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# Public Procurement as Social Policy?

An introduction to social criteria in public procurement in Germany

## Working Paper No. 1

*Working Paper Series*  
*'Comparative Governance'*  
Topic: Public Procurement  
August 2014

Hans **Böckler**  
**Stiftung** 



## Proposed Citation

Sarter, Eva Katharina/Sack, Detlef/Fuchs, Sebastian 2014. Public Procurement as Social Policy? An introduction to social criteria in public procurement in Germany. Working Paper Series 'Comparative Governance', No. 1, August 2014. Available online: [www.uni-bielefeld.de/soz/powi](http://www.uni-bielefeld.de/soz/powi). Universität Bielefeld.

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## *Acknowledgements*

This research was funded by Hans-Böckler-Foundation, project no. 2012-581-4 (*Social Standards in Public Procurement. Regulations and Implementation in European Comparison*). We gratefully acknowledge the financial support.

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## Contents

Abbreviations .....	3
Introduction .....	5
1. Social considerations in public procurement .....	6
2. Law making in a federal context .....	7
3. Public procurement regulations in Germany .....	8
4. Social considerations in public procurement regulations in Germany .....	8
5. Social Criteria in contemporary Federal States' Laws .....	11
5.1 Wage related criteria I: compliance with collective agreements and minimum wages ..	12
5.2 Wage-related criteria II: equal pay provisions.....	15
5.3 ILO Core Labour Standards .....	16
5.4 Fairtrade .....	19
5.5 Gender equality, reconciliation and family .....	20
5.6 Integration, Inclusion, and labour market integration of long-term unemployed .....	21
5.7 Dual Vocational Training .....	23
6. Types of criteria / proofs of compliance .....	24
Summary.....	26
References.....	27
A. Literature .....	27
B. Court rulings .....	29
C. European legislation.....	29
D. National legislation .....	30
E. Subnational legislation and administrative documents.....	30

## Tables and Figures

Figure 1: Schematic outline of public procurement regulation.....	7
Figure 2: Expansion of social criteria in German procurement law .....	10
Figure 3: Level of procurement specific minimum wages in the German Länder .....	14
Table 1: Types of proofs.....	25

**Abbreviations**

AEntG	Arbeitnehmerentsendegesetz <i>Federal law concerning the posting of workers</i>
AGG	Allgemeines Gleichbehandlungsgesetz <i>Federal anti-discrimination law</i>
BArbG	Bundesarbeitsgericht <i>Federal Labour Court</i>
BbgVergG	Brandenburgisches Vergabegesetz <i>Procurement law of Brandenburg</i>
BerlAVG	Berlinerisches Ausschreibungs- und Vergabegesetz <i>Procurement law of Berlin</i>
BGB	Bürgerliches Gesetzbuch <i>Civil Code</i>
BremKernV	Bremische Kernarbeitsnormenverordnung <i>Bremian decree on compliance with ILO Core Labour Standards</i>
BVerfG	Bundesverfassungsgericht <i>Federal Constitutional Court</i>
CDU	Christlich Demokratische Union Deutschlands <i>Christian-Democratic Party</i>
ECJ	<i>European Court of Justice</i>
EVB-ILO	Erg. Vertragsbestimmungen, ILO-Kernarbeitsnormen [Thüringen] <i>Supplementary terms of contract concerning the ILO Core Labour Standards (Thuringia)</i>
FFV	Frauenförderverordnung [Berlin] <i>Berlin decree on the promotion of women</i>
GdB	Grad der Behinderung <i>Level of disability</i>
GG	Grundgesetz <i>German constitutional law</i>
GWB	Gesetz gegen Wettbewerbsbeschränkungen <i>Federal Anti-Trust Law</i>
HmbVgG	Hamburgisches Vergabegesetz <i>Procurement law of Hamburg</i>
HVgG	Hessisches Vergabegesetz <i>Procurement law of Hesse</i>
ILO	International Labour Organization
LGG	Landesgleichstellungsgesetz [Berlin] <i>Berlin law on equal opportunities</i>
LTMG	Landestariftreue- und Mindestlohngesetz [Baden-Württemberg] <i>Procurement law of Baden-Wuerttemberg</i>
LTTG	Landestariftreuegesetz [Rheinland-Pfalz] <i>Procurement law of Rheinland-Palatinate</i>
LVG LSA	Landesvergabegesetz [Sachsen-Anhalt] <i>Procurement law of Saxony-Anhalt</i>
MiloG	Mindestlohngesetz <i>Federal law on minimum wages</i>

MiArbG	Mindestarbeitsbedingungengesetz <i>Federal law on minimum working conditions</i>
NPM	New Public Management
NTVergG	Niedersächsisches Tariftreue- und Vergabegesetz <i>Procurement law of Lower Saxony</i>
RVO TVgG NRW	Verordnung Tariftreue- und Vergabegesetz Nordrhein-Westfalen <i>Procurement decree of North Rine-Westphalia</i>
SächsVergabeG	Sächsisches Vergabegesetz <i>Procurement law of Saxony</i>
SchwBG	Schwerbehindertengesetz <i>Federal law on disabled people</i>
SGB	Sozialgesetzbuch <i>Social Code</i>
SHVgVO	Schleswig-Holsteinische Vergabeverordnung <i>Procurement decree of Schleswig-Holstein</i>
SME	Small and Medium Sized Enterprise
STTG	Saarländisches Tariftreuegesetz <i>Procurement law of the Saarland</i>
ThürVgG	Thüringer Vergabegesetz <i>Procurement law of Thuringia</i>
TTG	Tariftreue- und Vergabegesetz Schleswig-Holstein <i>Procurement law of Schleswig-Holstein</i>
TtVG	Tariftreue- und Vergabegesetz [Bremen] <i>Procurement law of Bremen</i>
TVG	Tarifvertragsgesetz <i>Federal law on collective agreements</i>
TVgG NRW	Tariftreue- und Vergabegesetz Nordrhein-Westfalen <i>Procurement law of North Rine-Westphalia</i>
TzBfG	Teilzeit- und Befristungsgesetz <i>Federal law on part-time work and fixed-term contracts</i>
VgG M-V	Vergabegesetz Mecklenburg-Vorpommern <i>Procurement law of Mecklenburg-Western Pomerania</i>
VgV	Vergabeverordnung <i>Procurement Decree</i>
VOB	Vergabe- und Vertragsordnung für Bauleistungen <i>Regulations on Contract Awards for Construction Works</i>
VOL/A	Vergabe- und Vertragsordnung für Leistungen, Teil A <i>Regulations on Contract Awards for Public Supplies &amp; Services, Part A</i>
VOF	Vergabeordnung für freiberufliche Dienstleistungen <i>Regulations on Contract Awards for Services of the Liberal Professions</i>
WFTO	World Fair Trade Organization

## Introduction

Public Procurement – i.e. the purchase of goods and services by public sector bodies – accounts for nearly one fifth of GDP in the European Union (European Commission, 2012). In Germany, public procurement by general government and state-owned utilities is estimated to account for about 17% of GDP (OECD, 2011). However, as no verified and compiled data exists that includes all levels of government, all types of purchases (especially low value purchases), all fields of procurement (e.g. construction, IT, rescue services, or catering) and all those institutions that fall under the scope of public procurement regulations in Germany, this is but a vague estimation and has to be taken with caution.<sup>1</sup> Undoubtedly though, public procurement accounts for an important amount as well as a wide range of goods and services purchased.

Until the reform of 2004 European regulations were largely characterized as neoliberal and focused on competition and the creation of the single market without focussing on social criteria (Rolfstam, 2009). In the beginning of the 20th century – and especially during the negotiations of a new Directive on public procurement, a debate on social standards in the economically based process of tendering gained momentum (Rolfstam 2009; Scherrer et al., 2010); this resulted in an intrusion of social criteria in Directive 2004/18 (Scherrer et al., 2010: 118). Also at the national level, social criteria became more important (Kahlenborn et al., 2011; Schulten et al., 2012; Sack, 2012). Seeing that public procurement is based in competition and market building these goals, however, are only taken into account up to a certain point and if they are treated rather restrictively.

Against the background of the history of NPM like-reforms, privatization and outsourcing since the 1980ies on the one hand and the politisation of dismantling public services on the other hand, social considerations in public procurement have attracted a growing interest among social scientists. With public procurement being a rather new field of concern in social sciences, knowledge on the extent and the characteristics of social criteria in public procurement in national perspective is still rather scarce. In this regard, the working paper aims to provide an overview of the development and the current situation of social criteria in public procurement regulations at national as well as subnational level in Germany. It shall thereby provide a starting point for future research as well as facilitate further. Being directed at scholar studying public procurement from a social science perspective and aiming at an introductory overview of developments and criteria the paper, however, leaves aside a detailed

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<sup>1</sup> For the Federal State of Hamburg, this was among others stated in the Senat's answer to the parliamentary question of Roland Heintze (CDU), which states for Hamburg that „*The total volume of purchasing by the administration of Hamburg is not evaluated statistically.*“ (translation by authors; Bürgerschaft der Freien und Hansestadt Hamburg, Drucksache 20/3027 of 3.2.2012). An insightful and detailed description of the problems regarding data on public purchasing in Germany as well as a compilation of the divergent data and their collection methods can be found in the final report „*Einkäufer Staat' als Innovationstreiber. Entwicklungspotentiale und Handlungsnotwendigkeiten für eine innovative Beschaffung im öffentlichen Auftragswesen in Deutschland*“ (Wegweiser GmbH et al., 2009: 55-66).

description of certain details: While a difference between mandatory and optional criteria can be observed and the criteria used are to be distinguished into selection criteria and award criteria, these issues will not be given priority.

