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An internationally oriented interpretation of EU law on public procurement: strengthening labour clauses through ILO Convention no. 94*

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An internationally oriented interpretation of EU law on public procurement: strengthening labour clauses through ILO Convention no. 94^{*α}

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1. Introduction.	3
2. Labour clauses in the EU legal order: primary and secondary sources.....	4
3. The jurisprudence of the Court of Justice: the “Rüffert doctrine”.	5
3.1 Bunderdruckerei Judgment: the non-exportability of the labour clause.....	7
3.2 RegioPost: the legitimacy of the salary set by law.	8
3.3 The judicial principles on labour clauses.....	10
4. The reforms approved in the aftermath of the Court of Justice case law.	11
5. ILO Convention no. 94: its genesis and a beneficial coexistence with the EU legal framework.	13

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6. The controversial international norm: an extensive protection for workers employed in public contracts.	15
7. Conclusions.	20
References.....	24

1. Introduction.

Public procurement may represent an excellent occasion to enforce workers' rights and support virtuous companies¹. The International Labour Organisation (ILO) attempts to foster such potential since 1949, when the Labour Clauses Convention has been adopted. A number of European Union (EU) Member States have ratified it. However, later in the 20th century, the EU legislator has intervened to regulate the matter, with a view to reinforcing the internal market. The international Convention, on the one hand, and the EU legal system, on the other, may enter into conflict at the detriment of the national progresses in the enforcement of workers' rights. The issue is particularly sensitive due to the recent evolution in the case law and legislation; which makes it worthwhile to proceed with an integrated analysis of EU relevant measures and ILO norms that may contribute not only to guarantee the enforceability of protective national norms, in compliance with the international source, but also to foster one of the aims of the EU Directive on public procurement, i.e.: "the best strategic use of public procurement to spur innovation", in order to improve "the efficiency and quality of public services while addressing major societal challenges"².

The essay aims to provide an understanding of EU norms which is consistent with ILO Convention no. 94, in order to allow a constructive coexistence of the two levels of sources and avoid the risk of denunciation of ILO Convention no. 94 from those EU Member States where it is in force. To this end, first, it identifies the main primary and secondary sources of EU law and it reviews the case law of the Court of Justice of the European Union (CJEU), as well as the reforms of the relevant EU Directives that have followed. Second, it reflects on the normative profiles that EU law and ILO Convention no. 94 have in common. Third, it assesses the content of Article 2.1 of ILO Convention no. 94, which constitutes the provision that raises the major problems of compatibility with EU law. In the concluding chapter, on the grounds of the evolutionary approach of the CJEU, the essay develops an extensive interpretation of EU Directives, which may ensure full enforcement of ILO Convention no. 94 as well.

¹ On the enforcement of social objectives through public procurement, see the comprehensive analysis by Corvaglia, 2017.

² Directive 2014/24, Recital 47. For a concise introduction to what is meant by "strategic public procurement" and its relationship with the EU 2020 Growth Strategy see Bovis C.H. (2018), Strategic Public Procurement in the EU and Its Member States. Editorial, European Procurement & Public Private Partnership Law Review, 2: 87-90.

2. Labour clauses in the EU legal order: primary and secondary sources.

The European Union has competence over public procurement, since its regulation impacts on the functioning of the internal market. The award and performance conditions of a procurement process may limit the exercise of economic freedoms, which found the internal market. This is true also for the working conditions applied by the winning bidder. As a consequence, the Member States' norms that impose upon such companies the duty to comply with employment standards (so called labour clauses) must be compatible with EU law. The Court of Justice of the European Union represents the latest stage of this scrutiny.

The constraints imposed by the EU on the subject at issue stem from a complex net of primary and secondary sources, that is the norms of the Treaty on the Functioning of the European Union (TFEU) that protect economic freedoms (first of all, Article 56 on the freedom to provide services) and Directives 2014/24³ (on public procurement) and 96/71 (on the transnational posting of workers). Both Directives have been interested by a reforming process: Directive 2014/24 has repealed and replaced Directive 2004/18, while Directive 96/71 has been reformed by Directive 2018/957. The legal framework has been further complicated by the evolving jurisprudence of the CJEU, which has concerned the provisions contained in the Directives, before they were reformed (even though the case law at stake is fairly recent). Therefore, it is necessary to assess the impact of such crucial Court of Justice cases, in an amended legal framework.

Ab origine, and at the basis of the Directives, remains Article 56 TFEU, which still represents a landmark for the judgments ruling on the legitimacy of labour clauses. This implies (since the *Säger* Judgment, from 1991⁴) that the obligation to comply with the standards of protection provided by the national law has to take account of two fundamental principles, applied by the Court in the assessment of national norms that hinder or obstruct the exercise of a fundamental freedom: the principle of non discrimination and the principle of proportionality (so-called *Gebhard* test⁵). The first entails that foreign

³ The essay is developed solely on the grounds of Directive 2014/24, however the same analysis applies also to Directive 2014/25 on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC.

⁴ CJEU 25.7.1991, C-76/90, *Säger*.

⁵ CJEU 23.5.1996, C-5/94, *Gebhard*, par. 37.

companies (i.e. those established in another Member State) cannot be obliged to comply with legal constraints that do not bind national companies. The second implies that the obligations imposed upon the same companies cannot go beyond what is necessary to pursue "public interests", which are legitimate under EU law.

This second principle is particularly relevant for judging the legitimacy of labour clauses. The Court of Justice admits that the necessity to protect workers can justify restrictions to the freedom to provide services⁶, also through the application of collective agreements, where appropriate⁷. However, the proportionality principle implies, in theory, that foreign companies cannot be obliged to entirely respect the working conditions applied to workers employed on the territory of another Member State. Otherwise, their freedom to provide services and, consequently, the possibility to access the market of the other Member State would be violated.

