



Aalborg Universitet

AALBORG UNIVERSITY
DENMARK

Moving In and Out of the Shadow of European Case Law

the Dynamics of Public Procurement in the Post-Post-Rüffert Era

Refslund, Bjarke; Jaehrling, Karen; Johnson, Matthew; Koukiadaki, Aristeia ; Larsen, Trine Pernille; Stiehm, Christin

Published in:
Journal of Common Market Studies

DOI (link to publication from Publisher):
[10.1111/jcms.13023](https://doi.org/10.1111/jcms.13023)

Publication date:
2020

Document Version
Accepted author manuscript, peer reviewed version

[Link to publication from Aalborg University](#)

Citation for published version (APA):
Refslund, B., Jaehrling, K., Johnson, M., Koukiadaki, A., Larsen, T. P., & Stiehm, C. (2020). Moving In and Out of the Shadow of European Case Law: the Dynamics of Public Procurement in the Post-Post-Rüffert Era. *Journal of Common Market Studies*, 58(5), 1165-1181. Advance online publication. <https://doi.org/10.1111/jcms.13023>

General rights

Copyright and moral rights for the publications made accessible in the public portal are retained by the authors and/or other copyright owners and it is a condition of accessing publications that users recognise and abide by the legal requirements associated with these rights.

- Users may download and print one copy of any publication from the public portal for the purpose of private study or research.
- You may not further distribute the material or use it for any profit-making activity or commercial gain
- You may freely distribute the URL identifying the publication in the public portal -

Take down policy

If you believe that this document breaches copyright please contact us at vbn@aub.aau.dk providing details, and we will remove access to the work immediately and investigate your claim.

**Moving in and out of the Shadow of European Case Law -
The dynamics of public procurement in the post-post-Rüffert era**

Authors:

Bjarke Refslund, (corresponding author)

Aalborg University
Kroghstræde 7, DK-9220 Aalborg Øst, Denmark
+45 25144980
bref@socsci.aau.dk

Karen Jaehrling

University Duisburg-Essen
Forsthausweg 2, 47057 Duisburg, Germany
karen.jaehrling@uni-due.de

Mathew Johnson

The University of Manchester
Booth Street West, Manchester M15 6PB, UK
matj515@gmail.com

Aristea Koukiadaki

The University of Manchester
Booth Street West, Manchester M15 6PB, UK
aristea.koukiadaki@manchester.ac.uk

Trine Pernille Larsen

Copenhagen University
Øster Farimagsgade 5, DK-1014 København K, Denmark
tpl@faos.dk

Christin Stiehm

University Duisburg-Essen
Forsthausweg 2, 47057 Duisburg, Germany
christin.stiehm@uni-due.de

This article has been accepted for publication and undergone full peer review but has not been through the copyediting, typesetting, pagination and proofreading process which may lead to differences between this version and the Version of Record. Please cite this article as doi: 10.1111/jcms.13023

Introduction

European level legislation and jurisdiction has strong implications for national public policies. However, the response of national actors and hence the policy outcomes within member states remain disputed in the literature. One strand of literature argues that judicial Europeanisation, here defined as top-down pressure from EU legal developments in particular the Court of Justice of the European Union (CJEU) case law, but also direct and indirect legislation, constrains national actors and hence policymaking (Blauberger and Schmidt, 2017; Schmidt, 2018). Other studies highlight the significant cross-national divergence in policy outcomes and compliance, and emphasise the room for manoeuvre when developing national policies in specific fields, thus providing evidence of adaptation to Europeanisation (Börzel and Sedelmeier, 2017; Hofmann, 2018; Martinsen, 2015). Our analysis of the field of public procurement in three countries (Germany, Denmark, and the UK) helps to reconcile these two diverging perspectives, by exploring the dynamic development of national policy in the “post-post-Rüffert” period (since 2014). Our findings illustrate that while the “long shadow of European case law” may constrain national policy-making, it may also concurrently trigger policy innovations by national actors in pursuit of social objectives, what we refer to as ‘moves in and out of the shadow’. In the case of public procurement, our analysis highlights how domestic policies in the three countries utilise labour clauses to protect wages and working conditions of sub-contracted workers in apparent defiance of the well-known CJEU *Rüffert* ruling. The analysis thereby contributes to the emerging literature on novel forms of ‘pushback’ against European case law that contain or even neutralise the de facto impact of CJEU rulings (Madsen et al., 2018; Hofmann, 2018). We argue to fully capture the dynamics of pushback mechanisms, it is crucial to ‘re-embed’ the analysis of judicial Europeanisation in the specific policy field under study as well as the national and local context. Focusing on domestic trajectories reveals the drivers and dynamics of policy change that would otherwise be under-elaborated as simply either ‘compliant’ or ‘non-compliant’ with EU regulations and jurisdiction. Overall we thus seek to answer the following research question; “How does Europeanisation interact with national political dynamics in explaining the divergent policy trajectories in the three countries in public procurement policies?”

The first section below briefly reviews the diverging theoretical arguments on judicial ‘Europeanisation’. The second section provides an overview of the interplay between European level legislation, jurisdiction and domestic law within the field of public procurement, particularly emphasising the application of labour clauses. The third section presents research methods and our findings from the three national cases before the final section presents the comparative discussion of our findings.

Europeanisation and domestic impact

In the debates about judicial Europeanisation several authors have emphasised various forms of ‘domestic resistance’ against the CJEU rulings (Hofmann, 2018; Madsen et al., 2018; Martinsen, 2015), which cannot simply be understood as explicit or overt non-compliance with CJEU rulings. For example, Martinsen (2015) describes four possible legislative responses at national level: codification, modification; non-adoption; and override. Similarly Hofmann (2018, p. 270) describes various forms of resistance or ‘workarounds’ “below the threshold of non-compliance” by which member states succeed in keeping the effect of controversial doctrines “*to what national policy-makers would find an acceptable level*”. This echoes Conant’s (2002) notion of ‘contained compliance’. Hofmann further points to the EU-level institutions’ limited ability of actually enforcing CJEU rulings, even in the case of infringement procedures, yet even more so in case of preliminary rulings referred to the CJEU by national courts. Generally, these studies argue that various ‘pushback’ or contestation strategies (understood as national actors actively challenging and mitigating the domestic effects of Europeanisation) are viable from a political, administrative and legislative perspective (Martinsen, 2005; Hoffmann, 2018). In this line of studies, the domestic configuration of political interests and key actors’ interests (on labour market issues particularly employers association and unions) as well as partisan politics are found to be influential for whether and how Europeanisation is contested (Blauberger, 2014; Sack and Sarter, 2018). Other studies have highlighted ‘push-back’ emanating from the legal system within member states. For instance domestic courts, who are reluctant to refer cases to the CJEU for preliminary judgements, like the highest constitutional court in Germany (Kelemen, 2016) or the courts in the Nordic countries emphasising the parliamentary sovereignty and traditionally referring few cases to the CJEU (Wind, 2010). In sum, this suggests that ambiguity of CJEU case law combined with weak enforcement mechanisms leave significant manoeuvre room for domestic policy-makers therefore limiting the real world impact of Europeanisation.