Starting, first, with introductory remarks on public procurement laws in Germany, it secondly outlines the development of social criteria in public procurement regulations. As will be shown, the inclusion of social criteria has risen notably since the last decade of the 20<sup>th</sup> century, which was accelerated by an external shock: the ruling of the *European Court of Justice on Case C-346/06 of 3 April 2008 Dirk Ruffert in his capacity as liquidator of the assets of Objekt und Bauregie GmbH & Co. KG vs. Land Niedersachsen*, in which the ECJ declared the oldest and most commonly applied social criteria in Germany as non-conform with European law. This stimulated not only a debate on the ruling in question but also triggered a development, which in consequence led to a qualitative as well as quantitative policy expansion. Subsequently, the single criteria used in subnational public procurement laws will be outlined. The paper concludes with a short summary.

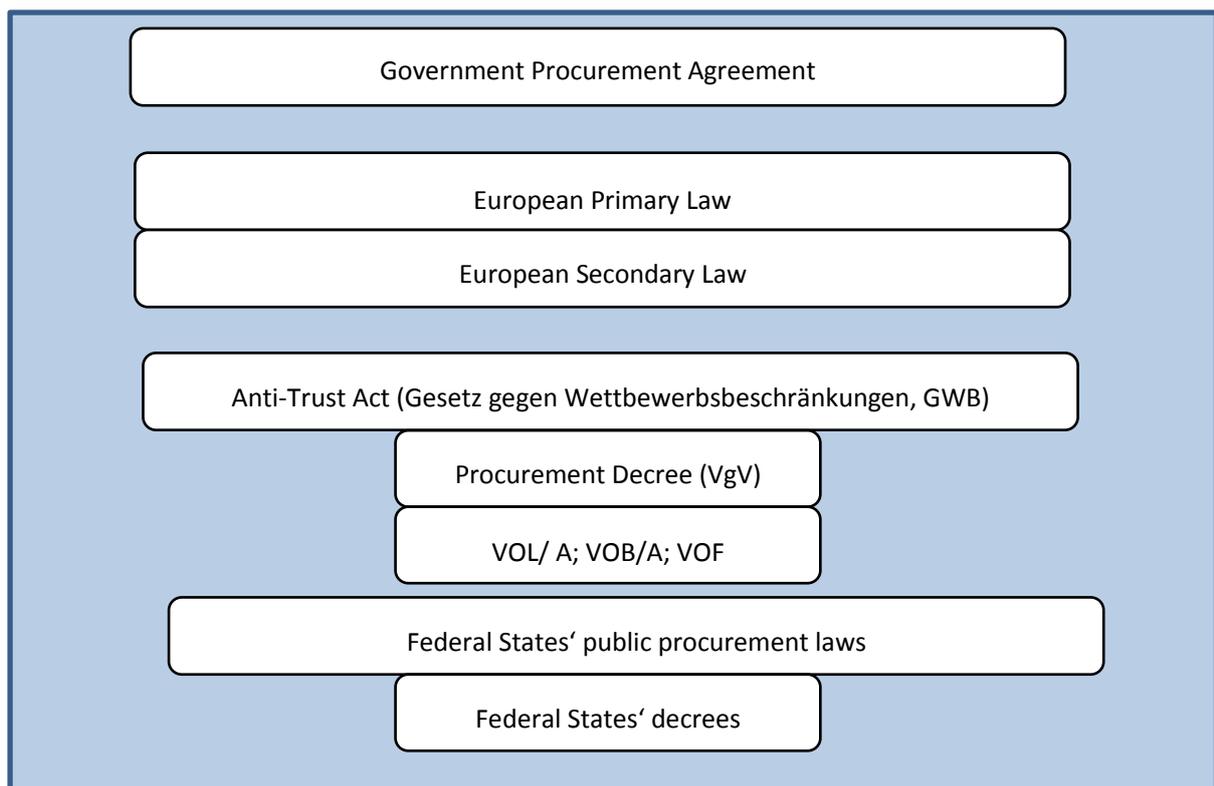
## **1. Social considerations in public procurement**

In brief, public procurement is – as every purchase – based on a succession of decisions and choices: The first decision, which also lays ground for the purchase, is the decision to purchase a certain good or service. Secondly, the specific characteristics of that good or service to be purchased have to be decided. Thirdly, the criteria on which the choice between different options will be based have to be decided on: thus, how important will the price be and which other criteria will be taken into account and to which extend? These are important questions that have to be answered (consciously or subconsciously) for every purchase. The criteria of public purchasing are of great interest not only to business but also politically: Due to the high volumina spent, public procurement can be used to influence economic and social outcomes. By purposefully and strategically choosing and purchasing, the authority can foster employment opportunities for distinct groups, distinct sorts of businesses (e.g. SMEs or minority run businesses) or societal goals. Public procurement thereby can be used as “a powerful tool for policy making.” (Bovis, 1998: 226)

## 2. Law making in a federal context

Germany being a Federal State, legislative competence is delegated to different levels; thereby certain policy areas remain the sole responsibility of Federal laws, while other areas are the realm of Federal States' legislation. As Article 74 of the German Constitutional Law (*Grundgesetz*) lays out, legal regulation regarding the economy are (with the exception of certain areas) part of what is commonly referred to as 'competitive legislation' (*'konkurrierende Gesetzgebung'*) – 'competitive legislation' means that both, the Federal State as well as the Federal States are entitled to pass legally binding regulations in the form of laws as well as decrees (*'Verordnungen'*). Thereby however, Federal law (if existent) sets a framework Federal States' laws have to contend. Thus, while Federal States' laws can address issues that are unaddressed by Federal legislation, they may not enter in opposition with Federal laws. In case of contradictory legislation, the Federal law is superior and exceeds Federal States' laws.

**Figure 1:** Schematic outline of public procurement regulation



**Source:** Own compilation, **Notes:** classic directive without regard to sector specific or defense regulations and budgetary law.

### 3. Public procurement regulations in Germany<sup>2</sup>

Being placed in the context of competition law, public procurement is regulated at national as well as at subnational level. At national level the Anti-Trust Law (*Gesetz gegen Wettbewerbsbeschränkungen*, GWB) regulates public purchasing. At the Federal level as well as in some States, statutory decrees regulate public purchasing or specific aspects therefore even further.<sup>3</sup> At subnational level, the Federal States (*Länder*) are also entitled to adopt Federal State laws on public procurement, which, in 2014, 15 out of 16 *Länder* did.<sup>4</sup> However, next to the GWB and the public procurement laws of the *Länder*, further regulations exist. Furthermore, in some *Länder*, decrees exist.

### 4. Social considerations in public procurement regulations in Germany

According to the stipulations of § 97.1 and §97.2 GWB the general principles of public procurement are defined as competition, transparency and non-discrimination. Within this framework, tenders are awarded to the 'most economically advantageous tender' (§97.5 GWB). Since the reform of 2009, the GBW (which already had been in place since 1958), allows social and ecological criteria in public tendering are explicitly admitted as criteria in public tendering: §97.4 states that the criteria used may include 'social, environmental or innovative aspects as long as these are related to the subject matter and made explicit in the specifications.' [authors' translation] While the GWB does not specify these criteria, today, specifications are to be found in the Federal States' public procurement laws and the specific Federal States' decrees.

In Germany, social criteria in public procurement laws are a relatively new phenomenon: The criteria with the longest tradition in German public procurement regulations aims at enforcing compliance with collective agreements (which in German is referred to as '*Tariftreue*'), and the fostering of companies' participation in apprenticeships<sup>5</sup>. These social requirements in procurement go back to the late 20<sup>th</sup> century: In the 1990s, Hamburg and Berlin introduced – for construction works – the obligation to pay at least the wage set by collective agreements at the location of the work. In the following years, more and more *Länder* took up regulations similar to these stipulations. In the late 1990s, another criterion joined the compliance with collective agreements: Starting in 1999 in Berlin, the companies' participation in vocational training system became a concern in public tendering.

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<sup>2</sup> This paper focusses on German procurement legislation and decrees concerning public procurement only. Other regulations, e.g. guidelines of public administrations, are therefore not considered.

<sup>3</sup> Neither the VgV nor VOL/A or the VOLB/A contain stipulations on social criteria.

<sup>4</sup> Bavaria as the sixteenth state was one of the first to legislate a law in 2000, but abolished it in 2009 after a change in the governing coalition (from Christian-Social majority to Christian-Social/Free Democrats-coalition).

<sup>5</sup> A further point of concern that is given major importance in public procurement law in Germany is the participation of SMEs in public tendering. These are, however, not in the focus of this working paper. For further information see Sarter/Fuchs/Sack, 2014, "*SME-friendly public procurement in Germany?*", Working Paper No.2.