Both Directive 96/71 and Directive 2014/24 are expression of these principles, which scope they should contribute to clarify, by translating them into norms to be transposed in national legal orders. The first Directive contains provisions aimed to identify the working conditions applicable to workers posted in a Member State, from a company established in another Member State, possibly also to execute a public contract. The second Directive, which regulates public procurement, provides for specific norms concerning the working conditions to be applied to workers employed in a public contract. These provisions apply to any public tender of an EU Member State that has an intrinsic "transnational" relevance, given that the call for tender must allow the participation of foreign companies as well.

3. The jurisprudence of the Court of Justice: the "Rüffert doctrine".

The problem of the possible conflict of labour clauses with EU law has emerged for the first time in relation to a case of transnational posting of workers: the renowned *Rüffert* case, of 3 April 2008⁸; subsequently it has been addressed by the Court (also) in light of the provisions on public procurement (in *Bundesdruckerei*⁹ and *Regiopost*¹⁰).

⁶ CJEU 23.11.1999, C-369/96, *Arblade*.

⁷ CJEU 27.3.1990, C-113/89, *Rush Portuguesa*, par. 18.

⁸ CJEU 3.4.2008, C-346/06, *Rüffert*.

⁹ CJEU 18.9.2014, C-549/13, *Bundesdruckerei*.

¹⁰ CJEU 17.11.2015, C-115/14, *RegioPost*.

The *Rüffert* case concerned a subcontracting that entailed the posting of workers in Germany (in the Lower Saxony *Länder*) from a Polish company. The *Länder's* law provided for the obligation for the winning bidder to guarantee to the workers concerned at least the remuneration prescribed by the collective agreement applicable at the place where the public contract was performed; that is collective agreements at regional (*Länder*) level, not universally applicable (not *erga omnes*).

The Court ruled that an obligation as such is inconsistent with both Directive 96/71 and Article 56 TFEU, which, as said above, constitutes the legal basis of the secondary source. The Directive, in reconciling the workers' protection with the economic freedom of companies that post workers in another Member State, admits the application of the collective agreements in force in the host Member State to the posted workers, although under certain conditions.

First, collective agreements, for being applicable to posted workers, must be declared universally binding. Alternatively, they must be respected "in practice" by all companies of the sector concerned by the public contract, in compliance with the criteria set by Article 3.8 of Directive 96/71; namely, collective agreements "which are generally applicable to all similar undertakings in the geographical area and in the profession or industry concerned, and/or collective agreements which have been concluded by the most representative employers' and labour organizations at national level and which are applied throughout national territory, provided that their application ... ensures equality of treatment" between national and foreign companies "which are in a similar position". Second, the obligation to comply with collective agreements must be limited to the minimum standards relating to the subjects listed by Article 3.1, Directive 96/71 (in the case at issue, the minimum wage set by the sector level collective agreement).

These conditions mirror the principles of non discrimination and proportionality mentioned above. Eventually, the Court declared that the Lower Saxony law did not comply with such principles and, consequently, it was incompatible with Directive 96/71.

The conflict with EU law is then confirmed, according to the Court, by the general principles concerning the freedom to provide services. Indeed, Article 56 TFEU admits the possibility to limit the company's freedom in order to pursue the objective (of general interest) of the protection of workers. However, this objective cannot be invoked in order to impose the application of collective agreements not universally applicable (or anyway not generally applicable), precisely because they do not apply to a part of the workers in the sector concerned by the public contract (as those employed in private contracts and, in general,

not employed in public contracts)¹¹. Limitations to an economic freedom, that follow an obligation imposed to protect only workers employed in public contracts (and does not protect workers employed in private contracts), are not allowed, since they cannot be justified by reasons of public interest.

The *Rüffert* judgment has had a considerable impact on the German legal framework on public procurement, competence of the *Länder*. Adjustments to the EU law constraints have occurred in various *Länder*, which have fixed by law the minimum remuneration to be respected by companies performing public contracts¹². Such reforms have been adopted before 2015, year in which the German government has approved the federal law on minimum wage.

The Court of Justice has ruled on the compatibility with EU law of the new legal framework, adopted in reaction to *Rüffert*, in *Bundesdruckerei*, of 18 September 2014, and *Regiopost*, of 17 November 2015. Let us see, in the next section, the evolution of the CJEU case law and the peculiar aspects of the latest judgments.

3.1 Bunderdruckerei Judgment: the non-exportability of the labour clause.

The *Bunderdruckerei* judgment concerned a tender relating to the digitalisation of documents of the city of Dortmund, which was imposing to the contracting company (and subcontractors) the application of the hourly minimum wage provided for by the law on public procurement of the Land of North Rhine-Westphalia. Given that, the performance of such contract does not entail the posting of workers to Germany, the Court has excluded the application of Directive 96/71 and it has ruled on the grounds of Article 56 TFEU. Indeed, the Directive provided for the general possibility to impose special conditions for the execution of the public contract, justified by "social considerations", "provided that these are compatible with Community law". As a consequence, the Court has analysed (again) the legitimacy of labour clauses on the grounds of the consolidated regulatory principles of the internal market.

The Court has recognised that the objective of the protection of workers may justify a "supplementary" burden on the winning bidder. It has clarified also that the rationale of such a constraint lies in the necessity to avoid social dumping and "the penalisation of competing undertakings which grant a reasonable wage to their employees"¹³.

¹¹ *Rüffert*, par. 39-40.

¹² For an assessment of the reforms that have followed the *Rüffert* judgment in German Lands see, Bücken et al., 2011.

¹³ CJEU 18.9.2014, C-549/13, *Bundesdruckerei*, par. 31.

Nevertheless, the application of the labour clause to workers that perform a public contract in the territory of a country different from that of the public authority has not passed the proportionality test, as it would have entailed the application of remuneration levels not reflecting the cost of living of the State where the activity was effectively performed. In this case, the Court has ruled that the possibility for the contracting company to take advantage from the different remuneration levels of other Member States prevails over the necessity to combat social dumping, which is, in principle, recognized as a legitimate necessity by the same Court.

