EU Public Procurement Law and Nordic Labour Law – Recent Developments and Future Challenges

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1 Issues

In this article I explore the interaction of EU public procurement law and Scandinavian labour law with special regard to the possibilities to include social considerations in a procurement process. I put a particular focus on

- the intersection of public procurement and equality/non-discrimination not only on grounds of nationality but also on grounds of gender, ethnic origin, religion, age, handicap and sexual orientation, and on

- the role of collective agreements in public procurement.

First, I briefly highlight the main features of the overall legal setting of EU and Scandinavian public procurement law and of the Nordic labour relations model.

2 EU and Scandinavian Public Procurement Law

The EU public procurement *acquis* builds on the free movement provisions in the EC Treaty, the general principles of Community law (in particular equal treatment, non-discrimination, mutual recognition, proportionality and transparency[1]), the procurement directives and the abundant case law of the European Court of Justice (ECJ).

2.1 Treaty Provisions on Free Movement on the Internal Market

EU procurement law[2] forms part of EU law on free movement of goods (Article 28 EC), persons (Article 39 EC on workers and Article 43 EC on freedom of establishment) and services (Article 49 EC). There is a general requirement of non-discrimination directly or indirectly on grounds of nationality and a prohibition of restrictions on the free movement of goods, services, etc which must be complied with in all procurement policies including employment related ones. As the main rule direct and indirect nationality discrimination and restrictions on the free movement are prohibited. Member States can, however, according to the case law of the ECJ to a certain extent put limitations on the free movement if the restrictions are applied in a non-discriminatory manner and are justified by imperative requirements in the general interest.[3] The principle of proportionality must be observed. There is also case law[4] according to which EU fundamental rights must be respected in order for a restriction to be justified.

1 *See* Recital 2 in Directive 2004/18/EC.

2 *See* generally Bovis, *Christopher: EU Public Procurement Law*, Cheltenham 2007.

3 *See* case C-55/94 *Gebhard* [1995] ECR I-4165.

4 *See* case C-260/89 *ERT* [1991] ECR I-2925.

2.2 General Principles of EU Law

Recital 2 of the Procurement Directive[5] states that the award of contracts on behalf of the State, regional or local authorities and other bodies governed by public law is subject to the respect of the principles of equal treatment, non-discrimination, mutual recognition, proportionality and transparency. Under Article 2 of the Procurement Directive contracting authorities shall treat economic operators equally and non-discriminatorily and shall act in a transparent way.

The *principle of equal treatment* of all tenderers or potential tenderers is stated expressly in Article 2 of the 2004 procurement directive. As a consequence of this principle there is a prohibition of negotiations with the candidates or tenderers. Promotion of equality or other employment policies in procurement can therefore not result from negotiations during the tendering procedure. All bidders must be treated equally irrespective of whether they are of the same (as in *Beentjes*, [6] where both the cheapest and second cheapest bid were from Dutch firms) or different nationality.

There is a requirement of *transparency.* For any criterion to be lawful it must be made known to all potential bidders from the beginning of the tendering procedure. Secret or disguised employment policies will always be unlawful in public procurement. Already in *Beentjes*, the ECJ ruled that an additional specific condition requiring employment of long-term unemployed must be mentioned in the contract notice. This is necessary in order to create transparency. The requirement of transparency applies as a general principle of EU law to all procurement governed by the EC Treaty irrespective of whether the case falls within or outside of the scope of the procurement directives.[7]

2.3 Current Directives

Since the early 1970's, the substantive rules in the EC Treaty on free movement have been complemented by directives coordinating tendering procedures in regard to supplies, works, services and utilities.[8] The procurement Directives contain procedural and remedial provisions aimed at ensuring transparency and equal treatment among different tenderers. The contracting authority or contracting entity can freely choose between two different tender procedures: open procedures or restricted procedures. There are detailed provisions on the selection of candidates to be invited to submit tenders in restricted procedures,

5 2004/18/EC.

6 Case 31/87 [1988] ECR 4635.

7 *See* case C-324/98, *Telaustria Verlags GmbH and Telefonadress GmbH* v *Telekom Austria AG* [2000] ECR I-10745, case C-275/98 *Unitron Scandinavia and 3-S* [1999] ECR I-8291, case C-231/03, *Consorzio Aziende Metano (Coname)* v *Comune di Cingia de' Bott* [2005] I-7287, case C-458/03, *Parking Brixen GmbH* v *Gemeinde Brixen, Stadtwerke Brixen AG* [2005] I-8612 and case C-410/04, *ANAV* v *Commune Bari* [2006] I-3303.

8 *See* now, in particular Directive 2004/18/EC on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts and the Remedies Directive 89/665/EEC 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.

on the exclusion of potential contractors or service providers, and on proof of professional and technical capability and of economic and financial standing. The award of contracts is usually made on the basis of either the lowest price or the economically most advantageous tender.

2.3.1 Directives 2004/18/EC and 2004/17/EC

In March 2004, the Community adopted two recast directives on public procurement: Directive 2004/18/EC on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts, in the following called the Procurement Directive, and Directive 2004/17/EC coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors.

The new directives came[9] into force on 1 May 2004. The Member States had to implement the new directives by 31 January 2006. The purpose of these directives is to simplify and modernise Community law on public procurement by increasing flexibility, taking account of new practices or market reality, and simplifying the procurement rules.[10] The Procurement Directive contains new provisions on framework agreements, electronic procurement and competitive dialogue.

2.3.2 Implementation of EU Procurement Legislation in Scandinavia

It is a characteristic feature of the Procurement Directive[11] that it allows for implementation *à la carte* in the sense that Member States are free to choose whether or not they will transpose some of the provisions into their legal systems, including Article 11 on central purchasing bodies, Article 19 on reserved contracts, Article 29 on competitive dialogue, Article 32 on framework agreements, Article 33 on dynamic purchasing systems and Article 54 on electronic auctions.

Denmark implemented the Procurement Directive by 1 January 2005 and thereby became the first EU Member State that implemented the Directive.The process for implementing EC procurement directives into Danish law is simple. The relevant Danish minister has the power to transpose EC procurement directives into Danish law by way of statutory instrument. This power is held under the 1990 Act on the coordination of procedures for the award of public works contracts and public supplies contracts, etc.[12] It is thus not necessary to adopt new legislation through Parliament.

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9 *See* for a general overview of the new directives Nielsen, Ruth and Steen Treumer (eds), *The New EU Public Procurement Directives*, Copenhagen 2005 and Arrowsmith, Sue: *An Assessment of the New legislative Package on Public Procurement*, Common Market Law Review 2004 p. 1277.

10 European Commission, Proposal for a Directive of the European Parliament and of the Council on the co-ordination of procedures for the award of public supply contracts, public service contracts and public works contracts COM(2000) 275.

11 *See* Larsen, Marianne K: *The New EU Public Procurement Directives*, in Nielsen, Ruth and Steen Treumer (eds), *The New EU Public Procurement Directives*, Copenhagen 2005, p. 9.

12 Consolidated Act No 600 of 30.6.1992.

After the EC introduced the new directives in 2004, the Danish Minister for Economy and Commerce used this power to implement the new directives into Danish law by way of statutory instruments issued in September 2004.[13] The directives went into force in Denmark on 1 January 2005, i.e. more than a year before the dead-line for implementation.

The Procurement Directive was not edited or reworded during the process of being transposed to Danish law, but applies in Danish law in the same form and wording given to it by the EC legislator. The operative provision in the statutory instrument implementing Directive 2004/18/EC is section 1 that provides that contracting authorities shall comply with the Procurement Directive. [14] In December 2004, the Danish Competition Authority published guidelines on the interpretation of the new procurement rules.[15] Denmark has chosen to introduce all of the optional provisions in the Procurement Directive with some modifications as regards electronic auctions.[16] Award of public works contracts cannot be made by means of an electronic auction.

Finland implemented the Procurement Directive with some delay[17] in 2007.[18] Procurement of goods and services with a value of more than 15 000 euro must meet the requirements of the Finnish Procurement Act. Finland has not (yet) implemented all the optional features of the Procurement Directive, but will probably implement the Procurement Directive's provisions on dynamic purchasing systems and electronic auctions at a later date.

Norway is not a member of the EU but follows EU procurement rules as part of its obligations under the EEA Agreement. A reference to Directives 2004/17/EC and 2004/18/EC was inserted in Annex XVI to the EEA Agreement

13 Statutory instrument No 936 on procurement procedures of entities operating in the water, energy, transport and postal services sectors and statutory instrument No 937 of 16.9.2004 on the procedures for the award of public supplies contracts, public service contracts and public works contracts.

14 The Danish original reads: '§ 1. Ordregivere skal overholde bestemmelserne i udbudsdirektivet. Stk. 2. Ved udbudsdirektivet forstås Europa-Parlamentets og Rådets direktiv nr. 2004/18/EF af 31. marts 2004 om samordning af fremgangsmåderne ved indgåelse af offentlige vareindkøbs kontrakter, offentlige tjenesteydelseskontrakter og offentlige bygge- og anlægskontrakter. Stk. 3. Udbudsdirektivet er medtaget som bilag 1 til bekendtgørelsen.

15 Konkurrencestyrelsens vejledning til udbudsdirektiverne, 20 December 2004.

16 The Danish original reads: § 3: Udbudsdirektivets art. 11 om indkøbscentraler, art. 19 om reserverede kontrakter, art. 29 om konkurrencepræget dialog, art. 32 om rammeaftaler og art. 33 om dynamiske indkøbssystemer finder anvendelse i dansk ret. Stk. 2. Udbudsdirektivets art. 54 om elektronisk auktion finder anvendelse på indgåelse af kontrakter om vareindkøb og tjenesteydelser med de begrænsninger, der følger af udbudsdirektivets art. 1, stk. 7, og på de betingelser, der er fastsat i direktivets art. 54.