This is in contrast to other accounts that emphasise the long-term impact of CJEU case law as constraining domestic policies (Blauberger and Schmidt, 2017; Schmidt, 2018). These studies also outline legal uncertainty – defined as the “difficulty to predict Law” (Schmidt, 2018, pp. 8) – as a key characteristic of EU-level legislation and jurisdiction. This is partly due to the heterogeneity of member states’ institutional frameworks, which leads to uncertainties of the implications of case law concerning one member state for other member states (Schmidt, 2018). This legal uncertainty, according to Blauberger and Schmidt (2017, pp. 915) “... *often provides an incentive for policy-makers to take legislative action in the first place*”. For example national governments may decide to implement or adapt to EU legislation in order to shield national policies from EU

judicial interventions in the future, referred to as ‘anticipatory obedience’ (Blauberger, 2014). Conversely, legal uncertainty may also result in domestic policy inertia, as national actors feel constrained by the CJEU general interpretation of the ‘four freedoms’. This may be the case even in areas that remain the prerogative of national law, since domestic policies “*must nevertheless exercise that competence consistently with Community law*” (Case C-341/05 *Laval*, para 87). Blauberger and Schmidt argue, these effects derive from the fact that there is almost no scope for domestic policies to simply ignore or override ECJ rulings, because of the ‘supremacy’ of EU primary and case law.

However, as diametrically opposed as these two strands of literature might seem, a closer review of their analysis of specific domestic responses reveals some similarities as well as shortcomings in the analyses of the policy impact of judicial Europeanisation. The much-quoted ‘*Laval quartet*’ cases illustrates this: Hofmann (2018) classifies the Danish response to *Laval* and the German response to the *Rüffert* ruling as soft forms of pushback through ‘containment’. Danish and German governments have adjusted their laws in order to make them ‘court-proof’ and “...*thereby prevented as far as possible the negative consequences to its national labour law regime and preserved its original regulatory goals*” (Hoffmann, 2018, pp. 268). This assessment echoes Blauberger’s (2012, 2014) interpretation that stresses that high legal uncertainty in these cases, triggered “more anticipatory and encompassing reforms”, in order “to avoid endless legal conflicts” (Blauberger, 2014, pp. 470). The difference between the two accounts essentially boils down to whether this kind of ‘pre-emptive legislation’ that seeks to avoid further interference by the court is considered as a “particularly strong example of CJEU legislative influence” (Blauberger and Schmidt, 2017, pp. 912) or as a soft version of pushback that helps to stabilise the status quo ante (Hofmann, 2018). While Hofmann assesses this by focusing on the policy outcome, and more precisely the extent to which the policy outcome deviates from the previous status quo (similar to Martinsen, 2015), the decisive criterion in Blauberger and Schmidt’s assessment seems to be whether national governments opted for a legal reform at all, instead of remaining inactive. Furthermore, as we will spell out below, in the case of the *Rüffert* ruling in Germany, both analyses however miss two important points, namely that a) the policy ‘responses’ after *Rüffert* were part of a broader and still ongoing policy shift in German wage setting policies, which b) in conjunction with *Rüffert* triggered novel solutions that neither correspond to the ‘original regulatory goals’ nor simply aligned domestic laws with CJEU case law.

To fully grasp these dynamics it is useful to combine both perspectives and supplement them. Following Hofmann, and more explicitly Martinsen, we agree that the assessment of the impact of CJEU case law requires an in-depth analysis of policy outcomes on a case-by-case basis. Yet we further contend that this

requires to re-centre the analysis on the more general question of how policy change is explained within a given policy field, instead of narrowly focusing on domestic actors' direct responses to CJEU rulings. This analytical angle includes taking into account the 'long shadow of European case law', as advocated by Schmidt (2018).

Yet it expands this perspective by examining the long-term dynamics of the broader policy field affected by the rulings. As we will show below, this allows us to detect important 'moves in and out of the shadow' and trace them back to dynamics both related and unrelated to the CJEU rulings.

Public procurement and Europeanisation in the 'post-post-Rüffert period' - continued legal uncertainty

The application of labour clauses and other social clauses¹ in public procurement has gained growing attention from both academics and politicians. Many public authorities find themselves under strong pressures to reduce costs, in particular following the austerity policies that have been high on the political agenda in many European countries following the economic crisis (Peters, 2012). The main objectives of public procurement are in most cases cost reduction and increased flexibility, which may have negative implications for labour. However, policy-makers are also obliged when spending taxpayers' money to prioritise the needs of workers and local communities, which reinforces the notion of the state as a 'socially responsible customer' (Jaehrling, 2015). Nevertheless, social and labour clauses may clash with European legislation and in particular CJEU case law (Bruun and Ahlberg, 2014).

The 2008 *Rüffert* (C346/06) and *Luxembourg* (C319/06) cases of the CJEU have been of great importance for public procurement policy development in many member states. In *Rüffert*, the CJEU held that Lower Saxony's Public Procurement Act violated the freedom to provide services and the Posted Workers directive (PWD) (71/1996) since it referred to collective agreements not universally binding. This led to direct changes in German public procurement legislation (Blauberger, 2012), and attracted political attention in other member states since it was interpreted as the freedom of movement of service and the PWD severely restricted the scope of labour clauses application. The *Luxembourg* ruling denied the state of Luxembourg the right to extend national collective agreements and labour laws to posted workers, which challenged procurement norms even in the UK that historically favoured light touch regulation (Barnard, 2009).

¹ Labour clauses generally set wage levels and often dictate other dimensions of working conditions, whereas social clauses have broader perspectives regulating e.g. the numbers of certain workers such as apprentices, disabled or other workers with special needs.