In 2008, with these criteria being part of German (subnational level) legislation, a judgement of the European Court of Justice (ECJ) gained paramount importance for the further development of social criteria in public procurement: Case C-346/06 of 3 April 2008 (*Rüffert vs. Land Niedersachsen*). Based on *Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services*, which was backed up by the freedom to provide services as laid down in Article 39 of the Treaty, it challenged a regulation that stipulated compliance with collective agreements. The ECJ declared the requirement to pay wages according to regional collective bargaining in the public procurement regulation of Lower Saxony as non-conform with European law as long as the agreements referred to were not universally binding (for the Rüffert judgment and the developments in its immediate aftermath see Sack, 2012). As has been shown elsewhere (Sack, 2012), the Rüffert judgment came as an external ‘shock’. Given the fact that compliance with collective agreements had been seen as a secure and legally certain criterion<sup>6</sup>, the Rüffert judgment threatened the legal certainty of social criteria in general. As regulations stipulating compliance with collective agreements were of outstanding relevance in Federal States’ legislation and were one of only two social criteria at the time of the judgment, the Rüffert judgment came to be a turning point for the regulation of public procurement in Germany.

In the aftermath of the Rüffert judgment, regulations which set minimum standards regarding wages were altered. However, the impact of the ruling was not restricted to regulations of compliance with collective agreements; it also triggered changes beyond its rather narrow scope. Starting in 2008, a development began, which can be characterized as an (qualitative as well as quantitative) expansion of social criteria in public procurement regulations at the level of the Federal States: While in the beginning of 2008, compliance with collective agreements, the fostering of apprenticeships as well as the fostering of the participation of SMEs in public tendering<sup>7</sup> were of major importance and further criteria relating to social and structural features did not exist in public procurement regulations, a constant expansion started. Initially more and more states legislated procurement bound minimum wages and strengthened existing criteria concerning apprenticeships. Also collective agreements were a point of concern. Thus, in the aftermath of the Rüffert judgment, a version of compliance with

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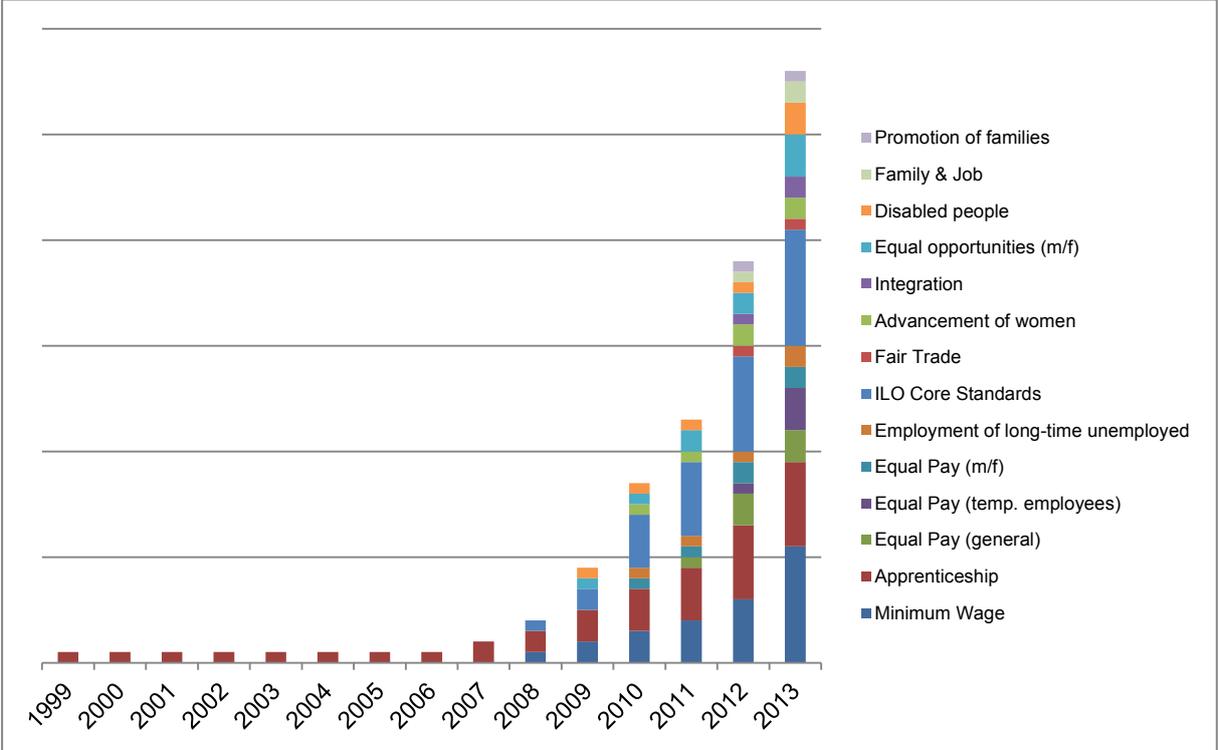
<sup>6</sup> Hardly two years beforehand, in July 2006, the German Constitutional Court (*Bundesverfassungsgericht*) had been dealing with the question whether stipulations such the one in question here were in line with German law (most importantly, the German Constitutional Law). In the course of this, it had declared them to be in conformity to underlying (German) regulations (BVerfG, 11.7.2006, BvL 4/00). It, thus, comes as no surprise that the Rüffert judgement created notable awareness in scientific, legal and political circles as well as in the media (Sack, 2012).

<sup>7</sup> Even though it provides a consideration of major importance in German public procurement regulations, the promotion of SMEs is a rather distinct criterion that operates on differing assumptions and within a different framework. Therefore, stipulations regarding SMEs are not topic of this paper. For further information on this issue see Sarter/Fuchs/Sack, 2014, “SME-friendly public procurement in Germany?”, Working Paper No.2.

collective agreements was sought that was conform to European legislation. In this context, minimum wage provisions for public procurement were of paramount importance.

Starting in 2010, the focus shifted and a further aspect of labour market-regulation became prominent on the agenda: Equal Pay stipulations. After addressed these ‘traditional’ wage and labour market concerns, Federal States began to address a growing number of societal issues in their procurement laws, e.g. in the field of integration or gender equality and vastly extended the scope of the regulations. The focus widened in another sense, too, as procurement laws began to broaden the focus from criteria with ‘domestic’ reach to ‘global’ problems, inaugurating Fairtrade and compliance with Core Labour Standards in their public procurement regulations. Today, compliance with ILO Core Labour Standards for goods used in public contracts is one of the most common social criteria in German procurement law. In 2014 not only did more Federal States include criteria relating to social considerations in their stipulations. Also the number of specific criteria and their scope widened (see Figure 2). However, up to now there is no real sign of an end in this ‘policy expansion’: the laws of Lower Saxony and Schleswig-Holstein, which had been legislated in 2013, contained more criteria than any of the laws before; a 2014 draft law from Hesse follows suit.<sup>8</sup>

**Figure 2:** Expansion of social criteria in German procurement law



**Source:** Own compilation; **Notes:** Criteria relating to the promotion of SMEs as well as ecological criteria were excluded.

<sup>8</sup> For example, the newly elected government of Hesse plans to reform the states’ procurement law in 2014. The recent draft contains criteria of all areas mentioned here, e.g. Fair Trade, Minimum Wage, Gender Equality or reconciliation of family and job (Hess. LT-Drs. 19/401 v. 13.5.2014).

## 5. Social Criteria in contemporary Federal States' Laws

Today, 15 out of 16 German Federal States have public procurement laws; 14 of these included social criteria. However, it seems important to stress that this does not mean that the specific criteria or their regulation are similar. Rather, the stipulations in the Federal States' laws are highly divergent regarding the number of social criteria as well as the specific criteria and their mode of regulation.

While some Federal States have regulations which only include one or two social criteria (the most common being minimum wages and the compliance with ILO Core Labour standards), other Federal States' laws (e.g. Schleswig-Holstein) include up to 13 different social criteria. The social criteria included in Federal States' public procurement laws comprise a wide range of issues. In general, social criteria in Federal States' laws (can) encompass criteria that aim at structural economic features (e.g. the participation of SMEs or apprenticeships), criteria that aim at the integration of disadvantaged groups in the labour market (e.g. the employment of long-term unemployed) and those meant to foster societal goals such as gender equality. Today, the following criteria are included in at least one Federal State's public procurement law: minimum wage stipulations, compliance with collective agreements (for the public transport sector), various kind of stipulations regarding equal pay, compliance with the ILO Core Labour Standards<sup>9</sup>, the purchase of certified Fairtrade goods, the advancement of women and gender equality, integration measures, the inclusion of workers with disabilities and long-term unemployed people as well as measure to foster reconciliation of work and family life as well as the advancement of families.

In the following, the single criteria will be outlined more in detail; they will be clustered according to their reach and aims as wage-related criteria, criteria with a focus on working conditions in a global context, and criteria with a domestic focus. However, it is important to keep in mind that the aim of this paper is to provide an overview over the development and the current situation rather than given an introduction to bidding procedures. Therefore, the focus is on the development and the existence of the specific criteria leaving other aspects (e.g. the control of the proof require in each single Federal State of each criterion) to be touched upon only cursorily.