17 The Commission had opened infringement proceedings against Finland but closed the case when Finland adopted its new Procurement Act, *See* IP/07/918.

18 *See* Lag om offentlig upphandling 30.3.2007/348 complemented by statsrådets förordning om offentlig upphandling (614/2007) which entered into force 1.6.2007.

in 2006.[19] In this connection, Norway adopted a new regulation on public procurement[20] and issued new guidelines on the interpretation of the procurement rules.[21]

Sweden is late in implementing the Procurement Directive, probably partly due to the change in government in 2006. The Procurement Act from 1992 is still in force.[22] Sweden is, however, preparing new legislation to implement the Procurement Directive. A proposal has been presented to the Swedish Parliament.[23] A key provision in the present Act is section 4 that provides:

The award of public contracts should be so arranged as to take advantage of existing competition and should also in other respects accord with the conventions of good business practice. No unwarranted considerations should affect the treatment of tenderers, candidates or tenders.

This provision is not included in the pending proposal for new legislation which builds more closely on the general principles referred to in the Procurement Directive.

2.3.3 Remedies Directive

As a starting point enforcement of EU law is a matter for national law. The ECJ was initially willing to leave the application of Community law in the hands of the Member States. National procedural rules and remedies would apply. In 1989, in *Commission* v *Greece*[24] the ECJ laid down minimum Community conditions to be applied to the national rules.

First, conditions attached to the national rules must not be less favourable than those attached to similar national actions. Second, the national rules must not be framed so as to render virtually impossible the exercise of Community rights. In any event, the remedy must be effective, proportionate and dissuasive. There are thus two general principles that must be observed in the enforcement of EU law: the principle of equivalence and the principle of effectiveness.

In matters of public procurement the general principles of EU law on enforcement are complemented by remedies directives.[25] In 2006, the

19 Inserted by Decision No 68/2006 of the EEA Committee (OJ No L 245, 7.9.2006, p. 22 and EEA Supplement No 44, 7.9.2006, p. 18), entry into force 18.4.2007.

20 Forskrift om offentlige anskaffelser, 2006-04-07-402, latest amendment 20.12.2006 no 1504, came into force 1.1.2007.

21 Veileder til reglene om offentlige anskaffelser, Oslo 2007, available at ”www.regjeringen.no/nb/dep/fad/dok/Veiledninger_og_brosjyrer/2006/Veileder-til-reglene-om-offentlige-anska/Veileder-til-reglene-om-offentlige-anska.html?id=476384”.

22 SFS 1992:1528, Act on Public Procurement. *See* for an overview of Swedish procurement law Bjurman, Pernilla and Douglas Roos: *The law of public procurement in Sweden*, Public Procurement Law Review 1998 p. 12.

23 Regeringens proposition 2006/07:128, Ny lagstiftning om offentlig upphandling och upphandling inom områdena vatten, energi, transporter och posttjänster.

24 Case C-68/88 *Commission* v *Greece* [1989] ECR 2979.

25 *See* Directive 89/665/EEC 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 for the classical public sector and directive 92/13/EEC on utilities.

Commission proposed a Directive amending the remedies directive.[26] 21 June 2007, the European Parliament adopted a legislative resolution that is expected to form the basis of a final text to be adopted later in 2007.[27]

The Nordic countries have made use of their national autonomy in matters of enforcement of the procurement rules and set up different enforcement machineries. Finland and Sweden have administrative courts while no such courts exist in Denmark and Norway.[28] In Denmark, there is a complaints board for public procurement that is an administrative body. In addition there is access to the ordinary civil courts. The Finnish Market Court is a special court hearing market law, competition law and procurement cases. In Norway the judicial system is similar to the court system in Denmark. In Sweden procurement cases will normally be brought before the ordinary administrative courts.

2.4 ECJ case law

The ECJ has contributed greatly to the development of the general principles of EU law and to the interpretation of the free movement provisions. In addition it has delivered a considerable number of judgments specifically on public procurement especially during the last 10-15 years. Only a few of these judgments[29] are of direct significance to the problems discussed in this article.

26 COM(2006)195 final /2, Adaptation after legal revision, Proposal for a Directive of the European Parliament and of the Council 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.

27 European Parliament legislative resolution of 21 June 2007 on the proposal for a directive of the European Parliament and of the Council 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 (COM(2006)0195 – C6-0141/2006 – 2006/0066(COD)).

28 *See* on Norway Krüger, Kai: *Action for damages due to bad procurement: On the intersection between EU/EEA law and national law, with special reference to the Norwegian experience*, Public Procurement Law Review 2006 p. 211.

29 *See* in particular case 56/77 *Agence Européenne d'Interims SA* v *Commission* [1978] ECR 2215, case 31/87 *Gebroeders Beentjes BV* v *The Netherlands* [1988] ECR 4635 and case C-225/98 *Commission* v *France* [2000] ECR I-7445 that are discussed further below in section 4.2 and the pending cases C-346/06, *Dirk Rüffert, as the liquidator of the assets of Objekt und Bauregie GmbH & Co KG* v *Land Niedersachsen*, C-341/05, *Laval un Partneri Ltd* v *Svenska Byggnadsarbetareförbundet, Svenska Byggnadsarbetareförbundets avdeling 1 Byggettan og Svenska Elektrikerförbundet* and C-438/05 *International Transport Worker's Federation and Finnish Seamen's Union* v *Viking Line ABP and OU Viking Line Eesti* that are discussed further below in section 5.

3 The Nordic Labour Relations Model

3.1 General Characteristic

There are major differences across Europe in the way labour law is conceptualized[30] and major variations between the European countries in relation to the legal regulation of employment and collective agreements. For comparative purposes the EU countries may be divided into 3 groups:[31]

- the Romano-Germanic system (Austria, Germany, France, Belgium, Holland, Luxembourg, Spain, Portugal, Italy, Greece and the eastern European countries that acceded to the EU as at 1 May 2004)
- the Anglo-Saxon system (England and Ireland)
- the Nordic system (Denmark, Finland and Sweden).

The tenor of Nordic labour law has historically been collective labour law, with collective agreements and case law from special Labour Courts as the main sources of law.[32] Hundred years ago, Denmark played a pioneer role in developing the concept of a collective agreement and collective labour law generally. As Hepple points out:[33]

> ''labour law' is of recent origin. In most countries it became recognised as a distinct division of law only after the Second World War. ...The exceptions were Germany and Denmark. In the latter, Carl Ussing, a Supreme Court judge who presided over the 'August Committee' of 1908-10, combined academic and practical expertise to produce a sharp analysis which helped to lay the foundations of Denmark's collectivist system. ... , but mainly due for reasons of language the impact of the Danish innovations was limited to Scandinavia'.

Since Denmark's entry into the EC/EU as at 1 January 1973 and Sweden's[34] and Finland's entry as at 1 January 1995[35] Nordic labour law is increasingly being shaped by EU law.[36] EU law puts new actors on the labour law scene such as the

30 *See* Supiot, Alain: *Critique du droit du travail*, Paris 1994 and Hepple, Bob: *The Making of labour law in Europe. A comparative study of nine countries up to 1945*, London 1986.

31 *See* generally Zweigert, Konrad and Hein Kötz: *An Introduction to Comparative Law*, Oxford 1998.

32 Bruun, Niklas, Boel Flodgren, Håkan Hydén, Marit Halvorsen and Ruth Nielsen: *The Nordic Labour Relations Model*, Aldershot 1992.

33 Hepple, Bob: *The Making of labour law in Europe. A comparative study of nine countries up to 1945*, London 1986 p. 7.

34 *See* on Swedish law in an EU labour law perspective Nyström, Birgitta: *EU och arbetsrätten*, Stockholm 2002.

35 *See* further Bruun, Niklas and Jonas Malmberg: *Ten Years within the EU – Labour Law in Sweden and Finland following EU Accession*, in Wahl, Nils & Pär Cramér (eds.): Swedish Studies in European Law, Oxford 2006 p. 59.

36 *See* for details Nielsen, Ruth: *European Labour Law*, Copenhagen 2000. *See* also Nielsen, Ruth: *Europeanization of Nordic Labour Law*, in Scandinavian Studies in Law Volume 43, *Stability and Change in Nordic Labour Law*, Stockholm 2002 p. 37.

Commission and the ECJ. It also builds on principles such as transparency and legal certainty that have not traditionally played a predominant role in Nordic collective labour law.

3.2 Role of Collective Agreements

In most EU Member States collective agreements are defined in legislation as formal written agreements characterised by the fact that they regulate working conditions for individual employees.[37] Usually the parties to the agreement are, on the one side, an employer, a group of employers or an employers' association and, on the other, a representative of workers or an organisation of workers (trade union). Denmark has no statutory definition of a collective agreement. In the Nordic countries, collective agreements are primarily regarded as private law contracts.

3.2.1 Parties to a collective agreement

The parties to a collective agreement are, generally, individual employers or employers' associations on the one side and trade unions on the other. On the employer side any employer can conclude a collective agreement individually. On the worker side the collective agreement must be concluded by a collectivity, typically a trade union.[38]

3.2.2 Obligatory effect of collective agreements

A collective agreement is in some countries a contract by which the trade union sells peace in return for wages and working conditions at a certain level.

An English collective agreement is *not* binding as a contract. From a legal point of view it thus has no obligatory or contractual effect. French collective agreements do have an obligatory function but this function is particularly important in the collective labour law systems in the Northern part of Europe. As Kahn-Freund points out:

> the obligatory effect of collective agreements is a German (and also Scandinavian) phenomenon.[39]

The contractual effect of a collective agreement entails a peace obligation on the worker side.

In the Nordic countries, the social partners have reached a historical compromise. Employers' managerial perogatives have been accepted by trade unions in return for trade union power. The concept of employers' prerogatives

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37 *See* e.g. 23 § in the Swedish Co-Determination Act: 23 § 'Med kollektivavtal avses skriftligt avtal mellan arbetsgivarorganisation eller arbetsgivare och arbetstagarorganisation om anställningsvillkor för arbetstagare eller om förhållandet i övrigt mellan arbetsgivare och arbetstagare'.