It follows from the *Bunderdruckerei* judgment that labour clauses are not "exportable", that is they cannot find application outside the territory of the contracting authority's State. The social dumping (i.e. wage dumping) does not justify, per se, limits to the economic freedoms, thus justifying a legitimate competitive instrument in the context of the internal market. A Member State can legitimately combat social dumping by using labour clauses, only if social dumping is perpetrated on workers posted on its own territory. Only in this latest case, the economic burden imposed on the contracting company is justified, because of the different cost of living that posted workers have to bear in the host Member State.

3.2 RegioPost: the legitimacy of the salary set by law.

The *Bunderdruckerei* ruling does not solve the question of the legitimacy of labour clauses in public procurement, if applied to workers posted in the contracting authority's State.

In this respect, the Court takes a position in the next judgment: *RegioPost*, where it expressly admits their legitimacy. Indeed, the obligation to comply with the minimum wage levels set by a law of the *Länder* of Rhineland-Palatinate, imposed only for workers employed in public contracts (and not also in the context of private contracts) is judged consistent with both Directive 96/71 and Directive 2004/14, as well as with the principles of Article 56 TFEU, apparently in contradiction with what stated in the *Rüffert* judgment¹⁴.

However, the *RegioPost* judgment cannot be read as a simple revision of the "Rüffert doctrine", able to overcome any problem of compatibility of labour clauses with EU material law. Indeed, several profiles of uncertainty on the possible consequences of the ruling remain,

¹⁴ *RegioPost* is often understood as a *revirement* of *Rüffert* by, among others, Nielsen 2017 and Kaupa 2016.

as demonstrated by the extensive academic debate originated from this judgment¹⁵.

In reading the *RegioPost* judgment, it is immediately evident that the Court constantly refers to the *Rüffert* judgment, which, obviously, it does not want to disprove. In order to reconcile the two cases, the Luxemburg Judges underline the differences of the norms under scrutiny. It is precisely the different type of labour clause addressed in *Rüffert*, compared to the one in *RegioPost*, that allows the Court to rule for the compatibility of the labour clause assessed in *RegioPost* with both Directive 96/71 and Article 56 TFEU.

Under the first profile, in the Court's legal reasoning enters also (as in *Bunderdruckerei* and differently from *Rüffert*) Article 26 of Directive 2004/14. The norm is recalled in order to confirm the legitimacy of "specific" provisions, which aim to protect workers employed in public contracts¹⁶. The argument that allows to reconcile this conclusion with the constraints imposed by Directive 96/71 is based upon the nature of the source of the labour clause: the Court recalls that the condition of the "general applicability" is provided for by Article 3.8 of Directive 96/71 with reference to collective agreements and not the law¹⁷. The Court concludes that this directive does not prevent a Member State from imposing employment standards not universally applicable (that is applicable only in public contracts), if established (as in the case at issue) by law. On the other hand, the Court argues, these standards can be qualified as "minimum rates of pay", under – the previous – Article 3.1 of Directive 96/71, given that other legal provisions (generally binding) that set lower standards do not exist in the *Länder* of Rhineland-Palatinate¹⁸ (which is again different from the *Rüffert* case).

Also in order to rule for the legitimacy of the contested norm with Article 56 TFEU, the Court highlights the different source of the labour clause in the case at stake, compared to *Rüffert*. Indeed, *Rüffert* concerned a collective agreement applicable only to the construction sector, not binding for the private sector, since it was not generally applicable. While, in the *Länder* of Rhineland-Palatinate law, the same minimum standard must be applied in any public contract, independently from the sector and in the absence of a legal minimum wage universally binding¹⁹. Therefore, the principle of proportionality is not violated, as

¹⁵ See the contributions in Sánchez-Graells 2018.

¹⁶ *RegioPost*, par. 65.

¹⁷ *RegioPost*, par. 63.

¹⁸ *RegioPost*, par. 62.

¹⁹ *RegioPost*, pars. 74-75.

this principle admits obstacles to the freedom to provide services, if justified by the necessity to protect “public interests”.

3.3 The judicial principles on labour clauses.

Even under the approach adopted in *RegioPost*, the framework of the constraints imposed by the Court of Justice on the use of labour clauses remains uncertain, because of the lasting necessity (confirmed also in *RegioPost*) to frame the terms of the labour clauses consistently with the limits imposed by Directive 96/71 and the principle of proportionality that stems from Article 56 TFEU²⁰.

The only certainty is that EU law is not violated by a law that sets the minimum standards (especially on minimum wage) applicable to the workers employed in – any – public contract²¹ (see *RegioPost*). Alongside, it is possible to impose, as public contract’s performance condition, the application of collective agreements either universally binding or in line with Article 3.8, Directive 96/71 (that is collective agreements respected, in practice, by all companies of the sector concerned by the public contract) (see *Rüffert*). Nevertheless, such obligations cannot be imposed upon a company that executes the public contract in a country different from the contracting authority’s country (see *Bunderdruckerei*).

The fact that norms that protect only workers employed in public contracts are legitimate does not necessarily imply an analogous legitimacy of the obligation to comply with collective agreements not generally binding. Nor that an obligation to implement higher standards than those provided for by Article 3.1, Directive 96/71, is allowed.

Moreover, the relationship between standards provided for by collective agreements and – potential – standards set directly by law remains unclear. Indeed, the restrictive interpretation of the proportionality principle by the CJEU can lead to conclude that the imposition of standards of protection via labour clause is admissible only in the absence of lower standards generally applicable and set by law. This would imply that not only the wage standards established by collective agreements, but also standards set by law for public contracts, would not be admitted (as “disproportionate”), where a law on minimum wage applicable to all workers in the national territory exists (a law that has been approved in Germany after *Regiopost*, as mentioned above).

Last, labour clauses that impose the compliance with local standards, set by regional laws or – *a fortiori* – territorial collective agreements (i.e. collective agreements of a lower level than the industry level) are, most

²⁰ Davies 2018.

²¹ Pecinovsky 2016.

likely, prohibited under EU law, if lower national standards exist²². Surely, territorial agreements are not applicable if the national law implementing Directive 96/71 refers to collective agreements signed by the most representative trade unions²³, given that Article 3.8 specifies that these must be “applied throughout national territory”.