However, recent developments at EU-level have added ambiguity to the ‘signals’ sent by CJEU case law and legislation. Firstly, the legal implications of the *Rüffert* ruling have been moderated in subsequent CJEU rulings most notably the *RegioPost* ruling (C-115/14) (cf. Pecinovsky, 2016). The German city of Landau published a call for tender for the postal services and required potential contenders declaring willingness to follow the regional law requiring them to pay the minimum hourly wage of 8.50 euro. The company *RegioPost* refused this, and the city council informed *RegioPost*, they would not be considered and subsequently granted another company the contract. *RegioPost* brought this before the German court who in turn sent it to the CJEU. The CJEU ruled the requirement of paying the minimum wage was law-based, and although only a regional law restricted to the public sector, this was seen as sufficient to meet the demands outlined in the PWD².³ The CJEU further found that the clause did not breach EU legislation, and stressed that the then applicable procurement directive (2004/18) article 26 allowed public procurers to set contract requirements that are not per se generally applicable beyond the tender. While there are differences between the two cases, *RegioPost* gives more prominence to the social dimension than intra-EU free movement compared to *Rüffert* thus providing some counterbalance to previous rulings (Pecinovsky, 2016). Secondly, EU legislation on public procurement has traditionally acknowledged the broad social dimension to contracts (as has CJEU case law in both *Rüffert* and *RegioPost*, and in previous rulings as the *Wolff & Müller* (ECJ-Case C-60/03)), albeit without making clear recommendations on how to incorporate specific social criteria. This reflects the general EU policy tension between market-making (e.g. achieving economic goals) and market embedding (e.g. achieving social goals such as inclusive growth) (Arrowsmith and Kunzlik, 2009; Bruun and Ahlberg, 2014; Scharpf, 2010).

The updated 2014 directive on public procurement, while still reflecting the duality of social and economic goals in European legislation, introduced a stronger emphasis on social and environmental criteria for supplier selection. Aiming explicitly at enabling ‘procurers to make better use of public procurement to support common societal goals’, the 2014 directive clarifies that public procurers have the possibility to assess bids not only on price, but on an overall qualitative assessment (e.g. lifecycle cost) and to exclude low-cost offers not complying with obligations found in social regulation (Van den Abeele, 2014). While various

² The PWD states that collective agreements should be general applicable in the national setting before they apply to posting companies, while this does not apply for demands based in laws.

³ While *RegioPost* was not posting workers, the CJEU still needed to assess whether the PWD was breached since hypothetically bidders could have been non-German companies (Pecinovsky, 2016).

references to the PWD in the recitals of the 2014 directive suggest that the EU legislature wished to confirm CJEU case law in relation to the interplay between the PWD and the procurement regime (Barnard, 2016), the 2014 Directive also built on recent CJEU case-law. Particularly the Dutch Coffee case (European Commission v Netherlands C368/10), which was adjudicated after *Rüffert*, to allow contracting authorities to determine what qualitative criteria, including those based on environmental characteristics or social considerations, to take into consideration when awarding a contract. Nevertheless, despite claims to the contrary from the European Parliament and European trade unions, the procurement directive still fails to explicitly recognise that prevailing wage laws (ruled unlawful by *Rüffert*) are in compliance with EU internal market law and the PWD. The new rulings and directives have not so far displaced *Rüffert*, but rather modified it (cf. Martinsen, 2015).

In sum, the legal uncertainty in this policy field arises from both ambiguous rulings within CJEU case law (over a long period), tensions within and between EU directives (PWD, procurement directives) as well as between EU directives and CJEU case law.

Case selection and methods

In public procurement and wage setting policies, important cross-national variations exist with regard to collective bargaining structures, institutional setting and regulatory framework. For example, in Denmark and Germany wage-setting is traditionally left exclusively to social partners, while wage-setting is primarily left to market forces in the UK despite introducing a statutory minimum wage in 1999 (Hay and Wincott, 2012). Likewise, subnational public institutions' autonomy concerning public procurement policies varies across the three countries with the widest scope of autonomy in the UK followed by Denmark and then Germany in terms of local government's abilities to deviate from national agreed procurement laws and practices (Jaehrling *et al.*, 2018). While the focal point in most previous studies has been national policy-making, our case selection captures this diversity in wage-setting, industrial relations institution and the legal context at national and sub-national level. This divergence in industrial relations systems translates into country-specific policy responses to labour market precariousness that also shapes national responses to Europeanisation.

The qualitative data for the analysis draws on a European comparative research project conducted in 2015-16 on social dialogue and precarious employment (see Grimshaw *et al.* 2016 for further details) and two ongoing research projects on procurement and social clauses in Germany and the UK, and additional interviews conducted in Denmark. These projects include national and local case studies on labour clauses and public procurement across the three countries based on interviews with politicians, union and

employers' association representatives, public procurement officers and managers of private subcontracting companies. Additionally, other material such as public tenders and procurement regulation, but also news reports were included to qualify the analysis.

Our country case studies specifically explore domestic developments in the 'post-post-Rüffert' period, and specifically since the 2014 revised directive on public procurement. However, in order to understand the recent developments it is necessary to link them back to the longer term development of industrial relations systems and the emerging role of public procurement in wage setting policies since the late 1990s.

Our national case analyses are structured around three empirical questions. 1) What was the role of public procurement and labour clauses in the national wage setting system pre-Rüffert? 2) What effect did the *Rüffert* ruling have on public procurement regulation and usage of labour clauses? 3) What have been the long-term changes in procurement policy emphasising the domestic political dynamics (where *Rüffert* is not the only potential trigger for policy changes) and hence also (if so) why *Rüffert* still has relevance? This enables us to reveal important insights on the 'long shadow' of EU case law and to emphasise the importance of the long-term effects and dynamic interplay between the European and domestic policy developments, which can create various 'pushback effects'. Next, we turn to the empirical analysis of each national case.