38 In Denmark any collectivity of workers (not only trade unions) has capacity to conclude a collective agreement but that is an unusual solution in a European perspective.

39 Kahn-Freund, Otto: *Labour Law and Industrial Relations in Great Britain and West Germany*, in Wedderburn, Kenneth William, Roy Lewis and Jon Clark: *Labour Law and Industrial Relations. Building on Kahn-Freund*, Oxford 1983 p. 5.

was a core concept in the first important legal text in Nordic labour law, the Danish Basic Agreement (Septemberforliget) of 1899, which was a collective agreement concluded between the main organizations on the Danish labour market. This agreement laid down procedural rules concerning industrial action (strikes, lock-outs, blocades and boycots). The employers recognized the (positive) right of workers to unionize. In return, the Confederation of Trade Unions (Danish LO) recognized the managerial prerogatives of the employer, in particular the employers' discretionary power in matters of recruitment and dismissal, their right to direct and allocate work and their right to require foremen not to join the unions of the workers.

In Sweden a similar development took place. The so-called December compromise was concluded in 1906 between the Swedish Employers Confederation (SAF) and the Confederation of Trade Unions (LO). By this agreement the organized employers explicitly accepted unions and collective bargaining. SAF refused to support employers who did not allow their workers to join unions and extended collective bargaining by negotiating industry-wide agreements even though the industry was only partially organized. In return for the employers' acceptance of unions and collective bargaining, unions agreed to include in all collective agreements a clause which provided:

> the employer is entitled to direct and distribute the work, to hire and dismiss employees at will, and to employ workers whether organized or not.

In Norway the same development occurred in 1907. The Finnish General Agreement concluded in 1944 contained similar regulations.[40]

These basic collective agreements which have later been replaced by other agreements or legislation upholding the main features of the system constitute the basic historical compromise underlying Nordic collective labour law. The employers' prerogatives were accepted in return for trade union power. This is probably one of the main reasons why Scandinavian employers, their organizations and political parties including conservatives and liberals, have accepted the integration of trade unions into nearly all decision-making processes concerning the labour market.[41]

3.2.3 Normative effect of collective agreements

In the continental European countries and the Nordic countries the general pattern is that collective agreements have a mandatory normative effect which implies that they cannot be derogated from to the detriment of the worker by individual contract.

If an individual contract of employment stipulates terms and conditions that are inconsistent with the collective agreement the individual contract is partially invalid and will have to be amended so as to comply with the collective agreement.

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40 *See* further Bruun, Niklas, Boel Flodgren, Håkan Hydén, Marit Halvorsen and Ruth Nielsen: *The Nordic Labour Relations Model*, Aldershot 1992.

41 Summers, Clyde: *Comparisons in Labor Law: Sweden and the United States*, Svensk Juristtidning 1983 p. 589.

Due to the mandatory normative function of a collective agreement it serves as a parallel to or an alternative to protective employment legislation. This effect establishes a hierarchy between collective agreements and individual employment contracts as sources of law with collective agreements as the higher ranking "*lex superior*".

3.2.4 Union density and coverage of collective agreements. General applicability (*Erga Omnes* effect)

Around 70% to 80% of the wage earners in Nordic countries are members of a trade union. This comparatively high level of unionization is due to the fact that not only private sector manual workers, but also private sector white collar workers and public sector employees are unionized. It is not only labour that is well organized in the Nordic countries. A uniquely high percentage, in the international context, of employers are also organized.

In his book '*Three Worlds of Welfare Capitalism*',[42] Esping-Andersen distinguished three clusters of welfare-state regimes: the Anglo-American, Canadian and Australian (liberal), the continental European (conservative) and the Nordic (social-democratic) welfare states. The Nordic model is based on tax financed social security which reduces income inequality.

In its Communication on 'Employment and social policies: A framework for investing in quality' from 2001,[43] the Commission contrasted the 'European social model' of public social spending with the 'US model', highlighting the fact that 40% of the US population lacks access to primary health care, although per capita health expenditure as a proportion of GDP is higher in the USA than in Europe. A defining feature of the European social model, when contrasted with that of the USA, is the important role of organisations of workers (trade unions) and employers in Europe. The European social model is also characterised by a high coverage rate of collective agreements.[44] Collective agreements constitute a particularly important element of the Nordic labour relations model.

In the Nordic countries, the starting point is that only parties to collective agreements are bound by them. On the employer side this means that an individual employer who has signed a collective agreement is bound by it. An employer who is member of an employer's organisation that has signed a collective agreement is also bound by the collective agreement.

In order for a collective agreement to bind other employers than those who are parties to it, i.e. to become generally applicable or have *erga omnes* effect, legislation or administrative intervention is required. Most EU Member States have a system for extending collective agreements so as to make them binding on employers who are not parties to them. The possibility for extending

42 Esping-Andersen, Gøsta: *Three Worlds of Welfare Capitalism*, Princeton 1990 p. 26 *et seq*.

43 COM (2001) 313.

44 *See* the definition of the European Social model in the Industrial Relations Dictionary of the European Foundation for the Improvement of Living and Working Conditions at "www.eurofound.europa.eu/areas/industrialrelations/dictionary/definitions/europeansocialmodel.htm".

collective agreements so as to give them *erga omnes* effect exists only to a limited extent in the Nordic countries.[45] In Sweden and Denmark, collective agreements can generally *not* be extended to cover employers who are not parties to them. In Norway there is a limited possibility of extension of the coverage of collective agreements. In Finland there is wider access to give *erga omnes* effect to collective agreements.[46]

3.3 Role of the Social Partners

In the Nordic countries, the social partners serve both as legislators, judges and litigators. The labour market organisations fulfil legislative functions mainly through the adoption of collective agreements. They have adjudicative functions mainly by participating as lay judges in the special labour courts and industrial tribunals. Finally, trade unions are main litigators in Nordic labour law. Collective agreements are, in a Nordic context, the key both to the legislative and the adjudicative function of the social partners.

Traditionally Nordic labour law has been rather intransparent and designed to function better for members of the labour market organisations - both on the employer side and the worker side - than for non-members. Its strength is that it is flexible and offers a fairly quick, cheap and efficient system for the majority of employers and workers/employees who are members of the social partners.[47] It may, however, be questioned whether the legal situation resulting from it is sufficiently precise and clear in an EU context. *Transparency* is, at explained above in section 2, one of the general principles underlying EU procurement law.

4 Social Considerations in Public Procurement

4.1 At What Level is it Decided whether Social Considerations may or should be Taken into Account?

The key decisions in respect of public procurement and labour are taken at different levels. In broad terms procurement law forms part of EU internal market law which to a considerable extent is governed by decision-making at EU level while labour law still mainly is the preserve of the Member States. Even in procurement law there are many options for the Member States and/or the contracting authorities. In the following I will distinguish between three levels:

- EU-level,
- National level
- Contracting authorities

45 *See* the overview in the Commission's report on Industrial relations in Europe COM(2000)113 at 41 (which, however, as far as I can see has misunderstood Finnish law).

46 *See* for details Ahlberg, Kerstin and Niklas Bruun, *Kollektivavtal i EU. Om allmängiltiga avtal och social dumping*, Stockholm 1996. Detailed rules are laid down in Act No 56/2001 (Lag om fastställande av kollektivavtals allmänt bindande verkan).

47 *Cf* Bruun, Niklas: *The Future of Nordic Labour Law*, in Scandinavian Studies in Law Volume 43, Stability and Change in Nordic Labour Law, Stockholm 2002 p. 375.

4.2 The Policy Debate

Over the last 20 years or thereabouts, there has been an intense debate among many actors as to whether and to what extent EU law precludes Member States from taking social considerations into account in public procurement.[48] A number of arguments have been put forward.

Seen in isolation, EU procurement law is rather narrowly aimed at fulfilling economic purposes of a commercial nature. In the Green Paper on Public Procurement, 1996[49] the primary objectives of the Union's public procurement policy are said to be:

- to create competitive conditions in which public contracts are awarded without discrimination through the choice of the best bid submitted;
- to give suppliers access to a single market with major sales opportunities;
- and to ensure the competitiveness of European suppliers.

The requirement of transparency is one of the arguments against allowing procurement to be used as a policy tool. Few and simple criteria promote transparency in the procurement process. Lowest price only as award criterion ensures a high degree of transparency. An indefinite number of criteria are, however, allowed under the heading 'economically most advantageous offer'.

There is also a wide range of arguments in favour of a broader interpretation of the procurement rules enabling procurement processes to serve employment related purposes.

Firstly, it may be argued that the contention that procurement law has a narrow competition orientation and commercial purpose is ill-founded. There is no support for this view in the EC Treaty. Procurement law cannot be interpreted in isolation but must be read in the light of the general objectives in Article 2 EC and in connection with other areas of law such as EU labour law. The Social Action Programme 1995-97 adopted following the Maastricht Treaty declared the economic and social dimensions to be interdependent. There cannot, according to that Programme, be social progress without competitiveness and economic growth. Conversely, it is not possible to ensure sustainable economic growth without taking the social dimension into account. Social progress and social solidarity must form an integral part of the European approach to competitiveness. A new balance must be achieved between the economic and social dimensions, in which they are treated as mutually reinforcing, rather than conflicting, objectives. Integration of equality policies into all areas of law, including competition law, is also required by the provision in Article 3 (2) EC inserted by the Amsterdam Treaty.

There is also no support in the EC Treaty or the case law of the ECJ for the view that the concept of "economic" in an EU context should be interpreted as

48 *See* generally Bercusson, Brian & Niklas Bruun: *Labour Law Aspects of Public Procurement in the EU,* in Nielsen, Ruth and Steen Treumer (eds): *The new EU Public Procurement Directives*, Copenhagen 2005 p. 97.