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<sup>9</sup> The Core Labour Standards of the International Labour Organisation (ILO) set minimum standards for working conditions norming four basic principles to be respected in employment (the freedom of association and the recognition of the right to collective bargaining, the eradication of all forms of forced or compulsory labour, effective abolition of child labour, and the extirpation of discrimination in respect of employment and occupation). Thereby, they encompass eight international ILO conventions, namely *C087 - Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87)*, *C098 - Right to Organise and Collective Bargaining Convention, 1949 (No. 98)*, *C100 - Equal Remuneration Convention, 1951 (No. 100)*, *C105 - Abolition of Forced Labour Convention, 1957 (No. 105)*, *C111 - Discrimination (Employment and Occupation) Convention, 1958 (No. 111)*, *C138 - Minimum Age Convention, 1973 (No. 138)* and *C182 - Worst Forms of Child Labour Convention, 1999 (No. 182)*.

### **5.1 Wage related criteria I: compliance with collective agreements and minimum wages**

As has been stated above, the Rüffert judgment stipulated that only compliance with universally binding collective agreements can be taken as a criterion. This created a specific problem in Germany: Based on the longstanding tradition of collective bargaining autonomy, wage setting in Germany is based on collective agreements. Until July 2014, when the German parliament, the Bundestag adopted a law on minimum wages<sup>10</sup>, Germany had no binding regulations on general minimum wages. However, special regulations for particular branches did exist to which cross references in the procurement laws of the *Länder* are made. The Federal Law concerning compulsory working conditions for those workers that have been posted cross border and regularly work in Germany (*Arbeitnehmerentsendegesetz*, AEntG) contains the possibility to regulate wages by decree and thereby make them generally applicable in particular sectors (§7 and §11). In 2014, the specific sectors in which wage regulations according to AEntG existed were waste management (including scavenger and winter road clearance), the construction sector, the electrical trade, the stonemason and stone sculpturing trades, certain services in job-training and further, temporary work and personal leasing, specialised work in coal mines, the butcher trade and meat industry as well as in industrial cleaning, roofers and laundry services for commercial clients (§7). Furthermore, §11 ff. extend regulatory options to care services. The AEntG offered possibilities to regulate wages and working conditions in a system that was largely based on collective bargaining autonomy. However, the reach was fairly limited.

Apart from AEntG, also the Federal Law on collective agreements (*Tarifvertragsgesetz*, TVG) offered the possibility to declare collective agreements universally binding if employers that are bound by collective agreements employ less than 50% of the employees that are bound to fall under the collective agreement in question. Furthermore, it was required that regulation was in 'public interest' (§ 5). On July 1<sup>st</sup> 2014, 501 out of a total of roughly 70.000 collective agreements (both including original as well as supplementary and amending agreements) had been declared universally binding (BAS, 2014a: 3).

Furthermore, a third option existed to regulate minimum wages and working conditions in certain sectors: The Federal Law on minimum working conditions (*Mindestarbeitsbedingungengesetz*, MiArbG) laid down the possibilities to implement minimum wages if at the national level less than 50% of the employees in a given sector are employed in companies that are bound by collective agreements (§1.2). However, no minimum wages were induced based on this law (BAS, 2014b: 3).

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<sup>10</sup> This law will enter into force on January 1st, 2015 and foresees a general minimum wage of 8,50 €. Collective agreements and sector-specific minimum wages have priority over the minimum wage, if they are higher. Trainees, apprentices, long-time-unemployed, volunteers, and the underaged are excluded. Furthermore, during a transition period until December 31<sup>st</sup>, 2017, collective agreements can be lower than the minimum wage if they are declared representative. During this period certain branches are excluded, too (newspaper delivery, seasonal workforce) (*Tarifautonomiestärkungsgesetz, Art.1 (Mindestlohnengesetz, MiLoG) v. 11.8.2014*).

As has already been outlined, regulations and requirements concerning the compliance with collective agreements (so called *Tariftreueregelungen*) are among the oldest social criteria integrated in public procurement regulations in Germany. First regulations go back to the 1990s and therefore existed already before the Ruffert judgment. However, the Ruffert judgment had declared stipulations regarding collective agreements which are not universally binding as not being in conformity with European legislation. Therefore, former stipulations could not be upheld, their content changed in the aftermath of the said ruling; against the background of the Ruffert judgment and the fact that minimum wages only existed in certain sectors, it was only in certain sectors that compliance could be required. In order to content the judgment, public procurement regulations were altered and the reach of compliance to those agreements limited to those that were universally binding or to compliance with collective agreements in the public transport sector.<sup>11</sup> Despite the fact that those Federal regulations are binding for everyone, the Federal States' procurement laws reiterate those regulations and require bidders to declare compliance with those rules. While some *Länder* use specific references (the AEntG being the most common point of reference followed by the MiArbG, and the TVG being mentioned in Hamburg solely), in many cases the *Länder* laws generally refer to 'Federal States' law concerning minimum working or wage conditions'. Hereby all of those regulations (AEntG, TVG, MiArbG) concerning minimum wages are covered even if they are not mentioned directly. While this limited the use of regulations referring to wage standards, compliance with collective agreements remained a point of concern. Hereby, however, the reach of the regulations were limited.<sup>12</sup>

Second, in the aftermath of the Ruffert judgment, a new kind of stipulation entered the stage: Minimum wages were introduced in public procurement. In addition to regulation wages by reference to existing law, Federal States' laws now implemented stipulations on procurement related minimum wages. Twelve *Länder* legislated procurement specific minimum wages,

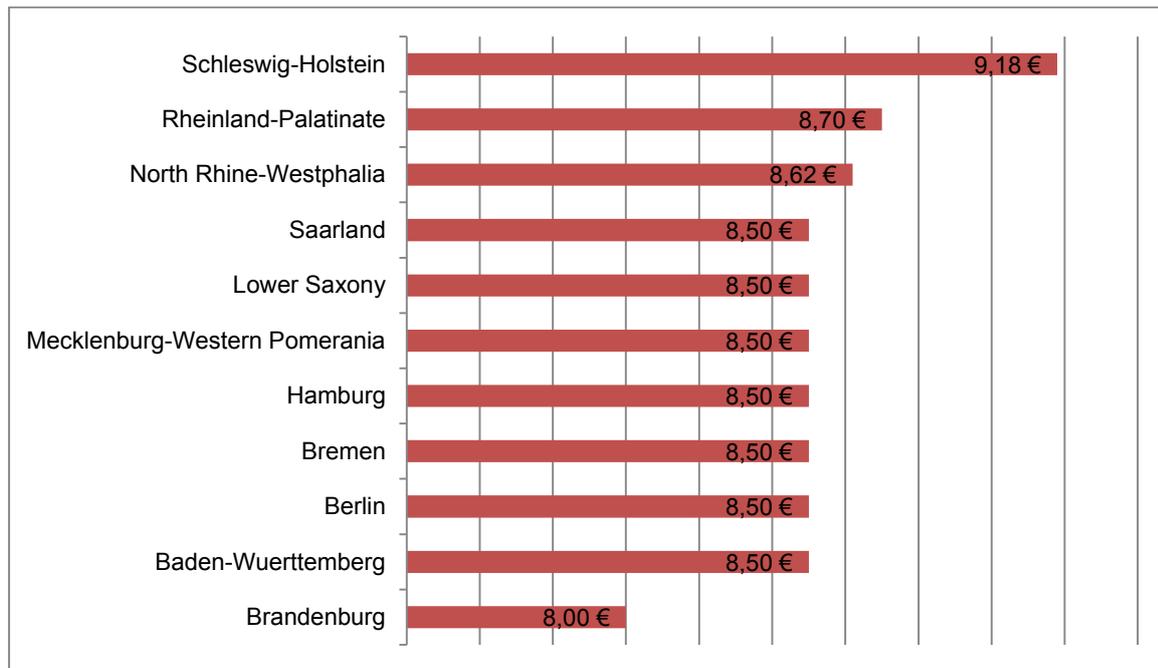
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<sup>11</sup> The European law foresees special rules for the public transport sector. In accordance with the *Art. 58 and 91ff. TFEU* and the *Regulation (EC) No 1370/2007 of the European Parliament and of the Council 23 October 2007 on public passenger transport services by rail and by road and repealing Council Regulations (EEC) Nos 1191/69 and 1107/70*, public transport can be regarded as a service of general interest. Therefore it is not affected by the limitations of the Ruffert judgement. With the exception of Hamburg, Hesse and Saxony all Federal States' laws require compliance with 'respective and representative collective agreements that have been established by a qualified trade union' in this sector. Suitable collective agreements are defined by decree of the subnational ministry in charge.

<sup>12</sup> A continuous point of disagreement in the debate is on 'duplicated' stipulations. Critics of the policy expansion in the public procurement of the German *Länder* argue that stipulations on minimum wage, universally applicable tariffs, equal pay and ILO Core Labour Standards (see below) are redundant because the Federal regulations cover these aspects of industrial relations not only for the whole country but also for the whole economy in which public procurement is just a section. Proponents, instead, argue that Federal states' stipulations are of importance for two reasons. First, the states and cities have particular staff and knowledge overseeing the implementation. Second, the subnational authorities have a particular incentive for control as contract penalties have to be paid to the local budget (in difference to fines in case of the violations of general rules that are allocated the general states' income). Thus, the debate is very much about the actual enforcement of social considerations.

ranging from 8,00 € (Brandenburg) to 9,18 € (Schleswig-Holstein) (see figure 3).<sup>13</sup>The level of the minimum wage is thereby, determined differently, either by specific commissions (Baden-Wuerttemberg, Brandenburg, Bremen, Lower Saxony, North Rhine-Westphalia, Rheinland-Palatinate, Saarland) or by States' governments (Berlin, Hamburg, Mecklenburg-Western Pomerania, Schleswig-Holstein).