4. The reforms approved in the aftermath of the Court of Justice case law.

As previously said, the case law of the CJEU assessed so far has concerned a normative framework of EU secondary law, which is now different, due to recent reforms. Therefore, we need to understand whether the amendments to both the public procurement (via Directive 2014/24 that has replaced Directive 2004/14) and the posting of workers (with Directive 2018/957 that has amended Directive 1996/71) legal frameworks have legitimized the use of labour clauses in the EU legal system, notwithstanding the limits imposed by the CJEU, or, at least, contributed to clarify the still uncertain profiles.

Article 70 of Directive 2014/24 confirms the previous Article 26 of Directive 2004/14 as regards the “special conditions” relating to the performance of public contracts, which may include “social considerations” and, most specifically – and meaningfully – “employment-related” considerations, which can be read as a recognition of the legitimacy of labour clauses aimed to guarantee the continuity of employment in public procurement (an issue which is out of the scope of this essay). However, the most innovative provision is to be found in Article 18 on “Principles of procurement”. Paragraph 2 reads as follows: “Member States shall take appropriate measures to ensure that in the performance of public contracts economic operators comply with applicable obligations in the fields of environmental, social and labour law established by Union law, national law, collective agreements or by the international environmental, social and labour law provisions listed in Annex X”.

Annex X only lists ILO core conventions; hence, it does not include Convention no. 94. The Directive clearly refuses to implement the provisions of the Labour Clauses Convention. However, such an exclusion may be seen as justified by the fact that only certain Member States have ratified Convention no. 94.

The reference to “collective agreements” made in Article 18 is not sufficient to undermine the relevance of Article 3.8 of Directive 96/71 and

²² Nielsen 2017, 208-209.

²³ As for the Italian Law on posting (art. 2. D.lgs. 136/06).

the conditions set therein. The fact that the norm shall be read consistently with the constraints imposed by Directive 96/71 is confirmed by Recital 98, which states that "requirements concerning the basic working conditions regulated in Directive 96/71/EC, such as minimum rates of pay, should remain at the level set by national legislation or by collective agreements applied in accordance with Union law in the context of that Directive"²⁴. Therefore, if Directive 2014/24 seems to admit (and even subscribe) the application of labour clauses in public procurement, it also confirms that these have to be applied in compliance with Directive 96/71 as interpreted by the Court of Justice. Consequently, Article 18 does not constitute a legal basis strong enough to overcome the "Rüffert doctrine".

The amendment of Directive 96/71 could have constituted an occasion to clarify the issues not solved by *RegioPost*, as regards the impact of the posting of workers legal framework on the regulation of public procurement. However, the European legislator has not taken this chance: in Directive 2018/957 no reference is made to public procurement, nor, in general, the criteria to select the collective agreements applicable to posted workers, listed at Article 3.8, have been modified²⁵. The most noteworthy novelty is the amendment of Article 3.1, Directive 96/71, which has replaced the concept of "minimum rates of pay" with "remuneration". Furthermore, the same article specifies that "the concept of remuneration shall be determined by the national law and/or practice of the Member State to whose territory the worker is posted and means all the constituent elements of remuneration rendered mandatory by national law, regulation or administrative provision, or by collective agreements or arbitration awards which, in that Member State, have been declared universally applicable or otherwise apply in accordance with paragraph 8".

We can observe that the amendment Directive extends the Member States' discretionality in determining the remuneration to be applied to posted workers, which is not anymore limited to the basic elements of the salary. As a consequence, also in public procurement, it is possible to impose remuneration standards that go beyond the minimum rates of pay. Nonetheless, it is confirmed that such standards (any standard) must be set by law or by collective agreements binding for all companies of a given sector, according to the criteria established by Article 3.8.

²⁴ Barnard 2018.

²⁵ Giubboni, Orlandini 2018.

At the same time, Directive 2018/957 transposes into law what had already been recognised by the Court of Justice in *Ammattilitto*²⁶ (published before the reform). Here, the Court includes in the notion of “minimum rates of pay” also a number of elements, which go beyond the minimum wage, but are provided for by the Finnish collective agreement for the construction sector. However, in that case, two elements have been decisive: that the collective agreement had been declared universally applicable and no lower standard was set by law. Therefore, also the new concept of “remuneration” adopted by Directive 2018/957 does not solve the controversial aspects described above, as far as concerns the application of collective agreements not universally binding and the problems stemming from the relationship between legal and contractual minimum standards.

Moreover, the principles that the Court of Justice derives from Article 56 TFEU, which are used to confirm the limits imposed by Directive 96/71, still persist.

5. ILO Convention no. 94: its genesis and a beneficial coexistence with the EU legal framework.

The Labour Clauses (Public Contracts) Convention, no. 94, was adopted in 1949, at a time when the most booming economies, such as UK and US, were experiencing substantial government expenditures. The Convention was drafted with the aim to remove labour costs from the competition between bidders²⁷ and ensure that workers engaged in the execution of public contracts enjoy the most advantageous working conditions adopted in the same area and in the same trade or industry²⁸. However, “this instrument did not meet with widespread enthusiasm” and only 60 ILO Member States ratified it²⁹. Over the years, “the Fair Wages approach” that had inspired Convention no. 94 lost consensus, to the point that UK, which had ratified the ILO tool in 1950, denounced it in 1982³⁰.

Notwithstanding the meagre interest towards the Labour Clauses Convention, this agreement still binds a number of States, including 9 EU

²⁶ CJEU 12.2.2015, C-396/13, *Ammattilitto*.

²⁷ Observation (CEACR) - adopted 2017, published 107th ILC session (2018), France.

²⁸ Observation (CEACR) - adopted 2009, published 99th ILC session (2010), Bulgaria.

²⁹ Interestingly, the Records of Proceedings for the adoption of ILO Convention no. 94 reveal an honest interest in a highly protective Convention also from the Italian employers’ member “in view of the interest of Italy in the conditions of work of Italian emigrants abroad”.

³⁰ Bruun et al. 2010, 475.

Member States, namely: Austria, Belgium, Bulgaria, Cyprus, Denmark, Finland, France, Italy, Spain.