49 COM(96)583.

commercial. Employment related criteria are not, necessarily complicated and difficult to see through.

As regards service contracts they will typically be limited in time to 3-5 years whereas the need they are designed to fulfill continues to exist for many more years so that a consecutive series of contracts will have to be entered into. Even though it is unlawful to put a service contract out for tender for an indefinite period or for a longer period than 3-5 years that cannot mean that it should be unlawful to think more than 3-5 years ahead and assess the value of a tender in a more long-term perspective than that of the particular contract at issue. If the economic objectives pursued by public procurement are not limited to the particular contract at issue but can also relate to sustainable economic growth which according to Article 2 EC is one of the aims of the European Union, the economic objectives cannot be achieved without taking the employment dimension into account.

A tenderer's staff is one of its technical resources within the meaning of the Procurement Directives. It is clearly lawful to require a certain number of staff and a certain level of qualification.

The *ECJ* has accepted employment related clauses in contracts concluded by tendering, see in particular the *Beentjes* case[50] where the ECJ held that a condition relating to the employment of long-term unemployed persons is compatible with the (then) Works Directive if it has no direct or indirect discriminatory effect on tenderers from other Member States of the Community. When employment related conditions are lawful, tenderers who cannot fulfil them are not qualified to perform the contract and must be de-selected for that reason. If the employment related contractual condition is phrased in a flexible way, for example, as a requirement that the contract should be performed by a work-force which to the largest possible extent is composed equally of men and women, the degree to which different tenderers can meet the requirement will vary. If it is lawful to use such a contractual condition it seems logical also to allow it being taken into consideration when awarding the contract.

In accordance with the principle of subsidiarity the problem discussed here is a matter that should be left to the Member States. There is nothing in the wording of neither the EC Treaty nor the Directives which preclude such an interpretation and EU law should not interfere more than necessary with national competences. Accordingly Member States who wish to pursue social policy by public procurement can do so. Member States who do not wish to pursue such policies can abstain from doing so.

Different actors have expressed different views.[51] The *European Commission,* especially the Directorate General on the Internal Market, is by and large in favour of a narrow competition promoting interpretation of the Procurement Directives limiting them to allow strictly commercial criteria in order to ensure effective competition by increasing the transparency of the procedures. According to this view, the Directives establish objective criteria

50 Case 31/87 [1988] ECR 4635.

51 *See* further Martín, José Fernández: *The EC Public Procurement Rules. A Critical Analysis*, Oxford 1996 Chapters 2 and 3.

strictly relevant to the particular procurement decision and uniformly applicable to all tenderers. The Commission has, for example expressed this view in its Green Paper on Public Procurement in 1996[52] and in its Interpretative Communication of the Commission on the Community law applicable to public procurement and the possibilities for integrating social considerations into public procurement.[53]

The Action Programme relating to the implementation of the Community Charter of Fundamental Social Rights for Workers 1989[54] declared that:

> the Commission could formulate a proposal aiming at the introduction of a 'social clause' into public contracts.

So far, no such proposal has been put forward but a comparative survey of contract compliance has been undertaken in respect of the promotion of equal opportunities for women.[55] The *European Parliament*, on the other hand, has proposed to see procurement in a broader legal context.

4.3 Case Law of the ECJ

The *ECJ* has accepted employment related clauses in contracts concluded by tendering in a few cases.

In *Randstad*[56] the ECJ held that it is lawful to take the ability to pay high wages into consideration when determining which tender is the most advantageous.

In *Beentjes*[57] the ECJ ruled that the condition relating to the employment of *long-term unemployed* persons is compatible with the Directive if it has no direct or indirect discriminatory effect on tenderers from other Member States of the Community. An additional specific condition of this kind must be mentioned in the contract notice.

In *Commission* v *France* (Nord Pas Calais)[58] the ECJ held on the lawfulness or otherwise of using an additional criterion related to employment as an award criterion:

> 50. None the less, that provision [the provision on award criteria] does not preclude all possibility for the contracting authorities to use as a criterion a condition linked to the campaign against unemployment provided that that condition is consistent with all the fundamental principles of Community law, in particular the principle of non-

52 COM(96)583.

53 COM(2001) 566, Interpretative Communication of the Commission on the Community law applicable to public procurement and the possibilities for integrating social considerations into public procurement p. 16 note 61.

54 COM (89) 568 p. 24.

55 McCrudden (1995).

56 Case 56/77 *Agence Européenne d'Interims SA* v *Commission* [1978] ECR 2215.

57 Case 31/87 *Gebroeders Beentjes BV* v *The Netherlands* [1988] ECR 4635.

58 Case C-225/98 *Commission* v *France* [2000] ECR I-7445.

> discrimination flowing from the provisions of the Treaty on the right of establishment and the freedom to provide services (see, to that effect, Beentjes, paragraph 29).
>
> 51. Furthermore, even if such a criterion is not in itself incompatible with Directive 93/37, it must be applied in conformity with all the procedural rules laid down in that directive, in particular the rules on advertising (see, to that effect, on Directive 71/305, Beentjes, paragraph 31). It follows that an award criterion linked to the campaign against unemployment must be expressly mentioned in the contract notice so that contractors may become aware of its existence (see, to that effect, Beentjes, paragraph 36).
>
> 52. As regards the Commission's argument that Beentjes concerned a condition of performance of the contract and not a criterion for the award of the contract, it need merely be observed that, as is clear from paragraph 14 of Beentjes, the condition relating to the employment of long-term unemployed persons, which was at issue in that case, had been used as the basis for rejecting a tender and therefore necessarily constituted a criterion for the award of the contract.

4.4 In which Contracts can Social Clauses be Inserted?

Social clauses requiring employment of specially targeted groups (unemployed, ethnic minorities, etc) can be used in works and services contracts where the work is to be performed in the country of the contracting authority. It is the view of the relevant Danish, Norwegian and Swedish authorities that social considerations in public procurement cannot be exported.[59] A contracting authority can therefore not insert social clauses in contracts where the work is to be performed in another country. Likewise, social clauses can arguably not be inserted into supply contracts because that would interfere with the right of the state where the goods are produced to lay down rules on working conditions in that state.

4.5 At What Stage in the Tendering Process can Social Considerations be Taken into Account?

4.5.1 Definition of the subject-matter of the contract

In order to meet the Procurement Directive's aim of ensuring development of effective competition in the award of public works contracts, the criteria and conditions that govern each contract must be given sufficient publicity by the authorities awarding contracts.[60]

4.5.2 Consulting on possible solutions

It may be helpful for a contracting authority to explore with external suppliers how its objectives, including race and gender equality objectives, could be realized. Drawing on the knowledge and experience of different suppliers may suggest a wider range of options for promoting race or gender equality within the context of the contract, as well as any accompanying risks. The Procurement Directive provides for a new procurement procedure: competitive dialogue. It is a procedure in which any economic operator may request to participate and

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59 *See* 'Veiledning fra Konkurrencestyrelsen' ("www.ks.dk/publikationer/udbud/2004/social/"), SOU 2005:22 ("www.regeringen.se/sb/d/108/a/40472") Nya upphandlingsregler p. 300 and the Norwegian Guide to public procurement available at "www.regjeringen. no/nb/dep/fad/dok/Veiledninger_og_brosjyrer/2006/Veileder-til-reglene-om-offentlige-anska/Veileder-til-reglene-om-offentlige-anska/9.html?id=476393" note 143.

60 *See* point 21 and 28 in Case 31/87 *Beentjes* [1988] ECR 4635.

whereby the contracting authority conducts a dialogue with the candidates admitted to that procedure, with the aim of developing one or more suitable alternatives capable of meeting its requirements, and on the basis of which the candidates chosen are invited to tender. Competitive dialogue may be used when the contract is particularly complex. Including equality aspects in a contract may contribute to it becoming particularly complex.

4.5.3 Variants

Article 24 of the Procurement Directive on variants empower the contracting authorities to authorize tenderers to submit variants where the criterion for award is that of the most economically advantageous tender. Contracting authorities shall indicate in the contract notice whether or not they authorise variants: variants shall not be authorised without this indication.

Contracting authorities authorising variants shall state in the contract documents the minimum requirements to be met by the variants and any specific requirements for their presentation.

Only variants meeting the minimum requirements laid down by these contracting authorities shall be taken into consideration.

In general, any contracting authority is free, when defining the goods or services it intends to buy, to choose to buy goods, services or works which correspond to its concerns as regards equality policy including through the use of variants, provided that such choice does not result in restricted access to the contract in question to the detriment of tenderers from other Member States.

Using variants - eg contracts with more or less ambitious equality content - enables the contracting authority to take the cost of equality into account without using the equality criterion as an award criterion - the lawfullness of which is still contested.

4.5.4 Subcontracting

In the contract documents, the contracting authority may under Article 25 of the Procurement Directive request or may be required by a Member State to request the tenderer to indicate in his tender any share of the contract he may intend to subcontract to third parties and any proposed subcontractors.

In the US subcontracting is used to improve procurement opportunities for small businesses, including minority women-owned small businesses.[61] Similarly the UK Commission for Racial Equality in its guidelines on Race Equality and Public Procurement recommends promotion of subcontracting opportunities for small firms and ethnic minority businesses.[62]

4.5.5 Exclusion and Qualitative Selection of Tenderers

The suitability of suppliers should be assessed on the basis of their economic and financial standing, and their technical capacity to carry out the contract in

61 Sirmons, Denise Benjamin: *Federal Contracting with Women-owned Businesses: an Analysis of Existing Challenges and Potential Opportunities*, Public Contract Law Journal 2004 p. 725.

62 *Race Equality and Public Procurement*, CRE, UK, "www.cre.gov.uk/duty_ proc_pa.pdf" p. 61.

question. For this purpose, technical capacity can encompass capacity to meet race relations and gender equality legislation and any race or gender equality requirements for performance of the contract.