**Figure 3:** Level of procurement specific minimum wages in the German Länder



**Source:** Subnational procurement laws and WSI, 2014

Introducing the minimum wage in public procurement turned out to be of notable concern for two reasons: First, given the fact that generally binding minimum wages had been declared as conform to European legislation, it was assumed that this extends to procurement specific minimum wages as well. However, despite their widespread reach and the fact that wage related criteria are among the first social criteria in German public procurement laws, procurement related minimum wages are somehow contentious. Thus, at the time of writing, two requests for preliminary rulings have been transferred to the ECJ regarding the question whether stipulations in the *Tarifreue- und Vergabegesetz North Rhine-Westphalia* (TVgG NRW) and the *Landestarifreuegesetz Rheinland-Palatinate* (LLTG) regarding procurement related minimum wages are not in conformity to European primary and secondary law (*Case C-549/13 Request for a preliminary ruling from the Vergabekammer Arnsberg (Germany) lodged on 22 October 2013 – Bundesdruckerei GmbH v Stadt Dortmund and Case C-115/14*

<sup>13</sup> Four of those *Länder* – namely Berlin, Bremen, Hamburg, Schleswig-Holstein – legislated a specific law for minimum wages making them applicable also beyond public procurement. In Hamburg, for example, compliance with minimum wage regulations is required from every recipient of funding from the Federal State and every company that is supervised by the Hamburg authorities (§2.3ff. *Hamburgisches Mindestlohngesetz*).

*Request for a preliminary ruling from the Oberlandesgericht Koblenz (Germany) lodged on 11 March 2014 — RegioPost GmbH & Co. KG v Stadt Landau).*

Second, as Germany has had no general minimum wage up to 2014 introducing it in the Federal states' regulations became a political lever in the struggle for stipulating a general minimum wage on the Federal level.

## **5.2 Wage-related criteria II: equal pay provisions**

Alongside regulations on minimum wages and compliance with generally applicable collective agreements, Federal States' law stipulate another regulation regarding wages: Equal pay. However, the actual points of reference for this provision vary. While some *Länder* refer to Equal pay in general others take agency workers or men and women as points of reference.

Equal pay (especially for men and women) is, however, not a new nor an otherwise unregulated issue. Rather, the principle of equal pay for men and women was already laid down in the Treaty of Rome (Article 119). Thereby, the duty to foresee non-discrimination in pay was placed on Germany. Here, gender based wage discrimination hadn't officially been declared illegal until 1955 when the Federal Labour Court (*Bundesarbeitsgericht*) declared these stipulations as non-conform to the constitution and it, as Ziegler states, "[...] took some decades till this ruling was *realiter* put into practice." (Ziegler, 2010: 53; translation by authors) In the years to follow, regulation on the topic was further expanded (*Council Directive 75/117/EEC of 10 February 1975 on the approximation of the laws of the Member States relating to the application of the principle of equal pay for men and women & Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions*). Thus, it has been in focus of European policies for some time (see e.g. *Resolution of the European Parliament on equal pay for work of equal value & Commission Communication of 17 July 1996 on the code of conduct concerning the implementation of equal pay for women and men for work of equal value*). Furthermore, at European level, a broad jurisdiction exists regarding this issue (e.g. C-43/75, *Defrenne v Sabena*, 8 April 1976). At German level, in 1980, §612.3 Civil Code (*Bürgerliches Gesetzbuch, BGB*) was passed, which stipulated equal pay for men and women (Liebscher, 2009: 4). It was abolished in 2006, when the Anti-discrimination law (AGG) was passed which stipulates non-discrimination relating to wages on the grounds of ethnic background, gender, religion or belief, disability, age or 'sexual identity' (most importantly §2 AGG).

Today, equal pay is regulated at European level (most importantly by *Directive 2006/54/EC of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast)* as well as by

*Article 157 Treaty on the Functioning of the EU*) as well as at Federal level in Germany (§2 AGG).<sup>14</sup>

Equal pay is a point of reference, in eight German subnational public procurement regulations. Thus, public procurement laws of Thuringia (§ 10.3 *Thüringer Vergabegesetz*, ThürVgG), Saxony-Anhalt (§10.3 *Landesvergabegesetz Sachsen-Anhalt*, LVG LSA) and Berlin (§1.8 *Berliner Ausschreibungs- und Vergabegesetz*, BerlAVG) set equal pay as a general requirement in public tenders, while Hamburg (§ 3.3 *Hamburgisches Vergabegesetz*, HmbVgG), North Rhine-Westphalia (§ 4.5 TVgG NRW), the Saarland (§3.6 *Saarländisches Tariftreuegesetz*, STTG) and Schleswig-Holstein (§ 4.5 *Tariftreue- und Vergabegesetz Schleswig-Holstein*, TTG) include equal pay provisions for agency workers.<sup>15</sup> The public procurement law of Rheinland-Palatinate (LTTG), which apart from minimum wage and compliance with collective agreements does not give specific criteria but examples of social criteria that can be used, explicitly mentioning equal pay for men and women as one possible social criterion (§1. 3 LTTG).

### 5.3 ILO Core Labour Standards

Compliance with ILO Core Labour Standards is part of international law as well as a point of concern in European public procurement legislation: International obligations to be respected in the course of public procurement are mentioned several times in the Directive 2014/24/EU. Thus, e.g. Recital 98 of the Directive 2014/24/EU names compliance “in substance with fundamental International Labour Organisation (ILO) Conventions” as one of the conditions that can be imposed on contract performance. Furthermore, Article 18.2 calls upon the member states to

“[...] 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”

Among the legal obligations mentioned in Annex X, *Directive 2014/24/EU* explicitly lists *ILO Convention 87 on Freedom of Association and the Protection of the Right to Organise*; *ILO Convention 98 on the Right to Organise and Collective Bargaining*; *ILO Convention 29 on Forced Labour*; *ILO Convention 105 on the Abolition of Forced Labour*; *ILO Convention 138 on Minimum Age*; *ILO Convention 111 on Discrimination (Employment and Occupation)*; *ILO*

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<sup>14</sup> § 4 *Teilzeit- und Befristungsgesetz (TzBfG)* foresees that employees working part-time are entitled to – at least – the percentage of the wages of full-time working employees that equals their working-time and thereby hampers indirect wage discrimination by working time.

<sup>15</sup> Due to readability aspects, only the short-names of the subnational laws are used in the text. For full-length titles see the reference section at the end of this working paper.

*Convention 100 on Equal Remuneration; ILO Convention 182 on Worst Forms of Child Labour.*<sup>16</sup>

In Germany, a number of *Länder* have provisions that stipulate the use of products produced under compliance with the ILO Core Labour Norms only. Thus, the laws of Berlin, Mecklenburg-Western Pomerania, Saxony-Anhalt, Thuringia, Bremen, Hamburg, Lower Saxony, North Rhine-Westphalia, Rheinland-Palatinate, Saarland and Schleswig-Holstein stipulate that public sector purchasing is to be restricted to products which were manufactured in compliance with ILO Core Labour Standards.

Thereby, some *Länder* – like Rheinland-Palatinate (§1.3 LTTG)<sup>17</sup>, Mecklenburg-Western Pomerania (§11 *Vergabegesetz Mecklenburg-Vorpommern*, VgG M-V), the Saarland (§11 STTG) and Saxony-Anhalt (§12 LVG LSA) – have rather broad regulations in their public procurement laws and no further specification via statutory instruments or ministerial norms. Others, namely North Rhine-Westphalia (§18 TVgG NRW), Schleswig-Holstein (§18.1 TTG), Thuringia (§11 ThürVgG), Berlin (§8 BerlAVG), Bremen (§18.2 *Tariffreue- und Vergabegesetz Bremen*, TtVG) and Hamburg (§3a HmbVgG) have regulations that further specify in which cases compliance with ILO Core Labour Standards is an issue. Berlin, Bremen and Hamburg only limit the range of products concerned: Thus, §8 of the Berlin procurement law states that compliance with ILO Core Labour Standards is a goal all public purchasing should adhere to (§8.1 BerlAVG). However, proof of compliance is only required for products which are vulnerable to breaches of these standards (§8.3 BerlAVG); these products are defined in a special list and currently contain products made from natural leather, natural textiles (especially cotton and hand-woven carpets), natural stones, wooden products, coffee, cacao, tea, tropical fruits, fruit juices, vine, herbs, honey, rice, dried fruit, nuts, sugar, sweets, fishery products, fireworks, matches, cut flowers and potted plants (*Gemeinsames Rundschreiben Nr. 1/2012, Senatsverwaltung für Wirtschaft, Technologie und Forschung, Senatsverwaltung für Stadtentwicklung und Umwelt Berlin*).