Denmark

Denmark has a long history of applying labour clauses in public procurement contracts, and ratified the ILO convention no. 94 (ILO94) in 1955⁴. However, the overall impact of labour clauses was considered somewhat limited until 2014, when the national legislation was amended and the 2014 legal decree on public procurement and labour clauses entailed profound changes. The legislation compels central government authorities to apply labour clauses in procurement, but only encourages regional and local authorities to do so⁵. While the regulation was also changed in 2015 with the transposition of the 2014 public procurement directive, this had limited impact. Most local and regional authorities apply labour clauses in public procurement, but with great variations in the comprehensiveness, enactment and control, although particularly larger municipalities have developed

⁴ The Convention regulates labour clauses in public work and 63 countries has ratified it. The UK ratified the convention in 1950, but as the only country, so far later denounced it in 1982, while Germany never ratified it.

⁵ The municipalities have substantial degrees of self-governance (*kommunal-fuldmagten*), restricting the central government's influence on the municipalities.

rather advanced systems of labour clauses and enforcement mechanisms. Several interviewees furthermore highlighted the preventive effect of the labour clauses, where the most dubious companies no longer bid on tenders.

The 2014 legislation reflects the ILO94 convention's obliging central government authorities to refer to terms and conditions (and hence not only wages) stipulated in the most *representative* collective agreements in the particular sector. The law thus follows the same procedure used in aligning the posted workers legislation following *Laval*, which strengthens the core union movement's position (Refslund, 2015). The provider only needs to adhere to the collective agreed standards – not to sign a collective agreement. The legislation also stresses in line with ILO94 public work as a 'model employer' for the private sector.

The legal changes in 2014 came after a prolonged policy debate following the uncertainties arising from *Rüffert*. To clarify the regulation and after pressure from especially Danish unions and left-wing parties, resulting among others from several examples of poor working conditions and low wages in outsourced public cleaning and construction, the Social democratic-led government (2011-2015) amended the law. The right-wing government preceding the Social democrats, had ignored the issue, stating the existing legislation was sufficient, despite the uncertainty caused by *Rüffert*. However, labour clauses remain a highly contested Danish policy area with employers and liberal parties opposing, and some internal divergence do exist among unions as well. The employers and liberal parties find labour clauses an unnecessary burden on business potentially raising wages, stressing that labour clauses and particularly the associated chain liability breach the voluntarist principles of the Danish IR-model (Knudsen, 2016). In fact, labour clauses is one of the few areas where Danish social partners repeatedly failed to reach an agreement and it hence departs from the otherwise consensus-bases relations characterising Danish IR-traditions, also when dealing with other CJEU rulings such as *Laval* (Arnholtz and Andersen, 2018; Refslund, 2015).

The social democratic and left-wing parties on the other hand, are strongly in favour, and typically apply labour clauses more comprehensively, although several centre- and right-wing-led municipalities also apply labour clauses (Advice, 2017). Despite a change of government in 2015 with a new liberal minority government taking office, the law on labour clauses remains unchanged. The parliamentary situation explains this, as the minority government depended on the far-right-wing Danish People's party (DF), who oppose such changes since the labour clauses have significant impact on foreign workers, and thus reduces the perceived unfair competition for Danish workers. A policy change could easily be portrayed by the left-wing parties as accepting social dumping for public funds, making it vulnerable to pursue politically.

Employer associations – especially within construction continues to defy the labour clauses and the associated chain liability, highlighting the disagreement among unions and employers association in construction. This contradicts the findings of Seikel (2015), who suggests that a cross-class coalition *within* construction between the unions and employers' association determined the Danish policy outcome following *Laval*. However, the '*Laval*-alliance' aimed to preserve the autonomy of the Danish IR-model and amounted to a much broader circle of actors than only within the construction sector (Arnholtz, 2014; Refslund, 2015). The Danish construction employers' associations in 2016 legally tested the chain liability in public procured contracts at the Danish public procurement complaint board (in the *Herlev* case), claiming that chain liability violates the proportionality principle in European legislation. However, the board found that chain liability was not incompatible with European legislation and referred to the legitimate target of securing public welfare in ILO94 and recital 105 in the preamble to the new procurement directive (2014/24/EU). The complaint board further argued that chain liability was nothing new for subcontracted construction work as other issues (such as quality) also refers to the main contractor rather than the subcontracting companies. Danish social partners are generally reluctant to bring cases to the CJEU due to the risks of undermining the autonomy of the Danish IR-system, and because of the legal uncertainty they feel are highly pertinent in CJEU-rulings. Overall, it currently appears from the interviews that the employers' association feel the potential gains (including the likelihood of winning) of a CJEU case are not strong enough to try to raise a CJEU case.

Despite this disagreement, some acceptance seems to be growing in most political parties and among most social partners that labour clauses have become an integrated part of public procurement. For instance, several construction companies, particularly larger entities actively apply labour clauses and chain liability, illustrating the divergence among employers. The Danish policy outcome is a comparatively advanced public procurement regime, which is generally explained by partisan politics in a multi-party political system and under the strong pressure from the unions, based on the perception that the challenges in relation to public work was very difficult for the unions to overcome. The unions, especially in construction, have pushed labour clauses high on the agenda, both nationally and locally by spurring a broader public discussion of social dumping, and an anti-social dumping agenda among many policy-makers. The public policy thus seems to have found an equilibrium at least for now, with growing acceptance of labour clauses, despite notable resistance in particular from employers' association, but also many centre-right politicians.

Germany

Unlike in Denmark, labour clauses in Germany were only introduced from the late 1990s onwards, when several federal states (*Länder*) in Germany decided to pass prevailing wage laws (*Tariftreuegesetze*) to combat wage dumping. These laws oblige public contractors to pay their employees according to the 'relevant' collective agreement for the respective industry. Their introduction was contested, as they challenged the hegemonic view shared by both employers and parts of the unions that state intervention in wage-setting infringed the principle of 'Tarifautonomie' enshrined in the constitution. Thus, even before *Rüffert*, procurement policies had become one of several sites of struggles over the question if and how to adjust the traditional system of wage setting in order to deal with low wage competition and the increasing segment of poorly paid jobs, including in outsourced parts of the public sector. With a few exceptions the prevailing wage laws were however restricted to construction and public transport.