4.5.5.1 Discrimination and breach of the rules on posted workers as Grave Misconduct

Under Article 45 of the Procurement Directive any economic operator may be excluded from participation in a contract where that economic operator:

> (c) has been convicted by a judgment which has the force of *res judicata* in accordance with the legal provisions of the country of any *offence* concerning his professional conduct;
> (d) has been guilty of *grave professional misconduct* proven by any means which the contracting authorities can demonstrate;

Recital 34 in the Procurement Directive refers to the posting of workers directive.[63] If national law contains provisions implementing that directive, non-compliance with those obligations may be considered to be grave misconduct or an offence concerning the professional conduct of the economic operator concerned, liable to lead to the exclusion of that economic operator from the procedure for the award of a public contract. Recital 43 in the Procurement Directive provides that (emphasis added):

> Non-observance of national provisions implementing the Council Directives 2000/78/EC and 76/207/EEC concerning equal treatment of workers, which has been the subject of a final judgment or a decision having equivalent effect may be considered *an offence concerning the professional conduct* of the economic operator concerned or *grave misconduct*.

Directive 2000/78/EC prohibits discrimination on grounds of religion or faith, age, handicap and sexual orientation in the employment field. Directive 76/207/EEC prohibits discrimination on grounds of sex in the employment field. As appears, the Ethnic/Race equal treatment Directive[64] is not mentioned in the Procurement Directive which must, however, be interpreted so that violations of national provisions implementing the Ethnic/Race equal treatment Directive may be also considered an offence concerning the professional conduct of the economic operator concerned or a grave misconduct. The Gender Equality (Goods and Services) Directive[65] is also not mentioned in the Procurement Directive from March 2004 but that is because it was only adopted in December 2004. By way of analogy violations of national provisions implementing the Gender Equality (Goods and Services) Directive may be also considered an offence concerning the professional conduct of the economic operator concerned or a grave misconduct.

63 96/71/EC. *See* on this directive below in section 5.2.4.

64 2000/43/EC.

65 2004/113/EC.

4.5.5.2 Approved Lists of Economic Operators

The Procurement Directive allows Member States to establish official lists of contractors, suppliers or service providers or a system of certification by public or private bodies, and makes provision for the effects of such registration or such certification in a contract award procedure in another Member State.

Contracting authorities with mainstreaming duties must see to it that such lists include a reasonable number of minority owned or women owned businesses and there must be no discrimination on grounds of race or sex when setting up such lists.

4.5.6 Award of the contract

Neither gender nor ethnic origin or other employment related criteria are explicitly mentioned as award criteria in the Procurement Directive. Article 53 on contract award provides:

1. Without prejudice to national laws, regulations or administrative provisions concerning the remuneration of certain services, the criteria on which the contracting authorities shall base the award of public contracts shall be either:

> (a) when the award is made to the tender most economically advantageous from the point of view of the contracting authority, various criteria linked to the subject-matter of the public contract in question, for example, quality, price, technical merit, aesthetic and functional characteristics, environmental characteristics, running costs, cost effectiveness, after sales service and technical assistance, delivery date and delivery period or period of completion, or
>
> (b) the lowest price only.

The question discussed here is whether the provisions on award criteria in the Procurement Directive restrict the freedom of Member States to pursue policies by means of procurement further than what follows from the Treaty provisions.

Recital 1 in the Preamble to the Directive states that the Directive is based on ECJ case-law, in particular case-law on award criteria, that clarifies the possibilities for the contracting authorities to meet the needs of the public concerned, including in the environmental and/or social area, provided that such criteria are

- linked to the subject-matter of the contract,
- do not confer an unrestricted freedom of choice on the contracting authority,
- are expressly mentioned
- and comply with the fundamental principles mentioned in recital 2.[66]

66 I.e. the principle of freedom of movement of goods, freedom of establishment and freedom to provide services and to the principles deriving therefrom, such as the principle of equal

The above provision in the Procurement Directive builds on the practice of the ECJ, including the judgement in the Finnish Bus Case.[67] In relation to the problem discussed here the question is whether the criterion 'economically most advantageous' may cover equality related considerations or whether it should be limited to commercial criteria.

In favour of a broad interpretation it may be argued that the ECJ has consistently held that a body may be engaged in economic activities and be regarded as an "undertaking" for the purposes of Community law though it does not operate with a view to profit. In this context it is worth noticing that the Court has developed its interpretation on the basis of the general provision in Article 2 EC and a cross-disciplinary discussion of cases. A good example of this is provided by the infringement case[68] against England concerning the Transfer of Undertakings Directive.[69] Advocate General van Gerven underlined that the Court had already accepted that economic cannot be reduced to commercial in competition law and social law - two areas of law that were not usually dealt with in the context of each other before the development of the EU.

On a narrow view Article 53 at least allows for the use of equality as an 'additional' award criterion. The concept of an additional criterion was first mentioned in *Beentjes*, where the Court held that a criterion relating to the employment of long-term unemployed persons was not relevant either to the checking of a candidate's economic and financial suitability or of the candidate's technical knowledge and ability, or to the award criteria listed in the relevant directive. The Court also held that this criterion was nevertheless compatible with the public procurement directives if it complied with all relevant principles of Community law.

In the Commission's interpretation,[70] the ECJ in *Commission* v *France* (Nord Pas Calais) held that contracting authorities can base the award of a contract on a condition related to the combating of unemployment, provided that this condition was in line with all the fundamental principles of Community law, but only where the said authorities had to consider two or more economically equivalent tenders. This condition was regarded by the Member State in question as an additional, non-determining criterion and was considered only after tenders were compared from a purely economic point of view. Finally, the Court of Justice stated that the application of the award criterion regarding combating unemployment must not have any direct or indirect impact on those submitting bids from other Member States of the Community and must be explicitly mentioned in the contract notice so that potential contractors were able to

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treatment, the principle of non-discrimination, the principle of mutual recognition, the principle of proportionality and the principle of transparency.

67 Case C-513/99 *Concordia Bus Finland* [2002] ECR I-7213.

68 Case C-382/92 *Commission* v *United Kingdom* [1994] ECR-I_2435.

69 The then 77/187/EEC, *See* now 2001/23/EF.

70 *See* COM(2001) 566, Interpretative Communication of the Commission on the Community law applicable to public procurement and the possibilities for integrating social considerations into public procurement p. 15.

ascertain that such a condition existed. This might also be the case for other conditions in the social field such as equality conditions.

The UK Commission for Racial Equality in its guidelines on Race Equality and Public Procurement takes a similar view:[71]

> For some contracts, there may be factors relating to the promotion of race equality that are not core requirements, but which you consider to be desirable and that would add value to the authority in its duty to promote race equality and other policy commitments. You might be able, in certain contracts, including those subject to EC directives, to take account of tenderers' ability to meet an additional race equality criterion, if you needed to decide between tenders that otherwise appear to offer equivalent value for money. This means that, in the exceptional case where you had evaluated two or more tenders as being equally economically advantageous for the authority, they could be compared against a further race equality factor. You could only do this if this additional criterion had been stated in your invitation to tender or contract notice, and if it does not breach EC law. You should get legal advice before including an additional criterion.

In my view that is a too narrow interpretation. There is nothing in the wording of the judgment that suggests this limited interpretation and - at least in respect of gender equality - it is contrary to the gender mainstreaming duty under Article 3(2) EC.

4.6 Contract Performance Conditions

Contracting authorities can impose contractual clauses relating to the manner in which a contract will be executed. Contract performance conditions are the standard instrument for obliging contractors to provide job training to specific target groups or recruit unemployed persons to work on the contract.

It is stated in the Preamble to the procurement Directive[72] that contract performance conditions are compatible with the Directive provided that they are not directly or indirectly discriminatory and are indicated in the contract notice or in the contract documents. They may, in particular, be intended to favour on-site vocational training, the employment of people experiencing particular difficulty in achieving integration, the fight against unemployment or the protection of the environment. For instance, mention may be made, amongst other things, of the requirements — applicable during performance of the contract — to recruit long-term job-seekers or to implement training measures for the unemployed or young persons, to comply in substance with the provisions of the basic International Labour Organisation (ILO) Conventions, assuming that such provisions have not been implemented in national law, and to recruit more handicapped persons than are required under national legislation. Article 26 of the Procurement Directive provides:

Conditions for performance of contracts. Contracting authorities may lay down special conditions relating to the performance of a contract, provided that these are compatible with Community law and are indicated in the contract

71 Race Equality and Public Procurement, CRE, UK, "www.cre.gov.uk/duty_ proc_pa.pdf" p. 54.

72 *See* 2004/18/EC Recital 33.

notice or in the specifications. The conditions governing the performance of a contract may, in particular, concern social and environmental considerations.

The clauses or conditions regarding execution of the contract must comply with Community law and, in particular, not discriminate directly or indirectly against non-national tenderers. By way of example, a clause stipulating that a successful tenderer must employ a certain number or percentage of long-term unemployed or apprentices, without requiring the unemployed or apprentices to be from a particular region or registered with a national body, for instance for the execution of a works contract, will not, a priori, amount to discrimination against tenderers from other Member States.[73]

In addition, such clauses or conditions must be implemented in compliance with all the procedural rules in the Directive, and in particular with the rules on advertising of tenders.[74] A public contract should be executed in compliance with all applicable rules, including those in the social and health fields.

Contract conditions are obligations which must be accepted by the successful tenderer and which relate to the performance of the contract. It is therefore sufficient, in principle, for tenderers to undertake, when submitting their bids, to meet such conditions if the contract is awarded to them. A bid from a tenderer who has not accepted such conditions would not comply with the contract documents and could not therefore be accepted. In *Storebælt*,[75] the ECJ stated that a contracting authority must reject bids which do not comply with the tender conditions to avoid infringing the principle of equal treatment of tenderers.