Similarly, in Hamburg, §3a.1 of the procurement law calls upon the purchasing authorities to ensure compliance with ILO Core Labour Standards (§3a.1 HmbVgG). However, according to §3.a.3 these products will be specified further: Also in this case, a circular letter of the Hamburg Financial Authority defines a certain range of products (cloths, textiles, products manufactured with leather, natural rubber, or tannery products, as well as toys, sports equipment or products which are manufactured using one or more of these products as far

<sup>16</sup> These eight Conventions, which set minimum standards for working conditions by norming four basic principles to be respected in employment (the freedom of association and the recognition of the right to collective bargaining, the eradication of all forms of forced or compulsory labour, effective abolition of child labour, and the extirpation of discrimination in respect of employment and occupation), are also commonly referred to as the Core Labour Standards of the International Labour Organisation (ILO).

<sup>17</sup> In contrast to other *Länder*, in Rheinland-Palatinate the stipulation regarding the ILO Core Labour Norms are voluntarily (§ 1.3 LTTG).

as they are mainly composed of these materials) (*Rundschreiben der Finanzbehörde Hamburg, 6.3.2009*).

Also Bremen's decree on compliance with the ILO Core Labour Standards in public procurement (*Bremische Kernarbeitsnormenverordnung, BremKernV*) defines that compliance with ILO Core Labour Standards have to be proven for Textiles and textile products, natural stones, coffee, cacao, tea, flowers, toys and sporting balls or any product consisting majorly one of these products (§1, §2 BremKernV).

Thüringen, North Rhine-Westphalia, and Schleswig-Holstein go further in qualifying (and restricting) the reach of the stipulations regarding compliance with ILO Core Labour Standards; they not only limit it regarding the range of goods concerned but also regarding the countries of origin of the goods to be purchased: While §11 of Thuringia's procurement law (ThürVgG) does not restrict the compliance with ILO Core Labour Standards, the form on compliance with ILO Core Labour Standards (*Formblatt zur Beachtung der ILO Kernarbeitsnormen (Ergänzende Vertragsbedingung, EVB-ILO)*) defines a range of products (clothing, textile products and textiles, natural rubber, leather and products manufactured with leather, toys, sports equipment, 'cheap products made from wood', natural stones, agricultural products, products manufactured from clothing, textiles and textile product, natural rubber and leather and products made of leather) for which compliance has to be proven if the product comes from Africa, Asia or Latin-American. Thereby, compliance can be proven by labels and certificates as well as by provider's declarations in case that no labels or certificates exist. Furthermore, the possibility to explain why 'despite intensively trying' labels and certificates could not be brought by is left open to the tenderer.

North Rhine-Westphalia and Schleswig-Holstein go one step further: They explicitly limit the reach of this stipulation to the principal subject matter. Thus, in North Rhine-Westphalia, the '*Verordnung Tariffreue- und Vergabegesetz North Rhine-Westphalia*' (RVO TVgG NRW) limits the range of purchases that require a proof of compliance with ILO Core Labour Standards to purchases where the main part of the good to be purchased (§1.3 RVO TVgG NRW) contains 'sensitive' products which come from one of the countries mentioned at the time of tendering in the DAC list of the OECD (§14.2 RVO TVgG NRW).

The *Schleswig-Holsteinische Vergabeverordnung* (SHVgVO) limits the requirements of proof of compliance with ILO Core Labour Standards is need to purchases that surpass a threshold of €15.000 (§6.1 SHVgVO), if the principal subject-matter consists of goods of at least one of the following groups: Clothes, textiles and textile products, products of natural rubber, tannery products, toys, sports articles, wood and wooden products, natural stone and agricultural products (§6.2 SHVgVO) and if a certification is possible (§6.1 SHVgVO). Furthermore, these conditions are limited to products manufactured in Africa, Asia and Latinamerica (§6.1 SHVgVO).

## 5.4 Fairtrade

As noted by the World Fair Trade Organization (WFTO) and Fairtrade International (FLO), Fairtrade can be seen as an answer to the perception of “[...] the failure of conventional trade to deliver sustainable livelihoods and development opportunities to people in the poorest countries of the world.” (WFTO & FLO, 2009 in Smith, 2013). Based on this assumption, Fairtrade seeks to provide an alternative approach towards decent working and living conditions in the Global South. It is a consumer strategy which is based on consumption choices. Fairtrade being a consumer strategy that is based on consumption choices of informed consumers, public sector purchasing has attracted attention, especially given the fact that not only general purchasing volumes are high but that this especially holds true for certain goods such as e.g. clothes. In this context, where public authorities are responsible for large sums used for purchasing goods and services, and are one of the main purchasers of certain goods, the practices of purchasing gain paramount importance for a consumption based strategy: By influencing public sector bodies’ procurement strategies towards the consumption of fair traded goods, a relevant share of the market can be shifted towards fair consumption. This led to local authorities as well as public institutions being addressed by Fairtrade organisations and activists. In this context, the inclusion of Fairtrade as a criterion in public procurement has been lobbied and could eventually be included in some *Länder’s* public procurement regulations: In Germany, the inclusion of Fairtrade as a criterion in public procurement is relatively new. It was first introduced in North Rhine-Westphalia (§18.1 TVgG NRW) in 2012. The only other Land that holds a stipulation on Fairtrade in its public procurement laws until now is Schleswig-Holstein, where it was introduced one year later, in 2013 (§18.1 TTG).

The deliberate purchasing of Fairtrade goods has also been a point of concern at the European level. First, it already was an issue in the European Court of Justice. Thus, in 2012 the question whether public procurement could be restricted to Fairtrade goods was raised in the ECJ. Thereby, the ECJ declared in C-368/10 European Commission vs Kingdom of the Netherlands of 10 May 2012 that in general Fairtrade can be used as a criterion as long as a) no specific labels are required but rather exemplary labels are given or specific criteria defined and b) a link to the subject matter of the contract exists. In the course of the reform of European public procurement regulations, this has been codified in *Recital 97 of the Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC*:

“In accordance with the case-law of the Court of Justice of the European Union, this also includes award criteria or contract performance conditions relating to the supply or utilisation of fair trade products in the course of the performance of the contract to be awarded. Criteria and conditions relating to trading and its conditions can for instance refer to the fact that the product concerned is of fair trade origin, including the requirement to pay a minimum price and price premium to producers.”

Also the use of labels<sup>18</sup> has been clarified:

“Where contracting authorities do not require the works, supplies or services to meet all of the label requirements, they shall indicate which label requirements are referred to.” (Article 43.1 Directive 2014/24/EU)

## 5.5 Gender equality, reconciliation and family

Next to stipulations regarding equal pay, some *Länder* laws include stipulations meant to foster the advancement of women or equal opportunities. Thereby, two different approaches and points of reference can be stated: While some *Länder* rely on assuring equal treatment, others take into account measures that are bound to the advancement of women.

The Schleswig-Holstein law on public procurement (TTG) lays down that the promotion of equal opportunities as well as non-discriminations and the compliance with binding anti-discrimination laws are taken into account if offers are equivalent (§18.3 TTG). Also Bremen stipulates that a tenderer that fosters equal opportunities of men and women in working life, is given priority over equivalent offers from other tenderers which don't have similar measures (§18.3 TtVG). Similarly, Thüringen stipulates that the existence of measures to foster equal opportunities between men and women in working life are taken as decisive criteria in case of equivalent offers if the company has at least 25 employees (§13 ThürVgG). In Lower Saxony, procurement law (NTVergG) allows promotion of equal opportunities and gender equality to be taken as criteria in tendering. However, this is restricted to enterprises with a minimum of 20 employees (§11 NTVergG).

While these *Länder*, thus, rely exclusively on equal opportunity measures, others explicitly include measure to promote women in working life: Since 2010, the Berlin law of public procurement (BerlAVG) stipulates that tenderers have to assure that they engage in measures that foster the advancement of women in accordance to the decree on the promotion of women (*Frauenförderverordnung*, FFV) (§9 BerlAVG). It furthermore makes explicit reference to Federal State's law on equal opportunities (*Landesgleichstellungsgesetz*, LGG), which stipulates specific thresholds in public procurement for measures relating to the advancement of women (§9 BerlAVG). The LGG stipulates in to §13 that above a threshold of 25.000 € for the provision of services and 200.000 € for construction, the contract has to con-

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<sup>18</sup> Article 43.1 of Directive 2014/24/EU also lays down minimum requirements that labels have to fulfill: „Where contracting authorities intend to purchase works, supplies or services with specific environmental, social or other characteristics they may, in the technical specifications, the award criteria or the contract performance conditions, require a specific label as means of proof that the works, services or supplies correspond to the required characteristics, provided that all of the following conditions are fulfilled: (a) the label requirements only concern criteria which are linked to the subject-matter of the contract and are appropriate to define characteristics of the works, supplies or services that are the subject-matter of the contract; (b) the label requirements are based on objectively verifiable and non-discriminatory criteria; (c) the labels are established in an open and transparent procedure in which all relevant stakeholders, including government bodies, consumers, social partners, manufacturers, distributors and non-governmental organisations, may participate; (d) the labels are accessible to all interested parties; (e) the label requirements are set by a third party over which the economic operator applying for the label cannot exercise a decisive influence.”

tain specific measure to foster the situation of women and a declaration of compliance with antidiscrimination laws (§13 LGG). The formerly said concerns the advancement of women as well as the measures for the reconciliation of work and family life.<sup>19</sup> The North Rhine-Westphalia law foresees that contracts shall be awarded to enterprises that have measures in place to promote women and to foster reconciliation of work and family life are taken and binding anti-discrimination laws respected (§19.1 TVgG NRW). The RVO thereby give a list of such measures (§17 RVO TVgG NRW). However, this only concerns companies with more than 25 employees and above a threshold of €50.000 respectively €150.000 if construction works are concerned.