Convention no. 94 applies to contracts signed by, at least, a public authority (belonging to an ILO Member for which the Convention is in force), which spends public funds, and a private contractor, which employs workers. The sectors covered by the Convention are: construction, alteration, repair or demolition of public works; the manufacture, assembly, handling or shipment of materials, supplies or equipment; or the performance or supply of services (Article 1.1)³¹.

Various matters regulated by the Convention do not raise issues of compatibility with EU law. First of all, EU Directives do not prevent Member States from including labour clauses in procurement procedures, to the contrary, Articles 18.2 and 70, of Directive 2014/24, do allow for employment considerations in public contracts, even though by using different wordings³². In particular, the labour clauses provided for by ILO Convention no. 94 relate to the third phase of the procurement process, that is the contract performance conditions. Indeed, under the ILO Convention, a labour clause is understood as a "binding requirement concerning the future work to be undertaken"³³, even though, in the context of a bidding process it must be "included in tender documents", as well³⁴. This profile does not cause any conflict with the EU procurement directive, which also allows the insertion of such clauses at the latest stage of the bidding process. On the one hand, "[T]he Convention does not relate to some general eligibility criteria, or prequalification requirements, of individuals or enterprises bidding for public contracts, but requires *a labour clause to be expressly included in the actual contract* that is finally signed by the public authority and the selected contractor"³⁵. In fact, under Convention no. 94, any public contract within the scope of Article 1 must contain labour clauses, "whether or not these contracts are assigned through a bidding process"³⁶. On the other hand, the already mentioned Articles 18.2 and 70 of Directive 2014/24 expressly refer to the contract performance

³¹ For an introduction to Convention no. 94 see, inter alia, Nielsen 1995.

³² From a Committee's Observation, we can infer that the French government suggests that the very fact of including labour clauses in public contracts violates EU law. See, Observation (CEACR) - adopted 2017, published 107th ILC session (2018), France.

³³ Observation (CEACR) - adopted 2011, published 101st ILC session (2012), France.

³⁴ Practical Guide on the Labour Clauses (Public Contracts) Convention, 1949 (No. 94), and the Labour Clauses (Public Contracts) Recommendation, 1949 (No. 84), published by the ILO in September 2008, 15.

³⁵ Direct Request (CEACR) - adopted 2011, published 101st ILC session (2012), Israel, italics added.

³⁶ Observation (CEACR) - adopted 2017, published 107th ILC session (2018), Burundi.

stage³⁷. An aspect that has been stressed by the European Commission as well, which has emphasized that “social considerations regarding labour conditions are generally more appropriate to be included in the contract performance clauses, thus showing consistence with the international source”³⁸.

Second, as regards the role of social partners, the Convention adopts a highly inclusive approach. For instance, it states that the “terms of the clauses to be included in contracts and any variation thereof shall be determined by the competent authority after consultation with the organizations of employers and workers concerned” (Article 2.3). Such a supportive attitude towards social partners is strongly consistent with the EU legal framework, since, even though any EU norm provides for a duty to consult national social partners to establish the terms of labour clauses, no provision obstructs such a practice either. To the contrary, Article 152 TFEU promotes the social partners’ role.

Last, not even the provision of Article 1.3, which extends the scope of application of the Convention to subcontractors frustrates the application of the EU Directive, which similarly covers the subcontracting chain and points out that “[O]bservance of the obligations referred to in Article 18(2) by subcontractors is ensured through appropriate action by the competent national authorities acting within the scope of their responsibility and remit” (Article 71.1).

While these – and other – profiles do not give rise to possible conflicts with EU norms, but rather contribute to fulfil EU obligations, the provision of Article 2.1 may be read as an obstacle to a proper implementation of EU Directives.

6. The controversial international norm: an extensive protection for workers employed in public contracts.

What raises the most serious doubts over the compatibility of ILO obligations with EU provisions relates to the core content of ILO Convention no. 94, which is worded in Article 2.1, establishing that the labour conditions applied to the workers concerned cannot be “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

³⁷ Corvaglia interprets this norm more extensively and argues that “[G]rounded on recital 40, the provision of Article 18(2) extends its scope of application to the different stages of procurement process, extending from the award stage to the verification of abnormally low tenders or the performance of the contract by the winning supplier” (Corvaglia 2018, 182)

³⁸ European Commission 2010, *Buying Social A Guide to Taking Account of Social Considerations in Public Procurement*, 7.

between organisations of employers and workers representative respectively of substantial proportions of the employers and workers in the trade or industry concerned; or (b) by arbitration award; or (c) by national laws or regulations”.

The Committee has always been consistent in interpreting this norm in such a way to guarantee the most substantial and extensive protection to workers employed in public contracts.

The obligation to provide for wages and other labour conditions, which are “not less favourable than the highest minimum standards” has been interpreted rigorously by the Committee, as well as by the International Labour Conference in the 97th session (2008)³⁹. Under this view, wages and other labour conditions cannot be less favourable than “the highest minimum standards established locally by collective agreement, arbitration award or laws and regulations”⁴⁰. Therefore, the private contractor should apply to the workers concerned “local standards higher than those of general application”, where they exist⁴¹, or, at least, the “most advantageous pay and working conditions”, which are established in the district concerned, for work of the same character⁴². In other words, the “best local practice” is the right parameter to identify wages and working conditions to be applied, understood as “collectively agreed standards covering a substantial proportion of employers and workers, even though the specific collective agreement containing such standards may not be applicable to the workers in question”⁴³. As a – predictable – consequence, a national provision that allows the company party to a public contract to conclude a company agreement “providing for less favourable working conditions than those fixed under collective agreements applicable to a substantial proportion of employers and workers in the sector of economic activity concerned” infringes upon Article 2.1, Convention no. 94⁴⁴.