Contracting authorities have a wide range of possibilities for determining the contractual clauses on social considerations. In its Communication on the possibilities for integrating social considerations into public procurement the Commission gave the following examples of lawful social clauses: [76]

> the obligation to recruit unemployed persons, and in particular long-term unemployed persons, or to set up training programmes for the unemployed or for young people during the performance of the contract;
>
> the obligation to implement, during the execution of the contract, measures that are designed to promote equality between men and women or ethnic or racial diversity. In the case of services contracts, this might for example involve establishing a policy aimed at promoting ethnic and racial diversity in the workplace, through instructions given to the persons in charge of recruitment, promotion or staff training. It may

73 *See* for the same view COM(2001) 566, Interpretative Communication of the Commission on the Community law applicable to public procurement and the possibilities for integrating social considerations into public procurement p. 16 note 61.

74 *See* point 31 in Case 31/87 *Beentjes* [1988] ECR 4635.

75 Case C-243/89 *Commission* v *Denmark* [1993] ECR I-3353.

76 COM(2001) 566, Interpretative Communication of the Commission on the Community law applicable to public procurement and the possibilities for integrating social considerations into public procurement p. 16 note 61.

also involve the appointment by the contractor of a person responsible for implementing such a policy in the workplace;

- the obligation to comply with the substance of the provisions of the ILO core conventions during the execution of the contract, in so far as these provisions have not already been implemented in national law;
- the obligation to recruit, for the execution of the contract, a number of disabled persons over and above what is laid down by the national legislation in the Member State where the contract is executed or in the Member State of the successful tenderer.

In the Commission's opinion it would appear more difficult to envisage contractual clauses relating to the manner in which supply contracts are executed, since the imposition of clauses requiring changes to the organisation, structure or policy of an undertaking established on the territory of another Member State might be considered discriminatory or to constitute an unjustified restriction of trade.

4.7 Sheltered Workshops

Article 19 of the Procurement Directive on reserved contracts provides that Member States may reserve the right to participate in public contract award procedures to sheltered workshops or provide for such contracts to be performed in the context of sheltered employment programmes where most of the employees concerned are handicapped persons who, by reason of the nature or the seriousness of their disabilities, cannot carry on occupations under normal conditions. The contract notice shall make reference to this provision.

4.8 Procurement and Equality/Non-discrimination Policies

4.8.1 Ban on discrimination on grounds of sex, race, etc in procurement

Equality problems in a procurement context may arise from equality failures in the procurement practice of the contracting authority, e.g. direct or indirect discrimination on grounds of nationality, sex, race, etc in the contracting authority's conduct of tendering processes. Statistics in the US show that:[77]

Women-owned businesses are dramatically underrepresented in federal procurement. Although women comprise almost 51 percent of the total U.S. population and own approximately 26 percent of the 20.8 million non-farm businesses in the United States, surprisingly women-owned firms represent only 8.3 percent of all federal prime contractors and on average receive less than 2.5 percent of total federal prime contract dollars annually.

There is - as far as I know - no similar statistics in Europe or Scandinavia but the problem may well be the same. In respect of race discrimination the UK Commission for Racial Equality (CRE) has issued a number of publications on how to avoid direct and indirect race discrimination in public procurement and how to fulfil the obligation existing under the UK Race Relations Act to promote

77 Sirmons, Denise Benjamin: *Federal Contracting with Women-owned Businesses: an Analysis of Existing Challenges and Potential Opportunities*, Public Contract Law Journal 2004 p. 725.

racial equality, see Commision for Racial Equality's home page on public procurement.[78]

Equality problems in a procurement context may also arise from lacks in the implementation of mainstreaming duties incumbent upon the contracting authority. Within the framework of the Council of Europe ECRI on 13 December 2002 adopted a general policy recommendation No 7 on national legislation to combat racism and racial discrimination.[79] It provides in point 9:

> 9. The law should place public authorities under a duty to ensure that those parties to whom they award contracts, loans, grants or other benefits respect and promote a policy of non-discrimination. In particular, the law should provide that public authorities should subject the awarding of contracts, loans, grants or other benefits to the condition that a policy of non-discrimination be respected and promoted by the other party. The law should provide that the violation of such condition may result in the termination of the contract, grant or other benefits.

Equality problems may further arise from equality failures in society at large.[80] Ayres' study[81] of retail car negotiations suggests that men and women do not obtain similar contracts when buying in the private sector in situations where the price is not definitively fixed. It seems doubtful whether the EU procurement regime makes the contracting process more gender neutral.

Discrimination on grounds of Racial or Ethnic Origin in the provision of goods and services - including inter alia public procurement - is prohibited in the Directive on ethnic equality.[82] Discrimination on grounds of sex in the provision of goods and services is prohibited in the Directive on equal treatment between men and women in the provision of goods and services.[83]

Discrimination on grounds of other protected criteria, for example religion or age, is not prohibited at EU level in regard to the provision of goods and services, including public procurement, but only with respect to employment and occupation.

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78 "www.cre.gov.uk/duty/procurement.html".

79 *See* on the recommendation compared to Directive 2000/43/EC on the implementing the Principle of Equal Treatment between Persons irrespective of Racial or Ethnic Origin Howard, Erica: *Anti Race Discrimination Measures in Europe: An Attack on Two Fronts*, Europoean Law Journal 2005 p. 468.

80 *See* generally Numhauser-Henning, Ann (red.): *Legal perspectives on equal treatment and non-discrimination*, The Hague 2001.

81 Ayres, Ian: *Fair Driving: Gender and Race Discrimination in Retail Car Negotiations*, Harvard Law Review 1991 p. 817 and Ayres, Ian: *Pervasive prejudice? - unconventional evidence of race and gender discrimination*, Chicago 2001.

82 Directive 2000/43/EC Directive on the implementing the Principle of Equal Treatment between Persons irrespective of Racial or Ethnic Origin.

83 Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services.

4.8.2 Procurement as an instrument to overcome (past) discrimination

Even if there is no reason to suspect that a procurement process adds to equality problems in the society at large, public procurement may be used as a tool to overcome discrimination and facilitate equality. Government is often the largest purchaser of goods and services in European countries. Public procurement can be made an instrument to pursue the social goal of the socio-economic inclusion of immigrants, ethnic minorities[84] and women. This can be done by taking the protected criteria into account, i.e. mainstreaming the protected criteria into various stages of the procurement process, such as invitation to tender, contract documentation (contract notice, specifications, etc), conditions for performance of contracts, variants, subcontracting, exclusion, verification of the suitability of tenderers, choice of participants (in restricted and negotiated procedures and in competitive dialogue), award and performance of the contract.

As set out above a number of provisions in the Procurement Directive deal more or less explicitly with the possibility to take gender, race, etc into account at various stages of the procurement process, see e.g. Recital 34 in the Preamble that refers to the equal treatment directive[85] and the employment framework directive,[86] discussed above in section 4.5.5.1.

Sweden adopted a regulation on anti-discrimination conditions in procurement contracts in 2006.[87] Contracting authorities covered by the regulation are required to insert anti-discrimination clauses in public contracts.

5 Public Procurement and Collective Agreements

5.1 Issues

After the enlargement of the EU as at 1 May 2004 with a number of Central and Eastern European countries where the average wage level is considerably lower that in most of the old Member States the possibilities for ensuring respect for national collective agreements in connection with procurement has increasingly become a contested issue and a matter of litigation.

5.2 Different ways an Employer can Become Bound by a Collective Agreement

There are different ways an employer can become bound by a collective agreement. He can e.g. become a party to the collective agreement either individually or by joining an employers' organisation that is party to the agreement. In some countries collective agreements may be made generally applicable, i.e. extended so as to become binding for other employers than those who are parties to them, see above in section 3.3.4.

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84 *See* Cormack, Janet and Jan Niessen: *Public Procurement and Anti-discrimination Legislation*, part II in Chopin, Isabelle and Jan Niessen (eds): *Combating Racial and Ethnic Discrimination: Taking the European Legislative Agenda Further*, Commission for Racial Equality, London 2002, "www.cre.gov.uk/downloads/combat.pdf".

85 76/207/EEC, amended by 2002/73/EC, recast by 2006/54/EC.

86 2000/78/EC.

87 SFS 2006:260, Förordning om antidiskrimineringsvillkor i upphandlingskontrakt.

5.2.1 ILO Convention 94, Labour Clauses (Public Contracts) Convention, 1949

Historically, labour law aspects of public procurement were first addressed within the context of the ILO that adopted the Labour Clauses (Public Contracts) Convention No 94 in 1949.[88] The Convention requires public contracts to include clauses ensuring working conditions: (Article 2):

> 1. ...not less favourable than those established for work of the same character in the trade or industry concerned in the district where the work is carried on
> (a) by collective agreement or other recognised machinery of negotiation between organisations of employers and workers...
> 2. Where the conditions of labour referred to in the preceding paragraph are not regulated in a manner referred to therein in the district where the work is carried on, the clauses to be included in contracts shall ensure to the workers concerned wages (including allowances), hours of work and other conditions of labour which are not less favourable than
> (a) those established by collective agreement or other recognised machinery of negotiation, by arbitration, or by national laws or regulations, for work of the same character in the trade or industry concerned in the nearest appropriate district; or
> (b) the general level observed in the trade or industry in which the contractor is engaged by employers whose general circumstances are similar.

Several EU Member States had ratified the ILO Convention already in the early 1950s. The nine Member States (ten within EEA) which have ratified the convention are: Belgium (1952), Denmark (1955), Finland (1951), France (1951), Italy (1952), Netherlands (1952), Spain (1971), Austria (1951) and the United Kingdom (1950). The UK denounced ILO Convention No. 94 in 1982. That was for domestic reasons associated with the (then) conservative Thatcher government's policy preferences. Within the EEA, Norway ratified ILO Convention No 94 in 1996. Sweden has not ratified the convention and its compatibility with EU law has been questioned in the Swedish debate.

