissance in Germany in public procurement.

Pay and other social clauses in the public procurement law of German federal states

Since the late 1990s an increasing number of federal states in Germany had introduced so called *Tariftrueugesetze* (laws on 'loyalty to collectively agreed standards') according to which public contracts should be given only to those companies which apply to collective agreements. Against the background of a steadily declining collective bargaining coverage, the new regional public procurement laws were designed to stabilise the entire collective bargaining system and to avoid unfair competition on the basis of low wages. When it came to the ECJ's judgment in the Rueffert case, however, all German federal states have in the first instance sus-

pending their procurement laws. For a moment it appeared that with the ECJ's ruling the whole concept of pay clauses in public contracts would disappear.

Only a few years later, however, Germany has overcome the 'Rueffert shock' while social considerations in public procurement have seen a strong revival. At the beginning of 2012, 10 out of 16 German federal states had concluded new regional procurement laws in the aftermath of the Rueffert case. Among them are the three city-states Berlin, Bremen and Hamburg as well as Brandenburg, Lower-Saxony, Mecklenburg-Vorpommern, North Rhine-Westphalia, Rhineland-Palatinate, Saarland and Thuringia. At least two more states (Baden-Wuerttemberg and Saxony-Anhalt) will follow this year so that large parts of Germany are covered by some legislation on socially responsible procurement.

Pay clauses in German public procurement law

Public procurement law in German Federal States

- with pay clauses,
- with plans to introduce pay clauses,
- with no pay clauses



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In comparison to the older legislation, the new procurement laws of the Post-Rueffert-Era are in many respects more advanced, although they had to consider the limitation set by the Rueffert case. While the older laws were often limited to the construction industry and public transport, the new laws usually cover all public contracts above a certain *de minimis* threshold. Instead of making a general reference to the application of collective agreements, which is no longer allowed after the ECJ's judgment, the new public procurement laws contain three forms of pay clauses:

First, in sectors where there are generally applicable collective agreements, companies are obliged to declare already in the tender for the public contract that they pay their workers at least the rate of these agreements. Although the extension of collective agreements is not very common in Germany, there are at least about ten branches (among them relatively important sectors such as construction, commercial cleaning, security services and care services) with collective agreements on sector-wide minimum wages which have been declared as generally binding on the basis of the German Posted Workers Law.

Secondly, in the public transport sector companies under public contracts have to accept the full provisions of the most representative collective agreements of the region, even if these agreements are not generally applicable. Such a special treatment of the public transport sector is licit, because it has a special legal status in EU law according to which the freedom to provide cross-border services underlies some restrictions in that sector. Consequently, the Rueffert case does not apply to public transport. Moreover, there is a special EU regulation on public transport (*EC No 1370/2007*) which explicitly allows the member states to make reference to collective agreements in the tenders "to ensure transparent and comparable terms of competition between operators and to avert the risk of social dumping".

Thirdly, most German federal states have introduced a procurement related minimum wage. Since Germany still has no national statutory minimum wage the federal states have used the opportunity of public procurement law to make sure that all companies under public contract will have to pay their workers a certain minimum rate. Currently, the procurement related minimum wage differs from state to state between 7.50 and 8.50 Euro per hour. The highest minimum wage with an hourly rate of 8.62 Euro has been concluded in North Rhine-Westphalia which corresponds to the lowest pay grade in the collective agreement for the public sector.

Apart from pay clauses, many of the new regional public procurements laws define further social criteria which have to be taken into consideration when choosing a contracting company. Among them are the offer of training places, the employment of disabled workers or measures to promote female employees and equal opportunities at the workplace. Furthermore, most regional pro-

urement laws make reference to the eight core ILO Conventions (covering freedom of association and right to bargain collectively; prohibition of forced labour and of child labour, and non-discrimination in employment and occupation), according to which public authorities should take care that the purchased goods have been produced in observance with the ILO core labour standards.

The future of the ILO Convention 94 in Europe

Despite the fact that Germany has seen a renaissance of pay clauses in public procurement, the Rueffert judgement of the ECJ still seriously limits the possibilities of promoting collective agreements as a procurement criteria. Obviously this has created strong tensions with the ILO Convention 94. Since Germany has never been among the various European countries which have ratified this convention, the ECJ has not explicitly discussed this issue in the Rueffert case. However, there is a strong need for political clarification in order to revise the ECJ's position.

More recently, the European Parliament dealt with that issue in a statement on "modernisation of public procurement" from 25 October 2011. As the EU wants to adopt a new European public procurement directive, the European Parliament "calls for an explicit statement in the directives that they do not prevent any country from complying with ILO Convention 94." Furthermore, it "calls on the Commission to encourage all Member States to comply with that Convention" and "stresses that the effective functioning of sustainable public procurement requires clear and unambiguous EU rules precisely defining the framework of Member States' legislation and implementation". So far, however, the European Commission has ignored the demand of the European Parliament and presented its draft for a new European directive on public procurement from December 2012 without any reference to the ILO Convention 94. Therefore, it is really time for the European trade unions and other social movements to take up this issue.

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