While the North Rhine-Westphalian (§19.1 TVgG NRW) and Schleswig-Holsteinian (§18.3 TTG) laws contain stipulations to foster the reconciliation of work and family life, Saxony-Anhalt explicitly includes ‘qualitative measures to promote families’ as a criterion for companies with more than 25 employees (§4.2 LVG LSA).

## 5.6 Integration, Inclusion, and labour market integration of long-term unemployed

A further field of consideration in German public procurement laws is the fostering of employment for certain disadvantaged groups. Thereby, different *Länder* focus on diverse groups whose employment opportunities shall be fostered. These are – although related – placed in different legal frameworks: The major difference is, generally speaking, the depth of Federal regulation regarding the specific groups whose employment is to be fostered. While a tight legal frame work exists regarding inclusion of people with disabilities, integration as far less regulated – and mainly limited to anti-discrimination.

Thus, stipulations aiming at fostering working opportunities for people with handicaps take place within a rather tight general legal framework that aims at fostering participation and inclusion of people with disabilities: Next to public procurement regulations, also the German Social Law and here especially the Social Code (*Sozialgesetzbuch*, SGB)<sup>20</sup> foresees special regulations regarding the inclusion of persons with disabilities.<sup>21</sup> Next to specific regulations regarding among others working times<sup>22</sup>, vacations<sup>23</sup> and special protection against dismissals<sup>24</sup> for persons with disabilities, the Social Code foresees the obligation to employ persons with disabilities: Thus, employers with a (yearly average of) at least 20 employees are re-

<sup>19</sup> This, however, only concerns firms with at least eleven regular employees (apprentices excluded).

<sup>20</sup> The German Social Code (*Sozialgesetzbuch*) is constituted by twelve chapters (SGB I-XII) focussing on different aspects of social security/welfare (e.g. Rehabilitation and Integration of the Disabled in SGB IX or Health Insurance in SGB V).

<sup>21</sup> The law distinguishes different ‚levels of disabilities‘ (*Grad der Behinderung*, GdB), ranging on a scale from 20 to 100 (§ 2 SGB IX). The level of a disability is ascertained by medical estimators under the rules of a special decree (*Versorgungsmedizin-Verordnung*). The rules described here only apply for *severely* disabled persons (level of disability >50) (VdK 2014).

<sup>22</sup> § 124 SGB IX states that employees with disabilities can reject working overtime.

<sup>23</sup> According to § 125 SGB IX people with disabilities are entitled to additional days of paid holidays.

<sup>24</sup> Disabled persons can only be dismissed with a cancelation period of four weeks and the approval of the integration agency (§ 85-86 SGB IX).

requested have at least 5% employees with disabilities in their workforce; and those enterprises that have less than 40 employees have to employ one and those having less than 60 employees 2 employees with disabilities (§71 SGB IX). If an employer does not fulfil this obligation, they are obliged to pay a countervailing charge (§77 SGB IX). In this context, it comes as no surprise that regulations relating to inclusion which are contained in public procurement regulations tend to cross-reference existing Federal (social) law. In this sense, the public procurement laws of Bremen (§18.3 TtVG), and Schleswig-Holstein (§18.3 TTG) favour those companies, that comply with the rules of §71 SGB IX. Also Lower Saxony (§11.2 NTVerG) takes the employment of people with disabilities as a point of concern. §13 RVO TVgG also states that in North Rhine-Westphalia tenderers can also be required to employ more people with disabilities than required by national law.

Furthermore, regulations at various level stipulate special conditions for sheltered workshops: European regulations explicitly offer possibilities to foster inclusion and employment opportunities for people with disabilities by setting distinct standards for contracting sheltered workshops, too. Article 19 of the Directive 2004/18 as well as Art. 20, 2014/24 stipulate the possibility to restrict tendering to sheltered workshops. In Germany, the Social Code sets special rules for sheltered workshops and workshops for the blind in public procurement (§141 SGB IX). Similar provisions are also given by other regulations such as §56.1 of the law on disabled people (*Schwerbehindertengesetz*, SchwbG), whose regulations specify that those workshops generally are to be favoured in tendering procedures. In addition to the stipulations in the Social Code, Federal public procurement regulations of the VOL/A declares in Art. 3.5-j that a direct award is possible, if the contract shall only be attributed to is aimed at sheltered workshops or sheltered workshops for the blind. The procurement laws of the *Länder* partly refer to this stipulation. Saxony-Anhalt reiterates the regulation of §141 SGB IX in §4.3.<sup>25</sup> Also the procurement laws of Hamburg (§3.5 HmbVgG), North Rhine-Westphalia (§4.6 TVgG NRW), Saarland (§3.7 STTG) and Schleswig-Holstein (§4.6 TTG) specify that sheltered workshops as defined in §141 and §143 SGB IX are excluded from any collective agreement or minimum wage regulation.

Integration, on the other hand, is much less regulated and the existent regulations largely consist of anti-discrimination measures, like European stipulations of free movement and its anti-discrimination legislation, and jurisdiction or the stipulations of the Constitutional Law (Article 3) and the Anti-Discrimination law in Germany. Furthermore, integration as an aim in procurement law is a relatively new and hardly prominent phenomenon in Germany: For the first time, it was introduced in public procurement regulations in 2012, when a new public

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<sup>25</sup> European regulations explicitly offer possibilities to foster inclusion and employment opportunities for people with disabilities by setting distinct standards for contracting sheltered workshops, too. Article 19 of the Directive 2004/18 as well as Art. 20, 2014/24 stipulate the possibility to restrict tendering to sheltered workshops.

procurement law was issued in North Rhine-Westphalia. This included „aspects relating to integration“ as one of the possible (social) criteria in public sector procurement (§3.5 TVgG NRW). Following this, Schleswig-Holstein (§3.6 TTG) integrated a similar provision in its public procurement regulation in 2013. However, while both laws state that aspects relating to integration can be taken into account – if they are related to the subject matter of the contract – both regulations aiming at fostering integration are rather vague and a definition of what integration related aspects can be is omitted.

A further criterion regarding labour market integration is the employment of long-term unemployed. Like the purchase of certified Fairtrade products, this is a criterion that has already been approved by the ECJ (in *C-31/87, Gebroeders Beentjes BV vs. State of the Netherlands of September 20th 1988*, the ECJ declared this a possible criterion as long as „it has no direct or indirect discriminatory effect on tenderers from other Member States of the Community.“ (37iii)) However, it also is a criterion that is only laid down in three Federal States' laws: While the public procurement law of Rhineland-Palatinate of 2010 mentions it among the four ‚social aspects that can especially be required‘ (§1.3 LTTG), it was introduced as a criterion in the Lower Saxonian law in 2013 (§11.2 NTVerGG). Also the RVO TVgG NRW stipulates that the employment of long-term unemployed or ‚other groups vulnerable to poverty‘ as well as of those ‚whose integration poses special problems‘ can be taken into account (§13.3 RVO TVgG NRW).

## 5.7 Dual Vocational Training

One of the criteria in public procurement regulations that relates to structural features of the economy aims to foster companies' participation in the country's system of Dual Vocational Training (*Duale Berufsausbildung*).<sup>26</sup>

The German model of dual vocational training is rather distinct. Its main pillars are duality, corporatism and the concept of occupation (Bosch, 2010: 143f.). Being firmly grounded in a dual responsibility of the State and firms, it combines public and private responsibility and participation in training as well as regarding the final exams; it thereby relies on practical company specific, coated training in a firm in combination with theoretical courses in sector specific public schools. Apprenticeships are overseen by the chambers and the final exams are the joint responsibility of practitioners from firms and teachers from the vocational schools. Specific vocational training frameworks (*Ausbildungsordnungen*) define contents and elements of vocational trainings in a specific job country-wide. They are negotiated by employers' organisations and trade unions as well as the Federal State and the *Länder*;

<sup>26</sup> A further criterion that relates to structural features of the German economic system is the promotion of SMEs. However, as this relates to the economic ability of enterprises and structurally shows clearly different intentions and patterns that clearly distinguish it from social criteria as treated here, it is not outlined in this context. For further information see Sarter/Fuchs/Sack, 2014.

while employers and trade unions agree over the contents of these *Ausbildungsordnungen*, these are implemented by the Federal ministry in charge and the *Länder* who are responsible for the system of professional schools (Busemeyer, 2012; BMW, 2014: 1).

Given the paramount importance of vocational training in Germany, it comes as no surprise that criteria relating to apprenticeships were among the first to be established in a German procurement law.

In 2014, eight states had public procurement laws that foresee criteria related to apprenticeships. Thereby, a dual focus can be stated: the participation in vocational training on the one hand and (financial) contributions to the system of vocational training on the other hand. Berlin (§10 BerlAVG), Bremen (§18.3 TtVG), Rhineland-Palatinate (§1.3 LTTG), Saxony-Anhalt (§4.2 LVG LSA) and Schleswig-Holstein (§18.3 TTG) give preference to bidders who allocate apprenticeships or contribute to the system of vocational training financially. While defining the same rule, Lower Saxony (§11.2 NTVerG) excludes companies with less than 20, Thuringia excludes those with less than 25 employees (§13 ThürVgG).