According to Article 307 EC, any public international law obligations undertaken by a Member State before joining the EU shall not be affected by the EC Treaty. However, if any such obligations are incompatible with Community law or an earlier international agreement, the Member State concerned shall eliminate such incompatibilities, i.e. they are obliged to denounce those treaty obligations as has been done, for example, in the case of ILO Conventions prohibiting night work for women.

In *Levy*,[89] the ECJ held that it follows from Article 307 EC (formerly Article 234 EC), that national courts are under an obligation to ensure that the Equal Treatment Directive[90] is fully complied with, unless the application of a conflicting provision is necessary in order to ensure that the Member State

88 *See* further Nielsen, Henrik Karl: *Public Procurement and International Labour Standards*, Public Procurement Law Review 1995 p. 94 and Krüger, Kai, Ruth Nielsen and Niklas Bruun: *European Public Contracts in a Labour Law Perspective*, DJØF Publishing, Copenhagen 1998 Chapter VII.

89 Case C-158/91 *Levy* [1993] ECR I-4287.

90 76/207/EEC.

concerned fulfils its obligations according to a prior obligation under international law. France could, therefore, impose a penalty on French employers for violating a prohibition of night work that was incompatible with the Equal Treatment Directive because the prohibition arose from an ILO convention ratified by France before the EC was established. France clearly had an obligation to seek to eliminate the incompatibility, e.g. by extending the prohibition of night work to apply to men or denounce the treaty in question. In *Levy*, the ECJ held[91] that it is not for the ECJ but for the national court to determine which obligations are imposed by an earlier international agreement on the Member State concerned and to ascertain their ambit so as to be able to determine the extent to which they constitute an obstacle to the application of the Equal Treatment Directive.

The aim of Convention No 94 is to make sure that already established national working conditions in a district are safeguarded. It is not, however, the purpose of the Convention to set up substantive minimum standards for the conditions of work regarding work carried out under a public contract.

Convention No 94 applies to contracts to which at least one party is a public authority and the contract must involve public resources and the employment of workers by the other party to the contract. The obligations flowing from the Convention are compulsory for central public authorities, while the application of the Convention on national level is optional for other public authorities. The Convention covers contracts for the construction, alteration, repair or demolition of public works, the manufacture, assembly, handling or shipment of material, supplies or equipment, or the performance or supply of services. The Convention also applies to work carried out by subcontractors or assignees of contracts. The text of the Convention is still the same as in 1949. No amendments have been made or proposed officially.

5.2.2 The Procurement Directive

The Public Procurement Directive[92] provides in Article 26 that contracting authorities may lay down special conditions relating to the performance of a contract, provided that these are compatible with Community law and are indicated in the contract notice or in the specifications. The conditions governing the performance of a contract may, in particular, concern social and environmental considerations. Article 27 of the Directive provides that:

> 1. A contracting authority may state in the contract documents, or be obliged by a Member State so to state, the body or bodies from which a candidate or tenderer may obtain the appropriate information on the obligations relating […], to the employment protection provisions and to
> the working conditions which are in force in the Member State, region or locality in which the works are to be carried out or services are to be provided and which shall be applicable to the works carried out on site or to the services provided during the performance of the contract.
> 2. A contracting authority which supplies the information referred to in paragraph 1 shall request the tenderers or candidates in the contract award procedure to indicate that they

91 In paragraph 21.

92 2004/18/EC.

> have taken account, when drawing up their tender, of the obligations relating to employment rotection provisions and the working conditions which are in force in the place where the works are to be carried out or the service is to be provided.

Recital 34 refers to the Posting of Workers Directive, see below in section 5.2.3.

5.2.3 Posting of Workers Directive

The Posting of Workers Directive[93] is designed to coordinate the laws of the Member States in order to lay down a nucleus of mandatory rules for minimum protection to be observed in the host country by employers who post workers to perform temporary work in the territory of a Member State where the services are provided.

This directive makes mandatory what until the mid 1990'ies had been only an option for Member States. The directive requires the Member States to apply to undertakings established in another Member State which post workers to their territory in the framework of the transnational provision of services a number of national rules setting terms and conditions of employment covering certain matters.

Article 3 obliges Member States to ensure that service providers posting workers in to their territory will at last pay the minimum rates of pay, as laid down by law or (in case of construction work) by universally applicable collective agreement. In countries that apply a system for declaring collective agreements generally applicable it is thus mandatory for an employer posting workers in the context of procurement to observe these collective agreements.

According to the Directive, the concept of minimum rates of pay is defined by the national law or practice of the host state. Article 3.7 states that this shall not prevent application of terms and conditions of employment which are more favourable to workers. In addition, Article 3.8 provides for a definition of universally applicable collective agreements, and allows Member States (such as Sweden and Denmark) – in which no system for declaring collective agreements generally applicable exists – to also apply collective agreements which are generally applicable to all similar undertakings in the geographical area and in the profession or industry concerned

> 'provided that their application to the undertakings referred to in Article 1 (1) ensures equality of treatment on matters listed in the first subparagraph of paragraph 1 of this Article between those undertakings and the other undertakings referred to in this subparagraph which are in a similar position'.

5.3 Balance (or Clash) between Freedom to Provide Services and Protection Against Social Dumping

The ECJ has an abundant case law on Article 49 EC. In broad terms the Court has put an expansive interpretation on Article 49 EC. It is settled case-law, [94] that Article 49 EC requires not only the elimination of all discrimination on grounds of nationality against providers of services who are established in

93 96/71/EEC. *See* on the Directive Davies, Paul: *Posted workers: Single market or protection of national labour law systems?*, Common Market Law Review 1997 p. 571.

94 *See* e.g. case C-164/99 *Portugaia Construções* [2002] ECR I-787.

another Member State, but also the abolition of any restriction, even if it applies without distinction to national providers of services and to those of other Member States, which is liable to prohibit, impede or render less attractive the activities of a provider of services established in another Member State in which he lawfully provides similar services.

It is further clear from settled case-law that, where national law which constitutes a restriction on freedom to provide services, is applicable to all persons and undertakings operating in the territory of the Member State in which the service is provided, it may be justified where it meets overriding requirements relating to the public interest in so far as that interest is not safeguarded by the rules to which the provider of such a service is subject in the Member State in which he is established and in so far as it is appropriate for securing the attainment of the objective which it pursues and does not go beyond what is necessary in order to attain it. Overriding reasons relating to the public interest that have been recognised by the ECJ include the protection of workers. In *Seco and Desquenne & Giral*,[95] the Court stated (emphasis added) that

> 14. It is well-established that Community law does not preclude Member States from applying their legislation, or *collective labour agreements* entered into by both sides of industry relating to *minimum wages*, to any person who is employed, even temporarily, within their territory, no matter in which country the employer is established, just as Community law does not prohibit Member States from enforcing those rules by appropriate means.

In *Finalarte*,[96] the ECJ stated that intentions behind restrictions of free movement have to be evaluated for their effects, not only for their aims. In *Guiot and Climatec*,[97] the ECJ held that Articles 49 EC precludes a Member State from requiring an undertaking in the construction industry established in another Member State and temporarily carrying out works in the first-mentioned Member State to pay employer' s contributions in respect of loyalty stamps and bad-weather stamps with respect to workers assigned to carry out those works, where that undertaking is already liable for comparable employer' s contributions, with respect to the same workers and for the same period of work, in the State where it is established.

In *Portugaia Construções*,[98] the ECJ stated that Community law does not preclude a Member State from requiring an undertaking established in another Member State which provides services in the territory of the first State to pay its workers the minimum remuneration laid down by the national rules of that State. In *Wolff & Müller*,[99] the ECJ declared:

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95 Joined Cases 62/81 and 63/81 *Seco and Desquenne & Giral* [1982] ECR 223.

96 Case C-49/98 *Finalarte Sociedade de Construção* v *Urlaubs und Lohnausgleichskasse der Bauwirtschaft* [2001] ECR I-7831.

97 Case C-272/94, criminal proceedings against *Michel Guiot and Climatec SA* [1996] ECR I-1905.

98 Case C-164/99 *Portugaia Construções* [2002] ECR I-787.

99 Case C-60/03 *Wolff & Müller* [2004] ECR I-9553.

> 36. However, although it may be acknowledged that, in principle, the application by the host Member State of its minimum-wage legislation to providers of services established in another Member State pursues an objective of public interest, namely the protection of employees (*Portugaia Construções*, paragraph 22), the same is true in principle of measures adopted by the host Member State and intended to reinforce the procedural arrangements enabling a posted worker usefully to assert his right to a minimum rate of pay.
>
> 37. In fact, if entitlement to minimum rates of pay constitutes a feature of worker protection, procedural arrangements ensuring observance of that right, such as the liability of the guarantor in the main proceedings, must likewise be regarded as being such as to ensure that protection.

In the pending *Rüffert* case,[100] a German court has put the following question to the ECJ for a preliminary ruling:

> Is it an illegal restriction of the freedom to provide services according to the EC Treaty that a contracting entity according to law is obliged, in public procurements, to only award offers from companies that in their tenders oblige themselves in writing to pay their employees wages "that are at least at the level of the wages that are foreseen on the basis of the collective agreement that applies to the place where the work is done"?

The *Rüffert* case focuses on the right of public authorities, when awarding contracts for work, to demand that tendering companies commit themselves to pay wages that are in line with rates already agreed through collective bargaining in the place where the work is done, or whether this could be outlawed as a restriction on the freedom to provide services under Article 49 of the EC Treaty. The company Objekt und Bauregie GmbH & Co won a contract for building work in Germany, which it subcontracted to a Polish firm, with an undertaking that it would ensure compliance with wage rates already in force on the site through collective agreement. The contract was withdrawn when it was discovered that the 53 posted workers were in fact earning 46.57% of the applicable minimum wage for the construction sector, and the Niedersachsen authority demanded costs. The company took legal action as a result.