The Convention lists three possible kinds of sources from which to derive the applicable working conditions in the context of a public contract: collective agreement, arbitral award, national laws or regulations. However, it has been repeatedly stressed that Article 2.1, on

³⁹ I.e. the General Survey concerning the Labour Clauses (Public Contracts) Convention, 1949 (No. 94) and Recommendation (No. 84) represents a cornerstone for the interpretation of ILO Convention, no. 94. Indeed, it is recurrently mentioned by the CEACR. One for all, Direct Request (CEACR) - adopted 2011, published 101st ILC session (2012), Italy.

⁴⁰ Direct Request (CEACR) - adopted 2017, published 107th ILC session (2018), Aruba.

⁴¹ Observation (CEACR) - adopted 2017, published 107th ILC session (2018), France.

⁴² Observation (CEACR) - adopted 2009, published 99th ILC session (2010), Bulgaria.

⁴³ Direct Request (CEACR) - adopted 2011, published 101st ILC session (2012), Israel.

⁴⁴ Observation (CEACR) - adopted 2012, published 102nd ILC session (2013), Spain.

the one hand, does not establish a hierarchy of sources and, on the other, does not offer an option "to *select* among three different ways of regulating the working conditions", provided that the public authority has to choose the source that provides for the "working conditions which are at least as advantageous as the best conditions among those established locally", independently from whether these are established by collective agreements, arbitral awards or laws and regulations⁴⁵.

Indeed, in order to guarantee working conditions that are "not less favourable" than those established by collective agreements, arbitration awards or national legislation, "the automatic result would be to require *the best conditions out of these three possibilities* under Article 2(1)(a)–(c) of the Convention"⁴⁶.

In particular, as far as concerns the three options envisaged by Article 2.1, the Committee has had more than one occasion to underline that this norm does not refer exclusively to collective agreements universally applicable. In a dense Observation on France, where the French Government had supported that "the compliance with collective agreements that have not been extended cannot be imposed on all public contract holders and subcontractors", as it would be contrary to community law also in light of the interpretation given by the Court in the *Rüffert* judgment, the Committee keeps stressing that "Article 2(1)(a) of the Convention refers to all collective agreements concluded between employers' and workers' organizations representing a substantial proportion of employers and workers in the trade or industry concerned, *and not only collective agreements that have been extended*". This point is repeated in various occasions, but what removes any doubt in this respect is the argument, put forward by the Committee, that "the insertion of labour clauses in public contracts may have positive advantages, particularly where collective agreements are not generally binding"⁴⁷.

Consistently with the arguments reviewed so far, the inclusion of labour clauses is independent from the general application of labour legislation also to workers employed in public contracts. The fact that employers are subject to analogous obligations in light of the general application of national labour law, social legislation and/or collective

⁴⁵ Observation (CEACR) - adopted 2013, published 103rd ILC session (2014), Spain; Observation (CEACR) - adopted 2017, published 107th ILC session (2018), France; Direct Request (CEACR) - adopted 2006, published 96th ILC session (2007), Finland.

⁴⁶ Observation (CEACR) - adopted 2017, published 107th ILC session (2018), Philippines, italics added.

⁴⁷ Observation (CEACR) - adopted 2017, published 107th ILC session (2018), France, italics added.

agreements is not enough for complying with Convention no. 94. To the contrary, specific labour clauses must be inserted, since “[S]uch inclusion ensures the protection of workers in cases in which the legislation only establishes minimum conditions of work (e.g. minimum pay rates) which may be exceeded by general or sectoral collective agreements”. The rationale behind such a provision stems from the evidence that labour law, regulations and collective agreements generally applicable normally establish minimum standards, which can be improved by imposing the applicability of other instruments (related to the sector and the district concerned) via labour clauses⁴⁸.

Even though, as seen above, the EU Directives on public procurement do not reject – in principle – the enforcement of – certain – employment standards through public procurement procedures, Article 2.1 of the Convention no. 94, as interpreted by the CEACR, clearly raises problems of compatibility with the “*Rüffert* rule”.

Furthermore, the attempt of the Committee to draw a clear distinction between EU Member States that have ratified the Convention and those who have not, in order to suggest that the peculiar situation of EU Member States which are also bound by Convention no. 94 would exempt them from the *Rüffert* doctrine⁴⁹, does not correspond to the Court of Justice approach, as regards the relationship between ILO sources and EU law. The relevant EU provision, in this respect, is Article 351.2 TFEU, which requires EU Member States to eliminate the incompatibilities existing between EU Treaties and international agreements, signed by the States before their date of accession, by taking “all appropriate steps”, with the implicit aim to ensure full enforcement of EU law.

The CJEU has had a number of chances to discuss the scope of application of Article 351 TFEU. With particular regard to ILO Conventions, it is surely noteworthy to refer to the *Levy* case⁵⁰, where a

⁴⁸ Observation (CEACR) - adopted 2017, published 107th ILC session (2018), France; Observation (CEACR) - adopted 2007, published 97th ILC session (2008), Bulgaria; Observation (CEACR) - adopted 2009, published 99th ILC session (2010), Bulgaria; Observation (CEACR) - adopted 2007, published 97th ILC session (2008), The Netherlands; Observation (CEACR) - adopted 2017, published 107th ILC session (2018), Djibouti; See also: ILC, 2008, General Survey concerning Labour Clauses in Public Contracts, paragraphs 40 ff.

⁴⁹ In order to support its point, the Committee can only rely on a weak argument: it recalls the European Parliament resolution of 25 October 2011 calling for “an explicit statement in the directives on public procurement that they do not prevent any country from complying with ILO Convention No. 94, and it called on the European Commission to encourage all European Union Member States to comply with the Convention” (Observation (CEACR) - adopted 2012, published 102nd ILC session (2013), Norway).

⁵⁰ ECJ 2.8.1993, C-158/91, *Levy* on the Judgment see, Seifert 2013.

French norm implementing ILO Convention no. 89 (1948) on women's night work was questioned before the EU Court for being in violation of Article 5 of Directive 76/207/EEC on the abolition of provisions contrary to the principle of equal treatment.