The North Rhine-Westphalian law postulates that any “aspects fostering apprenticeship” can be taken into account by public tenderers as a yardstick (§3.5 TVgG NRW). Furthermore, in North Rhine-Westphalia, job-training can be a mandatory requirement for construction-companies (§13.3 RVO TVgG NRW). In addition to favouring companies that participate in Dual Vocational training (see above) this broad interpretation can also be found in Schleswig-Holstein, where “aspects fostering apprenticeships” can be taken into account in procurement procedures (§3.6 TTG).

## **6. Types of criteria / proofs of compliance**

Next to the specific criteria used in the distinct public procurement laws, their specific design varies. Thus, while some criteria tend to be mandatory requirements (e.g. the compliance with minimum wages), others (such as integration or reconciliation of work and family) tend to be optional for the procurer.

Furthermore, variance can be found regarding the type of proof of compliance with a certain stipulation; this differs heavily between different types of criteria and the different Federal States' laws. If specified, as a general line, four modes of proofs are to be found (table 1 summarizes these distinct methods to provide ‘proof’ for the criteria): First, provider’s declarations (*Eigenerklärung*) provide a common way to ‘proof’ compliance. Thereby, bidders themselves have to declare that they comply with the given criterion. This mode is especially important in the realm of mandatory wage related criteria; thus, all regulations in all Federal States concerning minimum wages or compliance with collective agreements use this method. A second way outlined is the use of statements on how the criterion is to be fulfilled: Here, it is not compliance that shall be declared, but concrete measures to reach the goals

formulated by law must be stated by the bidder. These statements are mainly to be found relating to gender equality stipulations or reconciliation measures.

A third way to show compliance is to use labels and certificates. Given the fact that labels and certificates only exist for certain areas (e.g. Fairtrade), the use of labels is already structurally restricted. Therefore, it comes as no surprise that labels and certificates are mainly used in order to proof compliance with ILO Core Labour Standards and Fairtrade, despite the fact that the implementation of this principle differs in the single states: Bremen, for example, defines certain certificates that can be used in a dedicated decree (BremKernV) whereas Saxony-Anhalt only regulates, that 'suitable certificates or self-declarations' can be used as a proof of compliance with the ILO Core Labour Standards (§12.2 LVG LSA). This use of self-declarations or other not specified proofs is an alternative in all states with ILO or Fairtrade stipulations if no label exists for a group of products or if an independent proof cannot be found.

A fourth possibility to provide proof with certain stipulations is the use of official attestations of governmental agencies. They may be required as proof that the bidder's declarations are right and are mainly to be found regarding regulations of inclusion of disabled persons or participation in the system of Dual Vocational Training – thus, in field, where official documentation exists for other reasons.

**Table 1:** Types of proofs

Type of proof	Mostly used for...	Issued by...
Provider's Declarations ( <i>Eigenerklärungen</i> )	Minimum wages, minimum working conditions, compliance with collective agreements	Bidder
Statements on how compliance is reached	Gender equality, reconciliation, integration	Bidder
Certificates and Labels	ILO Core Labour Standards, Fairtrade	Independent agencies
Official attestations	Participation in Dual Vocational Training, employment of persons with disabilities	Public administration/Chambers of craft/Chambers of commerce/ Trade Unions

**Source:** Own compilation

Given the fact that declarations made by bidders are of paramount importance as a means to provide 'proof' of compliance with social criteria, and compliance with only few criteria are relying on externally provided proof, measures and methods of control gain importance. Without going into detail, it has to be stated, that in most Federal States control can hardly be said to be widespread. Evidence reveals that the actual enforcement of social considerations

varies notably. Implementation is dependent on the selective perception of relevant social considerations in the administration (e.g. minimum wages turned out to be of priority for the local practitioners). It, then, has to cope with different states of documentation within the transnational chain of production. Finally, the number of staff, their experiences and knowledge as well as their commitment to social considerations varies.

## Summary

The aim of this Working Paper being to provide an overview on social criteria in public procurement regulations in Germany, some core issues shall be highlighted: First, social criteria in public procurement regulations are a rather new phenomenon in Post-War Germany; they did not appear in German public procurement law until the end of the 20<sup>th</sup> century. Second, the Ruffert judgment was a turning point for the development of social criteria in public procurement regulations in Germany. Starting out with compliance with collective agreements and the promotion of apprenticeships, in the aftermath of the Ruffert judgment an expansion of social criteria in subnational laws started: New social criteria emerged and spread. Thereby, third, a quantitative as well as qualitative expansion can be stated, i.e. not only the reach of social criteria across Federal States increased but also the specific social criteria in use in the different Federal States diversified. Thereby, legal certainty of specific criteria (like e.g. in the case of employment of long-term unemployed or Fairtrade, where explicit jurisdiction exists confirming the option to use these criteria) does not seem to foster the use of the specific criteria. Rather, the two criteria which are directly challenged and in the following approved by the ECJ are among the least used of all social criteria in Germany. Fourth, today, social criteria in public procurement is a field of activity nearly exclusively taken up by the Federal States, a fact that leads to a high degree of variance and diversity: Not only can a diverse range of criteria be found in the different subnational laws but variance also exists in 'apparently similar' criteria in the different *Länder* and regarding the proof to be provided: Based on divergent legal requirements, each of these criteria is related to a different kind of 'proof' required. Thereby, the methods of 'proof' are not only different among the criteria but also vary among the Federal States.

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Brandenburg	Brandenburgisches Gesetz über Mindestanforderungen für die Vergabe von öffentlichen Aufträgen (Brandenburgisches Vergabegesetz – BbgVergG) v. 21.9.2011	<i>Procurement law of Brandenburg</i>
Bremen	Bremisches Gesetz zur Sicherung von Tariftreue, Sozialstandards und Wettbewerb bei öffentlicher Auftragsvergabe (Tariftreue- und Vergabegesetz – TtVG) idF. v. 24.11.2009, idF. v. 17.7.2012	<i>Procurement law of Bremen</i>
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Hamburg	Hamburgisches Vergabegesetz (HmbVgG) v. 30.4.2013	<i>Procurement law of Hamburg</i>
	Hamburgisches Mindestlohngesetz [Verkündet als Artikel 1 des Gesetzes über den Mindestlohn in der Freien und Hansestadt Hamburg und zur Änderung des Hamburgischen Vergabegesetzes] v. 30.4.2013	<i>Hamburgian law on minimum wages</i>
	Rundschreiben der Finanzbehörde Hamburg vom 6.3.2009, „Verpflichtung zur Beachtung der ILO-Kernarbeitsnormen; neue Ergänzende Vertragsbedingungen“	<i>Circular letter of the Hamburg Financial Authority</i>
Hesse	Hessisches Vergabegesetz (HVgG) [Verkündet als Art. 2 des Gesetzes zur Förderung der mittelständischen Wirtschaft und zur Vergabe öffentlicher Aufträge] v. 25.3.2013	<i>Procurement law of Hesse</i>
Mecklenburg-Western Pomerania	Gesetz über die Vergabe öffentlicher Aufträge in Mecklenburg-Vorpommern (Vergabegesetz Mecklenburg-Vorpommern – VgG M-V) v. 7.7.2011, idF. v. 25.06.2012	<i>Procurement law of Mecklenburg-Wester Pomerania</i>
Lower Saxony	Niedersächsisches Gesetz zur Sicherung von Tariftreue und Wettbewerb bei der Vergabe öffentlicher Aufträge (Niedersächsisches Tariftreue- und Vergabegesetz – NTVergG) v. 31.10.2013	<i>Procurement law of Lower Saxony</i>
North Rhine-Westphalia	Gesetz über die Sicherung von Tariftreue und Sozialstandards sowie fairen Wettbewerb bei der Vergabe öffentlicher Aufträge (Tariftreue- und Vergabegesetz Nordrhein-Westfalen - TVgG - NRW) v. 10.01.2012	<i>Procurement law of North Rine-Westphalia</i>
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Schleswig-Holstein	Gesetz über die Sicherung von Tarif treue und Sozialstandards sowie fairen Wettbewerb bei der Vergabe öffentlicher Aufträge (Tariftreue- und Vergabegesetz Schleswig-Holstein - TTG) v. 31.5.2013	<i>Procurement law of Schleswig-Holstein</i>
	Landesverordnung über die Vergabe öffentlicher Aufträge (Schleswig-Holsteinische Vergabeverordnung – SHVgVO) idF. v. 13.11.2013	<i>Procurement Decree of Schleswig-Holstein</i>
Thuringia	Thüringer Gesetz über die Vergabe öffentlicher Aufträge (Thüringer Vergabegesetz - ThürVgG-) idF. v. 18.4.2011	<i>Procurement law of Thuringia</i>
	Beachtung der ILO-Kernarbeitsnormen (§ 11 ThürVgG) Ergänzende Vertragsbedingung - (EVB-ILO)	<i>Supplementary terms of contract concerning the ILO Core Labour Standards (Thuringia)</i>