The *Rüffert* ruling did more than just abolish these laws. Rather, the legal adjustments after *Rüffert* amount to a shift in procurement law towards establishing and enforcing legal *minimum* wages for a *broad* set of industries – as opposed to securing *higher* collectively agreed standards for only a *few* industries before. The revised post-*Rüffert* procurement laws referred to two different types of minimum wages. Firstly, *industry-specific* minimum wages based on a collective agreement declared legally binding. This instrument had existed before, but its use had decreased over the 1990s and early 2000s (see Bispinck and Schulten, 2009). The revitalisation from the second half of the 2000s onwards was not primarily due to *Rüffert*, but to other legislative changes and the minimum wage campaign by the unions. Secondly, and more importantly, several *Länder* chose to introduce *procurement-specific* minimum wages; i.e. wages to be paid by all public contractors, even in industries without an industry-specific minimum wage. As Sack (2012) has pointed out, the *Rüffert* ruling thereby triggered legislative innovations at the subnational level. In fact, minimum wages without any basis in a collective agreement was completely alien to the German wage setting system. These procurement-specific minimum wages were mostly contingent on the *Länder*'s political leadership, as evidenced by the fact that their adoption of procurement specific minimum wages were pioneered by Social Democratic led *Länder* (Sack and Sarter, 2018; Jaehrling *et al.*, 2018).

The year 2015 marks the beginning of a new period of reforms of procurement laws. Given the temporal correspondence, one might be inclined to accredit these new reforms to the modified European jurisdiction (RegioPost ruling) and the new European directives on public procurement. In fact, many written statements and interviewed respondents acknowledge the new directive's emphasis on social goals and report that, unlike ten years ago, using procurement for social goals is now widely accepted as legitimate *and* legal in

the political discourse. Yet despite this apparent paradigm shift at the level of the political discourse, the changes in pay clauses took the opposite direction, as most federal states abolished the procurement specific minimum wages. This is largely explained by two factors: Firstly, the new national law regulating public procurement is generally rather similar to the EU directive containing many ‘CAN’-rules, but very few ‘MUST’-rules with regard to social goals, and thus also does not include any regulations making pay clauses in public contracts obligatory, thereby transposing the legal uncertainty to the domestic level. Secondly, the introduction of the national minimum wage in 2015 has had an even stronger impact. At € 8.50/hour, it was at the same level or only slightly below most of the procurement-specific minimum wages. This raised the question of whether pay clauses at Länder level were redundant and led to the abolition of the procurement-specific minimum wages in 8 out of 12 Länder where these minimum wages had been in place. The abolition was neither opposed by the large unions in the industries with a high share of public contracts (e.g. construction, contract cleaning, security services) as these industries in the meantime all had their own, higher industry-specific minimum wage, nor by the employer organisations.

Yet a smaller group of Länder have embarked on a different path and continue to use public procurement as an independent tool to raise wage levels. Currently five Länder (Berlin, Brandenburg, Thüringen, Mecklenburg-Vorpommern, Schleswig-Holstein) – all of which are or have been led by a Social democratic or Left Party government – decided to retain the procurement-specific minimum wage at a level above the national minimum wage. This is justified with the goal of ensuring wages in the quasi-public sector should be ‘more’ than just the general minimum wage. Despite *RegioPost* there is still legal uncertainty among legal experts and procurement politicians whether this holds true *after* the introduction of the national minimum wage which already defines a minimum standard (Nassibi *et al.*, 2016). Thus, the decision to lift the procurement-specific minimum wage above the level of the national minimum wage is already a deliberate decision to ‘test the limits of European Case law’. An even more ambitious solution is found in Bremen, where the SPD-led government decided to re-introduce pre-*Rüffert* prevailing wage laws that oblige public contractors to comply with the full collectively agreed wage grid, albeit only for the construction sector and only for contracts below the EU-thresholds. This decision was taken by the SPD following complaints in particular by small and medium sized firms in construction, many of which are covered by collective agreements. By restricting the prevailing wage law to contracts below EU-thresholds the law intendedly remains ‘under the radar’ of the CJEU’s potential judicial intervention.

The diverse dynamics at the subnational level in the most recent realignment of procurement policies thus confirm the ‘long shadow’ of the European Case law, in particular *Rüffert*, which continues to constrain domestic policy choices. Yet it also sheds light on policy responses testing the limits of CJEU case law and on other factors influencing policy responses, most importantly the alternative wage setting policies that were not least fuelled by *Rüffert* and to some extent substitute for pay clauses in procurement laws.

United Kingdom

The use of wage clauses in public sector contracts in the UK has a long but politically contested history. From the late 19th century ‘Fair Wage Clauses’ were used to set an acceptable ‘going rate’ for public sector contractors until changes during the 1980s (under Margaret Thatcher) that explicitly prohibited those awarding contracts from making decisions based on ‘non-commercial considerations’. The Best Value programme of New Labour formally relaxed the rules but a tendency remained for procurement professionals to prioritise the lowest cost over broader issues of quality and social benefits (Cunningham and James, 2017). Government advice in the late 2000s suggested that social clauses could be added at the post-award stage but only on a voluntary basis (Office of Government Commerce, 2009, pp.9). However, the growing support for the Living Wage Campaign since the early 2000s has means that the incorporation of living wage clauses often takes place at the earliest possible stage of the procurement process (e.g. Greater London Authority (GLA), 2008).

The then government’s apprehension about the incorporation of social clauses in procurement was re-affirmed when *Rüffert* was adjudicated. Rather than suppliers bidding for public contracts contesting living wage clauses, it was the UK Cabinet Office, the government department responsible for procurement, which was broadly against the imposition of the living wage for fear of challenges under EU law (Office of Government Commerce, 2009), but also because this was seen broadly as contrary to the idea of an efficient procurement market (Koukiadaki, 2014). The pushback against *Rüffert* in the UK did not come from policy-makers, but primarily from the concerted efforts of non-judicial actors, i.e. civil society organisations (i.e. Citizens UK), Labour party controlled local authorities (e.g. the GLA) and suppliers at local level. This also helps explain why efforts, predominantly by Labour-led local authorities, aimed at containing the effects of *Rüffert* via relying on a case-by-case approach to the incorporation of living wage clauses in the procurement process rather than via legislative reforms.