First, the Court refers to the application of Article 351 TFEU. Second, it focuses on the specific case of treaties signed by EU Member States with non-member countries, before the date of accession, provided that under these circumstances "that application of the Treaty does not affect the commitment of the Member State concerned to respect the rights of non-member countries under an earlier agreement and to comply with its corresponding obligations"⁵¹. A reasoning hardly applicable to ILO Conventions, for their peculiar conception and structure, which does not envisage mutual obligations aimed at enforcing mutual rights, but it rather – attempts to – build an international space where the rights to be respected belong to individuals.

Eventually, the EU Judge does not enter into the merit of the binding force of the ILO Convention at issue, nor it evaluates whether the international tool provides or not for obligations that France has to comply with in order to respect the rights of non-member countries, since it argues that it is for the national court to determine when an earlier agreement imposes obligations on the Member State concerned "so as to be able to determine the extent to which they constitute an obstacle to the application of Article 5 of the directive"⁵².

Partially different is the attitude of the Luxemburg Court in *Commission v. Austria*⁵³, as concerns its role in relation to the relevant ILO Convention. Here the CJEU does not restrain its analysis to the relationship between the national and the EU norms, but it goes as far as to address the international treaty itself. And, most interestingly, it does so in order to, first, establish whether Austria had violated the prohibition of discrimination between man and women at work, as provided for by Directive 76/207, and, second, prescribe how the country shall behave towards the international treaty. Indeed, in *Commission v. Austria* the Court overcomes the *Levy* jurisprudence and takes the chance to clarify how a Member State shall act with respect to ILO Conventions signed prior to the accession and – obviously –, also, with non-member countries.

The contested national provision was adopted in 2001 and, *inter alia*, prevented women from working in the underground mining industry,

⁵¹ *Levy*, par. 12.

⁵² *Levy*, par. 21.

⁵³ ECJ 1.2.2005, C-203/03, *Commission v. Austria*.

which “goes beyond what is necessary in order to ensure that women are protected within the meaning of Article 2(3) of Directive 76/207”⁵⁴. However, the Austrian norm was enforcing ILO Convention No. 45, ratified by Austria in 1937.

The already mentioned Article 351 applies also in these circumstances. Therefore, being the obligations imposed by Convention no. 45 incompatible with EU law, the Austrian government has “to take all appropriate steps to eliminate the incompatibilities”⁵⁵.

On the grounds of its case law⁵⁶, the CJEU points out that the appropriate steps include the denunciation of the conflicting ILO Convention. Subsequently, it refers to Article 7 of ILO Convention no. 45, which allows the member States to the Convention to denounce it every ten years from the date of its entry into force (similarly to Article 14 of Convention no. 94). Considering that it was only on September 1998 that the Commission's first letter on the subject was sent to the Austrian government, the Luxemburg Court concludes that Convention No 45 could only be denounced on 30 May 2007, at the earliest. Eventually, the Court dismisses the appeal with a clear statement: “by maintaining in force national provisions such as those contained in the regulation of 2001, the Republic of Austria has not failed to fulfil its obligations under Community law”⁵⁷.

Therefore, the Court has excluded the violation of Article 351 exclusively upon the argument that the terms to denounce the ILO Convention had not expired at the time, yet. In conclusion, the *Commission v. Austria* Judgment implicitly confirms that, in case of an incompatibility between the obligations stemming from an ILO Convention and those imposed by EU law, which cannot be overcome, the State is bound to denounce the ILO Convention, since the denunciation represents the “appropriate step” indicated by Article 351.2 TFEU⁵⁸.

7. Conclusions.

In order to move to some concluding thoughts, let us summarize the main problematic profiles raised by the overlapping of EU and ILO norms. First and foremost, the most serious risk of conflict between the supranational sources derives from the obligation imposed by ILO Convention no. 94, on the States where it is in force, to ensure to the workers concerned the highest labour standards applied in the area

⁵⁴ *Commission v. Austria*, par. 49.

⁵⁵ *Commission v. Austria*, par. 60.

⁵⁶ ECJ 4.7.2000, C-62/98, *Commission v. Portugal*.

⁵⁷ *Commission v. Austria*, par. 64.

⁵⁸ Koutrakos 2015.

where the contract is performed, even if such highest standards are established by a collective agreement not generally binding. While EU Directives (as interpreted by the CJEU) seem to preclude EU Member States from including in public contracts the obligation to comply with collective agreements not generally binding.

A second controversial aspect concerns the application of standards set by local instruments, which are more protective than those established at national level. While ILO Convention no. 94 requires the more favourable (to the workers) source to be applied, whether of national or district level, EU law seems to allow only the application of the national standard, where it exists.

The recent evolution of EU law, both from the Court of Justice and the legislator, demonstrates a progressive opening towards the inclusion of labour clauses in public procurement, less dystonic with Convention no. 94. The *Rüffert* doctrine has been specified in such a way to allow Member States to impose certain labour standards only in public contracts (and not towards all workers); which represents a notable evolution, especially as regards minimum wage. However, the uncertainties about the extent of the discretionality left to national legislators remain, with reference to both the applicable protections (if higher than the minimum standards applicable in the national territory for the all public contracts) and the sources that can be indicated by the labour clause (especially relevant as regards collective agreements not generally applicable).

Therefore, the risk that EU law may come into conflict with Convention no. 94 is not overcome. Such a scenario may lead to the denunciation of the latter on the grounds of Article 351.2 TFEU, from those Member States that have ratified it, both if they have joined the EU after the ratification and (even more) if the ratification has occurred when the State at issue was already a member of the Union. Even though this is possible only consistently with the provisions of the Convention, i.e. when the "denunciation window" opens, and, according to Article 14, a member State to the Convention can denounce it "after the expiration of ten years from the date on which the Convention first comes into force" (Article 14.1), otherwise it "will be bound for another period of ten years and, thereafter, may denounce this Convention at the expiration of each period of ten years" (Article 14.2).