The German Court of Appeal referred the case to the ECJ in order to determine whether public procurement rules in Niedersachsen are incompatible with the freedom to provide services in the EU. The national court suggested that Article 49 EC prohibits the demand to pay wages "that are at least at the level of the wages that are foreseen on the basis of the collective agreement that applies to the place where the work is done", because these may be higher than the minimum wage that would otherwise be applicable, and more in general this kind of public procurement obligation would prevent foreign service providers from competing on the basis of lower wages. The Advocate General delivered his opinion 20 September 2007. He concluded that the Posting of Workers Directive[101] and Article 49 EC must be interpreted as not precluding national legislation which requires contractors and, indirectly, their subcontractors to pay

100 Case C-346/06, *Dirk Rüffert, as the liquidator of the assets of Objekt und Bauregie GmbH & Co KG* v *Land Niedersachsen*, pending.

101 96/71/EC.

workers posted in the framework of the performance of a public contract at least the remuneration prescribed by the collective agreement in force at the place where those services are performed, on pain of penalties that may go as far as the termination of the works contract, if the collective agreement to which the legislation in question refers is not declared to be generally applicable. It is for the court of reference to verify whether that legislation confers a genuine benefit on posted workers, which significantly augments their social protection, and whether, in the application of that legislation, the principle of transparency of the conditions for the performance of public contracts is respected.

Germany has a system for declaring collective agreements generally applicable[102] but the collective agreement at issue in the *Rüffert* case was not declared generally applicable. This case is therefore of direct relevance to Sweden and Denmark where collective agreements never have *erga omnes* effect, see above in section 3.3.4.

ILO Convention 94 on Labour Clauses is not mentioned in the Rüffert case. If the ECJ comes to the opposite conclusion of the one reached by the Advocate General the Convention is incompatible with EU law. In my view, it is unlikely that the ECJ will arrive at such a conclusion. EU law does (probably) not constitute any obstacle for a contracting authority to include collective agreements in the tendering process and to impose the obligation on a contractor and his sub-contractors to adhere to applicable social regulations, such as to pay wages laid down in a collective agreement applicable to the works carried out and to the services provided during the performance of the contract.

5.4 Industrial Action

5.4.1 Laval

The pending *Laval-case*[103] concerns a company from Latvia (Laval) which has tendered for and won a construction contract for the renewal of a school in Vaxholm in Sweden. Laval posted workers from Latvia who were paid in accordance with contracts of employment specifying a rate of pay lower than that normally paid in Sweden. The company was bound by Latvian collective agreements. A Swedish trade union, which had no members of its own among the workers employed by Laval, demanded that the company should sign a Swedish collective agreement.

When the company refused to sign such a collective agreement, the trade union gave notice of and then implemented a blockade against the company. This industrial action was subsequently extended by supporting secondary action taken by other trade unions, which made it impossible for the company to

102 *See* further Bieback, Karl-Jürgen , Thomas Dieterich, Peter Hanau, Eva Kocher und Claus Schäfer: *Tarifgestützte Mindestlöhne*, Baden-Baden 2007.

103 Case C-341/05, *Laval un Partneri Ltd* v *Svenska Byggnadsarbetareförbundet, Svenska Byggnadsarbetareförbundets avdeling 1 Byggettan og Svenska Elektrikerförbundet*, pending. *See* on the case Ahlberg, Kerstin, Niklas Bruun and Jonas Malmberg: *The Vaxholm case from a Swedish and European Perspective*, Transfer, Vol 12, Brussels 2006, p. 155 and Inston, Rita, Tore Sigeman: *The Freedom to Provide Services and the Right to Take Industrial Action – An EC Law Dilemma*, Juridisk Tidskrift 2006-7 p. 365 and Eklund, Ronnie: *The Laval Case*, Industrial Law Journal 2006 p. 202.

continue work on the project. Laval then instituted legal proceedings before the Swedish Labour Court claiming that the industrial action in question was contrary to the EU law. The Swedish Labour Court made a reference to the ECJ for a preliminary ruling, asking whether industrial action in the form of a blockade against a foreign temporary provider of services aimed at enforcing demands of the kind claimed in the case is compatible with Articles 12 and 49 EC and with the Posted Workers Directive.

The Advocate General delivered his opinion 23 May 2007. He suggested that the answer should be that where a Member State (like Denmark and Sweden) has no system for declaring collective agreements to be of universal application the Posting of Workers Directive[104] and Article 49 EC must be interpreted as not preventing trade unions from attempting, by means of collective action in the form of a blockade and solidarity action, to compel a service provider of another Member State to subscribe to the rate of pay determined in accordance with a collective agreement which is applicable in practice to domestic undertakings in the same sector that are in a similar situation and was concluded in the first Member State, to whose territory workers of the other Member State are temporarily posted, provided that the collective action is motivated by public interest objectives, such as the protection of workers and the fight against social dumping, and is not carried out in a manner that is disproportionate to the attainment of those objectives. When examining the proportionality of the collective action, the national court should, in particular, verify whether the terms and conditions of employment laid down in the collective agreement at issue in the case before it, and upon which the trade unions made the application of the abovementioned rate of pay conditional, were in conformity with Article 3(10) of the Posting of Workers Directive and whether the other conditions, upon which application of that rate of pay was also conditional, involved a real advantage significantly contributing to the social protection of posted workers and did not duplicate any identical or essentially comparable protection available to those workers under the legislation and/or the collective agreement applicable to the service provider in the Member State in which it is established.

5.4.2 The Danish parallel to the Swedish Laval case

There has been a case before the Danish Labour court[105] which – apart from the reference to the ECJ – is in many ways similar to the Swedish Laval case. The Danish Labour Court stated (my translation):[106]

It is characteristic of the Danish way of fixing wages that the level of pay is ensured by means of collective agreements, not legislation. The right for the labour market organisations to take industrial action is thus of decisive importance for the attainment of minimum wages in this country.

104 96/71/EC.

105 A 2005.839, available in Danish at "www.arbejdsretten.dk/ARSager/2005839.htm".

106 The Danish original reads: 'Det er karakteristisk for den danske arbejdsmarkedsregulering, at lønniveauet mv sikres gennem de kollektive overenskomster, ikke gennem lovgivning. Arbejdstagerorganisationernes konfliktret til opnåelse af kollektiv overenskomst er således af afgørende betydning for opnåelse af mindsteløn osv her i landet'.

The Danish Labour Court referred to the *Wolff & Müller case*[107] and found that is was clear that taking industrial action in accordance with traditional Danish collective labour law was no violation of EU law so that it was unnecessary to ask preliminary questions to the ECJ.

5.4.3 Viking

The Viking case[108] was referred to the ECJ by the Court of Appeal, England and Wales in November 2005. Viking Line is a Finnish passenger shipping company. It owns and operates a ferry, Rosella. The Rosella is under Finnish flag and has a predominantly Finnish crew who benefit from a collective agreement negotiated by the Finnish Seamen's Union. Viking wished to change its place of establishment to Estonia in order to benefit from lower wage levels and provide its services from there. A Finnish trade union, supported by an international association of trade unions, sought to prevent this from happening and threatened strike action and boycotts if the company were to move without maintaining its current wage levels. The legal problems raised touch on the horizontal effect of the Treaty provisions on freedom of movement, and on the relationship between social rights and the rights to freedom of movement. The Advocate General delivered his opinion 23 May 2007. He suggested the following answer:

> 1) Collective action taken by a trade union or association of trade unions which seeks to promote the objectives of the Community's social policy, is not, for that reason alone, exempted from the application of Article 43 EC and Council Regulation (EEC) No 4055/86, of 22 December 1986, applying the principle of freedom to provide services to maritime transport between Member States and between Member States and third countries.
>
> (2) Article 43 EC and Article 1(1) of Regulation No 4055/86 have horizontal effect in national legal proceedings between an undertaking and a trade union or an association of trade unions in circumstances such as those under consideration in the main proceedings.
>
> (3) Article 43 EC does not preclude a trade union or an association of trade unions from taking collective action which has the effect of restricting the right of establishment of an undertaking that intends to relocate to another Member State, in order to protect the workers of that undertaking. It is for the national court to determine whether such action is lawful in the light of the applicable domestic rules regarding the exercise of the right to collective action, provided that cases of intra-Community relocation are not treated less favourably than cases of relocation within the national borders.
>
> (4) Article 43 EC precludes a coordinated policy of collective action by a trade union and an association of trade unions which, by restricting the right to freedom of establishment, has the effect of partitioning the labour market and impeding the hiring of workers from certain Member States in order to protect the jobs of workers in other Member States.

107 Case C-60/03 *Wolff & Müller* [2004] ECR I-9553.

108 Case C-438/05 *International Transport Worker's Federation and Finnish Seamen's Union* v *Viking Line ABP and OU Viking Line Eesti* pending.

6 Conclusion

In my view, it follows from the above that EU law leaves the Member States the option to take social considerations into account provided the general principles of EU law, i.e. the free movement provisions and the principles of equal treatment, non-discrimination, mutual recognition, proportionality and transparency are respected. Denmark, Finland and Norway have ratified the ILO Labour Clauses (Public Contracts) Convention No 94. There are three cases[109] pending before the ECJ of relevance to the compatibility of the Nordic collective labour law system with EU internal market law. They are not likely to result in any fundamental clash between the freedom to provide services on the Internal Market and the traditional Nordic way of securing protection against social dumping, i.e. through collective agreements concluded under the threat of industrial action.

109 Case C-346/06, *Dirk Rüffert, as the liquidator of the assets of Objekt und Bauregie GmbH & Co KG* v *Land Niedersachsen*, pending , case C-341/05, *Laval un Partneri Ltd* v *Svenska Byggnadsarbetareförbundet, Svenska Byggnadsarbetareförbundets avdeling 1 Byggettan og Svenska Elektrikerförbundet*, pending and case C-438/05 *International Transport Worker's Federation and Finnish Seamen's Union* v *Viking Line ABP and OU Viking Line Eesti* pending.

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