It was against this context that the 2012 ‘Social Value Act’, which passed with cross-party support, represented something of a change of policy direction. The Act requires local authorities, when entering

into public procurement contracts, to give greater consideration to economic, social or environmental well-being. However, these ‘social value’ goals were not promoted in their own right but were bundled up with a desire to see greater flexibility in procurement processes and increased opportunities for domestic SMEs and voluntary sector organisations to bid for public contracts (Loader, 2018). The transposition of the 2014 EU Public Procurement Package then followed with the adoption of the UK Public Contracts Regulations 2015. In an attempt to take advantage of the new flexibilities quickly, the UK government implemented the EU Directives one year after their entry into force. Consultation took place with relevant stakeholders, albeit amid calls from unions for delay in the transposition with a view to “send a clear signal of much needed shift in UK public procurement to encourage public bodies to implement the Living Wage” (Unison, 2015). Consistent with the underlying rationale of the Social Value Act, the 2015 regulations ‘opened up’ the trading potential of procurement to micro-businesses through removing e.g. the Pre-Qualification Questionnaires and extending the application of the ‘light touch’ regime (previously described as Part B services).

Although the new regulations theoretically created greater scope for ‘socially responsible procurement’, the unions still criticised the UK government for ignoring their calls to include non-compliance with applicable environmental, social and labour law amongst the mandatory grounds of exclusion and for not making it a mandatory requirement for services to be awarded on the basis of ‘best price/quality ratio’. The promotion of social considerations in both the Social Value Act and Public Services Regulations could thus be read as being incidental to the main aim of promoting the role of SMEs rather than being the result of a strategic choice to contain the impact of *Rüffert* for social considerations.

The lack of an explicit recognition of the legality of living wage clauses in the amended UK procurement framework could amplify in principle the scope for contestation between different actors. Stakeholders were indeed concerned that, even within the new ‘social value’ legislative framework, public authorities requiring contractors to pay a living wage would still be open to litigation for potential violation of EU law. But unlike in other jurisdictions, many of which have public procurement tribunals, only the High Court has that authority in the UK and the cost of issuing a claim there can often prove prohibitive for suppliers (Arrowsmith and Craven, 2016). This has resulted in relatively limited litigation of procurement cases and a greater reliance instead on out-of-court settlements meaning that domestic case law offers a limited source of interpretative guidance (Sanchez-Graells, 2018). Furthermore, the limited deployment of posted workers into the UK for public contracts outside of London has arguably reduced the chances of legal challenge arising from labour clauses after *Rüffert*.

Against this context, the legislative reforms seem to have consolidated further the incorporation of living wage clauses in procurement. Rather than doing this through making compliance with a living wage a mandatory condition of contract award or through purely voluntary mechanisms that operate out of the procurement process, consensus has emerged on accommodating such clauses as contract performance or contract award criteria (see, among others, Barnard, 2016). From a practical point of view, recent evidence suggests that some local authorities are increasingly willing to take the financial and legal risk of requiring prospective bidders to agree to living wages along with other employment conditions such as guaranteed hours contracts and payment for travel time, even where it incurs significant additional costs (Jaehrling *et al.*, 2018). Mechanisms used by local authorities include asking bidders for their position on fair pay and employment policies in the tender documentation or attaching a specific (e.g. 20%) weighting to social value in evaluation of tenders. The consolidation and expansion of such practices has been facilitated by the stance of suppliers and unions alike. On the supplier side, living wage clauses are seen as enhancing the reputation of firms as ethical or responsible businesses, preventing unfair wage competition from ‘rogue’ firms and helping professionalise lower paying occupations and industries such as cleaning. On the union side it is seen a pragmatic solution to low pay issues in specific local contexts (e.g. Unison’s involvement in the GLA procurement process) and recently more broadly, i.e. through the promotion of Employment Charters (e.g. in the care sector) that are designed to tackle low wages and insecure employment for outsourced workers.

Comparing the three cases – similar changes, but different policy trajectories under the shadow of *Rüffert*

Across the three countries, *Rüffert* has had a long-term effect on domestic policy-making on public procurement and the application of labour clauses. There was an initial direct effect – mainly in Germany with the abolishment of prevailing wage laws, as the ruling concerned German legislation. However, the main effect has been indirect, in terms of the legal uncertainty *Rüffert* caused, and the ambiguity continues to influence the policy-field in the post-post-*Rüffert* period. As Blauburger and Schmidt argue, in the field of labour market policies, the ‘shadow’ is biased towards the four fundamental freedoms. In fact, in the three countries under study as well as in other European countries (cf. Bruun and Ahlberg, 2014), public authorities were in the direct aftermath after *Rüffert* concerned about actively promoting labour clauses in public procurement. However, our long-term analysis of the three case studies highlights how Europeanisation emphasising the four fundamental freedoms can in fact stimulate various ‘pushback’ strategies at the domestic level counter to the CJEU’s long-

held general ‘philosophy’ on the primacy of internal market considerations. Such policy innovations are breaking the policy inertia of the ‘long shadow’ and have developed in apparent defiance of (or inadvertently triggered by) *Rüffert*. One could be inclined to attribute this to the modifications of *Rüffert* in both CJEU case law (e.g. *PostRegio*) and secondary legislation (the new EU Procurement directives) heralding a new ‘post-post-*Rüffert*’ era. Yet in our case studies, the changes do not primarily result from these modifications of European level policies and jurisdiction, but rather from the national political dynamics, and to some extent subnational level dynamics, gaining pace in the aftermath of *Rüffert* - although *Rüffert* has to be seen as just one among several triggers of policy change. This political dynamic led to a policy shift in Denmark with the updated 2014 regulation, and in Germany a shift towards legal minimum wages in Germany – a shift that started well before *Rüffert* due to the erosion of traditional wage setting in the industrial relations systems. In a similar vein, in the UK *Rüffert* created legal uncertainty around labour clauses, yet it did not constitute a destabilising factor for the national living wage campaign – which, was also established in the pre-*Rüffert* era in response to the failure of the industrial relations system to guarantee decent wage levels. In this context, *Rüffert* acted as a further incentive to consolidate the existing commitments of politicians and social partners towards living wage clauses at local level. These policy changes were thus an *alternative ‘court-proof’* mean to pursue the *emerging* (not ‘original’) regulatory goal, namely to avoid wage dumping in publicly procured works and services. Our analysis underlines the transformative power of CJEU case law, while also acknowledging the possibilities for various forms of domestic ‘pushback’.

Despite the emergence of domestic ‘pushbacks’ and ‘softening’ effect of the revised procurement directive and *RegioPost* considerable uncertainty remains. For instance in Germany there is the question whether procurement-specific minimum wages are compliant with EU primary law, and even more so in regard to pre-*Rüffert* prevailing wage laws, *Rüffert* thus continue to have impact.