The academic literature has suggested that a conclusion as such shall be rejected, since the Court of Justice would rather be bound to interpret EU law consistently with Convention no. 94, in so far as it is a norm of

international law⁵⁹. This thesis should be supported by both Article 351.1 TFEU and Article 53 of the Charter of Fundamental Rights, which excludes the possibility to interpret the Charter “as restricting or adversely affecting human rights and fundamental freedoms as recognized by international law and by international agreements to which the Union, the Community or all the Member States are party”. An interpretation as such of the relationship between EU law and ILO Conventions, as much as desirable, can hardly be confirmed by the CJEU case law. As regards Article 351 TFEU, it is enough to emphasize that the Court in *Commission v. Austria* has not adopted this approach. On the other hand, Article 53 of the Charter does not seem to be applicable to the case at stake, since not all EU Member States are members of ILO Convention 94, nor this Convention can be understood as customary international law, provided that it does not fall among the fundamental ILO Conventions, which are binding for all ILO members, independently from their ratification.

Obviously, the main way to prevent the risk of denunciation would be a reform of the secondary sources of EU law addressed by the case law of the Court of Justice discussed above. Indeed, it would be appropriate, first, to include, explicitly, in Directive 2014/24 the possibility for the States to impose as contract performance condition the fulfilment of collective agreements applicable in the place where the public contract is executed, according to national law or practice; second, to specify in Article 3.8 of Directive 96/71 that Member States can impose, within public contracts, the application of the same labour standards as those demanded to national companies awarding the contract.

The conflict between ILO Convention no. 94 and EU law can be overcome also by way of interpretation. Indeed, as mentioned above, if ILO Convention no. 94 cannot be considered a legally binding source in the EU legal system, this does not mean that it can be considered irrelevant, nor that the Court of Justice can ignore its provisions once it is called upon to evaluate its compatibility with the internal market norms on public procurement. Even though ILO Conventions are not binding, they still constitute an interpretation tool for the Court of Justice, already applied several times in its case law⁶⁰.

Where the conflict between EU law and ILO sources can be overcome by way of interpretation, it should be avoided by the Luxemburg Court. In this respect, the reference to “all appropriate steps to eliminate the incompatibilities”, included in Article 351.2, certainly encompasses also

⁵⁹ Bruun et al. 2010.

⁶⁰ *Inter alias*, ECJ 18.12.2007, C-341/05, *Laval*, par. 90; ECJ 20.01.2009, C-350/06, *Gerhard Schultz-Hoff*, par. 38; 22.11.2011, C-214/10, *KHS AG*, par. 41.

an interpretation of EU law obligations as coherent as possible with the obligations stemming from international conventions (interpretation that the Court of Justice should endorse).

In other words, the denunciation of a Convention should represent the *extrema ratio* for the States, which should occur only when the conflict with EU law is irremediable by way of interpretation. From this perspective, we can observe the difference between the norms of antidiscrimination law (as in *Commission v. Austria*) and those concerning public procurement. Differently from the first ones, the norms on public procurement are extremely ambiguous as regards the content of labour clauses, by allowing (or rather imposing) them, without clarifying how they should be applied not to violate the internal market principles. As already said, the Court of Justice itself has considerably modified its approach after the *Rüffert* judgment, even without explicitly disproving it. The legal framework and the principles on public procurement is, indeed, evolving and it cannot be said to be consolidated.

Therefore, in this context, there are margins for the Court of Justice to interpret the current legal framework so as to avoid any conflict with Convention no. 94. An interpretation as such (even if not imposed by international sources), would be coherent with the use of ILO Conventions as external parameter of interpretation of EU law, already made by the Court of Justice in its case law.

The necessity to strengthen the coherence between EU and International obligations, in order to allow the States to enact policies of protection of social instances, encourages us to reflect on the possibility to interpret the EU Directive on Public Procurement and the Posting of Workers Directive in such a way to allow the most virtuous Member States to fulfil their international commitments and guarantee a substantial protection of workers employed in public contracts, albeit within the boundaries of the EU legal framework.

Such kind of interpretation is possible by overcoming a "formalistic" understanding of Article 3.8 of Directive 96/71 and by promoting the rationale of the norm, which aims to avoid disparities in treatment between national and foreign companies, in relation to the applicable collective agreements. This rationale is, indeed, respected both when the law sets the labour conditions to be applied to workers posted in the context of a public contract (as the Court rules in *RegioPost*), and when it is the collective agreement to provide for such standards, irrespectively of its scope of effectiveness. For the same reason, nothing stands in the way of admitting the possibility to impose higher standards than the minimum conditions established at national level. This interpretation of Article 3.8 of Directive 96/71 would surely be more syntonic with Articles

18.2 and 70 of Directive 2014/24, which have a limited relevance if understood exclusively as aimed to impose the standards generally applicable to the whole national territory (either by law or collective agreement)⁶¹.

However, even by interpreting Directive 96/71 as above, the problem of justifying the obligation to apply certain collective agreements in public procurement procedures, under Article 56 TFEU, remains. The principle of proportionality would anyway admit only the application of minimum protection standards, not to add burdens to the winning companies. However, in this respect, over the years the Court has applied the proportionality test with wide margins of discretionality. As in *Sähköalojen ammattiliitto*, where it has interpreted the proportionality principle less rigidly compared to *Laval*. Hence, it is also possible to justify a different application of the same principle, compared to the *Rüffert* judgment. It would be enough to recognise that the outcome of the proportionality test is not necessarily the same if the main contractor – which makes use of the worker – is a private company or a public authority, which can pursue social aims, that cannot be imposed upon the private contractors. This is, once again, syntonetic with the evolution of the relevant legislation. In *Regiopost*, the Court of Justice has already adopted a similar approach, by referring to Article 16, Directive 2004/18, which justified the imposition of “special conditions” with a social character in the performance of public contracts. Beyond any doubt, Directive 2014/24 has emphasised the relevance of social aims for public procurement; which (under an evolutionary perspective) can justify a different understanding of the principle of proportionality, and, therefore, allow for different and more incisive limits to the exercise of economic freedoms (compared to those imposed in the context of private contracts), in order to protect workers.

Nor Article 56 TFEU constitutes an insuperable obstacle to overcome the cautious attitude of the *Regiopost* judgment, as regards the possibility to impose to the winning companies also obligations not provided for by law or by generally applicable sources.

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⁶¹ Davies 2018.

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