Altogether, our findings suggest some common impacts of Europeanisation in the three countries, insofar as politicians, employers and unions, increasingly consider state intervention in wage setting ‘legitimate’. This has been furthered by the *Rüffert*-ruling, albeit not exclusively so. To capture fully the dynamics, it is necessary to broaden the analysis and take into account the long-term dynamics of the policy field under study, i.e. the field of wage setting and industrial relations.

Divergence in the public procurement field under the shadow of Europeanisation

Although there are similarities in the trajectories, there are also significant variations in policy outcomes across the three countries. In order to understand and contextualise these variations, we need to broaden our analytical perspective on domestic political and industrial relations settings, and acknowledge that Europeanisation cannot be understood as the ‘independent variable’ *per se*, but rather as one among several ‘independent variables’. Our findings thus highlight the room for domestic pushback that Blauberger and Schmidt (2017) somewhat underplay, which is dependent on domestic actors, mainly unions, employers' association and politicians, and their preferences and determination to ‘push-back’ against EU law as well as the power relations among key societal actors (Sack, 2012; Seikel, 2015). Our findings further support previous studies (Jaehrling *et al.*, 2018; Sack, 2012; Sack and Sarter, 2018) that point to the role of social democratic/left-wing domestic politicians in contesting EU case law, at least in the case of public procurement. In the Danish case, we show how social democrats and left-wing parties, urged by unions, imposed an advanced procurement regime despite the opposition from the employers' associations, along their own political preferences. We found a similar role for left-wing politicians in Germany and the UK, but at the subnational level, and in the UK case the local government level was particularly important with left-wing political parties having stronger representation there.

The impact of the subnational level was in part due to the limited debate at national level about labour clauses. At the same time, contestation at the subnational level continues to be guided by the national legal frameworks and competencies. For example in the UK, local living wage clauses have proven popular but still rely on the ‘soft’ regulation provided by accreditation with the UK living wage foundation. This illustrates how country-specific policy responses driven by the failure of traditional wage settings systems to maintain acceptable living standards also shapes national responses to Europeanisation. In the German case, the shift to obligatory procurement-specific minimum wages continues the trend towards of expanding legal minimum wages (first industry-specific, then national) that started in the mid-1990s.

The long-term assessment: room for manoeuvre under the shadow of Europeanisation

As the discussion of our empirical results shows we find insights in both the literature arguing that Europeanisation has a long-term impact, and the literature arguing for options for domestic ‘pushback’ against Europeanisation. Our empirical findings thus helps bridge these two opposing strands of literature and enables us to understand better the domestic policy trajectories, under the influence of judicial Europeanisation.

Analysing the long-term and dynamic effects of Europeanisation shows how the effect of *Rüffert* has thus been twofold and ambiguous. On the one hand, as an unintended effect, it gave an additional impetus to unions and

social democratic parties to push for a stronger role for the state in the wage setting system in both Germany and Denmark –*despite* resistance from employers. However, on the other hand the long-term effect of the potential threat of bringing a case to the CJEU constrained national/sub-national level policy-making, at least in Germany and in the UK, whereas the Danish courts are more reluctant to bring cases to the CJEU (Wind, 2010). This can result in ‘non-decisions’ or the avoidance of binding procurement policies at subnational level that are at risk of being challenged through the CJEU, and this illustrates how *Rüffert* still result in legal uncertainty that the recent policy developments have not overcome.

In general, our findings confirm the argument of Blauburger and Schmidt (2017) that CJEU case law should receive more prominence in the analysis of domestic policies. However, our results also question Blauburger and Schmidt’s argument that domestic political systems have difficulties in challenging CJEU case law. Europeanisation appears to be setting a frame for national policy solutions rather than determining the policy outcomes across member states. This shows that we must see Europeanisation as just one of several important factors that can trigger national policy shifts. The national (and subnational) actors are not merely passive receivers of European case law, but dynamic actors trying to further their own agenda, which leads to path dependent policy divergence rather than simple convergence following Europeanisation. This demonstrates how the continuous interplay between law and politics and the interpretations, perceptions, and interests of political actors and governing majorities matter for our understanding of how the process of Europeanisation influences national public policies.

Acknowledgements: We would like to thank Dorte Sindbjerg Martinsen for helpful comments on a previous version of the article.

References

- Advice (2017) ‘Brug af klausuler mod social dumping’. Report from Advice consultancy commissioned by 3F, Copenhagen.
- Arnholtz, J. (2014) *A legal revolution in the European field of Posting?* PhD thesis, Copenhagen: University of Copenhagen.
- Arnholtz, J. and Andersen, S. K. (2018) ‘Extra-Institutional Changes under Pressure from Posting’. *British Journal of Industrial Relations*, Vol. 56, No. 2, pp. 395-417.

Arrowsmith, S. and Kunzlik, P. (2009) *Social and Environmental Policies in EC procurement law* (Cambridge: Cambridge University Press).

Arrowsmith, S. and Craven, R. (2016) 'Public procurement and access to justice'. *Public Procurement Law Review*, Vol. 6, pp. 227-252.

Barnard, C. (2009) 'The UK and Posted Workers: The Effect of Commission v Luxembourg on the Territorial Application of British Labour Law'. *Industrial Law Journal*, Vol. 38, No. 1, pp. 122-132.

Barnard, C. (2016) 'To boldly go: Social clauses in public procurement'. *Industrial Law Journal*, Vol. 46, No. 2, pp. 208-244.

Bispinck, R. and Schulten, T. (2009) 'Re-Stabilisierung des Deutschen Flächentarifvertragssystems.' *WSI-Mitteilungen*, Vol. 62, No. 4, pp. 201-209.

Blauberger, M. (2012) 'With Luxembourg in mind... the remaking of national policies in the face of ECJ jurisprudence'. *Journal of European Public Policy*, Vol. 19, No. 1, pp. 109-126.

Blauberger, M. (2014) 'National responses to European Court jurisprudence'. *West European Politics*, Vol. 37, No. 3, pp. 457-474.

Blauberger, M. and Schmidt, S. K. (2017) 'The European Court of Justice and its political impact'. *West European Politics*, Vol. 40, No. 4, pp. 907-918.

Börzel, T. A. and Sedelmeier, U. (2017) 'Larger and more law abiding? The impact of enlargement on compliance in the European Union'. *Journal of European Public Policy*, Vol. 24, No. 2, pp. 197-215.

Bruun, N. and Ahlberg, K. (2014) 'Public Procurement and Labour Rights : Governance by Scaremongering?'. In Evju, S. (ed.) *Regulating Transnational Labour in Europe* (Oslo: Privatrettsfondet), pp. 263-279.

Conant, L. (2002) *Justice contained: law and politics in the European Union* (Ithaca: Cornell University Press).

Cunningham, I. and James, P. (2017) 'Analysing public service outsourcing: The value of a regulatory perspective'. *Environment and Planning C: Politics and Space*, Vol. 35, No. 6, pp. 958-974.

Grimshaw, D., Johnson, M., Rubery, J. and Keizer, A. (2016) 'Reducing Precarious Work - Protective gaps and the role of social dialogue in Europe,' report from Precawo-project, European Work and Employment Research Centre, University of Manchester.

Hay, C. and Wincott, D. (2012) *The Political Economy of European Welfare Capitalism* (Basingstoke: Palgrave Macmillan).

Hofmann, A. (2018) 'Resistance against the Court of Justice of the European Union'. *International Journal of Law in Context*, Vol. 14, No. 2, pp. 258–274.

Jachrling, K. (2015) 'The state as a "socially responsible customer"? Public procurement between market-making and market-embedding'. *European Journal of Industrial Relations*, Vol. 21, No. 2, pp. 149–164.

Jaehrling, K., Johnson, M., Larsen, T. P., Refslund, B. and Grimshaw, D. (2018) 'Tackling Precarious Work in Public Supply Chains: A Comparison of Local Government Procurement Policies in Denmark, Germany and the UK'. *Work, Employment and Society*, Vol. 32, No. 3, pp. 546–563.

Kelemen, R.D. (2016) 'The Court of Justice of the European Union in the Twenty-First Century'. *Law and Contemporary Problems*, Vol. 79, No. 1, pp. 117–140.

Knudsen, P. (2016) 'Udfordringer for den danske aftalemodel'. In Larsen, T.P. and Ilsøe, A. (eds.) *Den danske model set udefra* (København: Jurist- og Økonomforbundets Forlag), pp. 425–434.

Koukiadaki, A. (2014) 'The far-reaching implications of the Laval Quartet: the case of the UK living wage'. *Industrial Law Journal*, Vol. 43, No. 2, pp. 91–121.

Loader, K. (2018) 'Small-and medium-sized enterprises and public procurement: A review of the UK coalition government's policies and their impact'. *Environment and Planning C: Politics and Space*, Vol. 36, No. 1, pp. 47–66.

Madsen, M. R., Cebulak, P. and Wiebusch, M. (2018) 'Backlash against international courts: explaining the forms and patterns of resistance to international courts'. *International Journal of Law in Context*, Vol. 14, No. 2, pp. 197–220.

Martinsen, D. (2005) 'The Europeanization of welfare: the domestic impact of intra-European social security'.

Journal of Common Market Studies, Vo. 43, No. 5, pp. 1027–1054.

Martinsen, D. (2015) *An ever more powerful court?: The political constraints of legal integration in the European Union* (Oxford: Oxford University Press).

Nassibi, G., Rödl, F. and Schulten, T. (2016) 'Perspektiven vergabespezifischer Mindestlöhne nach dem Regio-Post-Urteil des EuGH'. WSI Policy Brief No. 3 (Düsseldorf: Hans-Böckler-Stiftung).

Office of Government Commerce (2009) Procurement Policy Note – Quarterly Update. March 2009, (London: Office of Government Commerce), available at:
http://webarchive.nationalarchives.gov.uk/20110802163105/http://www.ogc.gov.uk/documents/PPN_Update_03_09.pdf. (Accessed 20 November 2018)

Pecinovsky, P. (2016) 'Evolutions in the social case law of the Court of Justice: the follow-up cases of the Laval quartet: ESA and RegioPost'. *European Labour Law Journal*, Vol. 7, No.2, pp. 294–309.

Peters, J. (2012) 'Neoliberal convergence in North America and Western Europe: Fiscal austerity, privatization, and public sector reform'. *Review of International Political Economy*, Vol. 19, No. 2, pp. 208–235.

Refslund, B. (2015) 'Adjusting the Danish industrial relations system after Laval: recalibration rather than erosion'. *Transfer: European Review of Labour and Research*, Vol. 21, No. 2, pp. 247–251.

Sack, D. (2012) 'Europeanization Through Law, Compliance, and Party Differences – The ECJ's "Rüffert" Judgment (C-346/06) and Amendments to Public Procurement Laws in German Federal States'. *Journal of European Integration*, Vol. 34, No. 3, pp. 241–260.

Sack, D. and Sarter, E. (2018) 'Collective bargaining, minimum wages and public procurement in Germany: Regulatory adjustments to the neoliberal drift of a coordinated market economy'. *Journal of Industrial Relations*, Vol. 60, No. 5, pp. 669–690.

Sanchez-Graells, A. (2018) 'Regulatory substitution between labour and public procurement law: The EU's shifting approach to enforcing labour standards in public contracts'. *European Public Law*, Vol. 24, No. 2, pp. 229–254.

Scharpf, F. W. (2010) 'The asymmetry of European integration, or why the EU cannot be a "social market economy"'. *Socio-Economic Review*, Vol. 8, No. 2, pp. 211–250.

Schmidt, S. K. (2018) *The European Court of Justice and the Policy Process: The Shadow of Case Law* (Oxford: Oxford University Press).

Seikel, D. (2015) 'Class struggle in the shadow of Luxembourg. The domestic impact of the European Court of Justice's case law on the regulation of working conditions'. *Journal of European Public Policy*, Vol. 22, No. 8, pp. 1166–1185.

Unison (2015) UNISON briefing calling for delay of the UK Public Contracts Regulations 2015.

<https://www.unison.org.uk/content/uploads/2015/02/TowebUNISON-Bargaining-and-negotiating-briefing-on-the-delay-of-the-Public-Contracts-Regulations-20151.pdf> (accessed 25 April 2019).

Van den Abeele, É. (2014) 'Integrating social and environmental dimensions in public procurement: one small step for the internal market, one giant leap for the EU?' *ETUI working paper 2014/08*, Brussels: ETUI.

Wind, M. (2010) 'The Nordics, the EU and the reluctance towards supranational judicial review'. *Journal of Common Market Studies*, Vol. 48, No.4, pp. 1039–1063.