ILO Convention 94 in the Aftermath of the Rüffert case

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The purpose of this paper is to discuss the ILO Convention 94 and, in particular, the legal situation in the aftermath of the decision of the European Court of Justice in the Rüffert case (Case C-346/06) on 3 April 2008. The authors argue that the labour law concerning social clauses in commercial contracts is an old and well established institution in labour law that still has an important role to play. The authors analyse the Rüffert case and argue that there is a conflict or contradiction between the European Court's judgment and ILO Convention 94. The authors recommend that the Posting Directive 96/71/EC should be clarified in order to resolve this contradiction. This issue should be raised by the EU Member States in the discussions in June 2008 at the ILO Labour Conference in Geneva concerning ILO Convention 94.

1. The historical development of labour clauses in public contracts

The policy instrument laid down in ILO Convention 94 on labour clauses in public contracts has its roots deep in the history of modern labour law. We can trace its origins back to 1891 when the British House of Commons adopted the so-called Fair Wages Resolution. According to this Resolution, public authorities contracting with private companies were required to pay 'fair wages' to their workers. The exact meaning of 'fair wages' could be established by reference to the collective agreement in a specific sector of the economy. Similar provisions were later included in legislation granting licenses, subsidies, etc. State enterprises and local governments adopted this policy in their contracts with private companies. The Fair Wages Resolution of the House of Commons of 1891 was revised in 1909 and 1946.[1]

As Ireland was in 1891 part of the United Kingdom, the Fair Wages Resolution became part of Irish labour law.[2] The use of this instrument also spread to other European countries. So France adopted

[1] Texts in *Industrial Relations Handbook*, p. 149-152/214-216; R.W. Rideout, *Principles of Labour Law*, 4th ed. London, 1983, p. 357-360; O. Kahn-Freund, *Labour and the Law*, 1st ed., London, 1972, p. 158-160; O. Kahn-Freund, *Labour Relations and the Law*, London, 1965, p. 37-38; B. Bercusson, *Fair Wages Resolutions*, London, 1978; B.L. Adell, *The Legal status of Collective agreements in England, the United States and Canada*, Ontario, 1970, p. 52-54; R. Lewis, 'The Historical Development of Labour Law', *British Journal of Industrial Relations* 1976, p. 1-17; B.A Hepple & P. O'Higgins, *Encyclopedia of Labour Relations Law*, London/Edinburgh, 1976, p. 1114; B.A. Hepple & P. O'Higgins-, *Employment Law*, IVth ed., London, 1981, p. 33-34; J.G. Riddall, *The Law on Industrial Relations*, London, 1981, p. 83-86; A. Flanders, 'The tradition of voluntarism', *British Journal of Industrial Relations*, 1974, p. 357; P. O'Higgins in T. Mayer-Maly (Ed.), Kollektivverträge in Europa, Salzburg, 1972, p. 251-256; A. Pelling, *A History of British Trade Unionism*, Harmondsworth, 1979, p. 107; P.B. Beaumont, 'The use of fair wages clauses in government contracts in Britain', *Labour Law Journal*, 1977, p. 147-165; E.P. de Jong, *Een inleiding in het denken over arbeidsconflictenrecht*, Deventer, 1975, p. 45.

[2] J.B. McCartney, Ireland and Labour Relations, in: *Western European Labour and the American corporation*, Ed. Kamin, 1970, p. 275-276.

in 1899 the Décrets-Millerand with a similar objective[3], and the Netherlands adopted comparable measures in the construction industry from the 1930s.[4]

However, it was on the other side of the Atlantic, in the United States, that this instrument was greatly developed.[5] In 1891 the State of Kansas was the first to impose fair working conditions on companies with which it did business and this example was successively followed by other States of the US. The various statutes had in common that they required of employers that their products be manufactured and their services delivered under safe and healthy working conditions. However, they varied as regards the required level of wages to be paid. Sometimes they required the 'locally prevailing wages', sometimes the local minimum wage.

In the 1930s the federal government authorities in the US began to adopt this policy. The first federal US statute was the Davis-Bacon Prevailing Wage Act of 1931. This provides that firms in the construction industry engaged in work for the federal government, on contracts exceeding a threshold of $ 2000, must pay at least the 'prevailing wages', including 'fringe benefits'.[6] The US Department of Labor is empowered to define the concept of 'prevailing wages'. In the past, this was often fixed near the level laid down in collective agreements. In recent years, however, the Department of Labor has more often been satisfied with 'the average wage', which is often a lower wage rate.

The second federal US Act was the Walsh-Healey Public Contracts Act of 1936. This covered contracts for the manufacture and supply of materials, goods and equipment. It applied to all companies selling products to the federal US government in contracts exceeding $ 10.000. The contractors were required to pay at least the prevailing minimum wage, which the US Department of Labor normally takes as provided by the Fair Labor Standards Act.[7]

For obvious reasons, the British and American regulations in this area became of major importance during the 1940s with the massive government expenditure resulting from the involvement of Britain and the US in World War II.

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2. ILO Convention 94 of 1949

Against the background of the positive Anglo-American experience of this classic instrument of labour law, it was not surprising that the ILO Conference in 1949 adopted Convention 94, giving this instrument a potential global reach.

[3] A. Brun/H. Galland, *Droit du Travail*, Paris, 1958, p. 459-460; G. Lyon-Caen, *Salaires*, Tome 2 du G.H. Camerlynck (Dir.) *Traité de Droit du Travail*, Paris, 1967, p. 15; P.-D. Ollier, *Le droit du Travail*, Paris, 1972, p. 177.
[4] M. G. Levenbach, *De Nederlandse Loonpolitiek*, Alphen a/d Rijn, 1955, p. 7; T. v. Peijpe, *De Onwikking van het loonvormingsrecht*, Nijmegen, 1985, p. 109-110; M.A. v. Wijngaarden, *Handleiding tot de UAV*, Deventer, 1974, p. 11; A.N. Molenaar, *Arbeidsrecht*, Deel I, Zwolle, 1953, p. 313-317.
[5] A.J. Thieblot, *Prevailing Wage Legislation*, Philadelphia, 1986; J.E. Kalet, *FLSA & Other Wage & Hour Laws*, 3rd Ed. Washington DC, 1994. B. Bercusson, *Regulation of Wages in Public Contracts: A Comparative Study of the UK and the USA*, PhD. Dissertation, University of Cambridge, 1974.
[6] 40 U.S.C. §§ 276a-276a-7; now 40 U.S.C. 3141, et seq.
[7] 41 U.S.C. §§ 35-45, et seq.; H.C. Morton, *Public contracts and private wages: Experiences under the Walsh-Healey Act*, 1965.

It is the aim and purpose of Convention No. 94 that employees performing work under public contracts do not enjoy conditions of labour less favourable than those enjoyed by other workers in the same trade or industry.[8]

The ILO Convention of 1949 was comprehensive in scope. It targeted not only the construction industry, but also the manufacture of goods, shipment of supplies and equipment, and the supply of services. It also extended to work carried out by subcontractors or assignees of contractors, although low value contracts and high level persons may be exempted. However, it is uncertain whether public-private partnerships fall within the scope of the Convention,[9] and there is a margin of discretion as regards its application to measures involving financial subsidies, licenses to operate a public utility[10] and public procurement by other that central authorities (notably regional and local authorities).

The main importance of the Convention, however, lies in the requirement concerning labour standards on public contracts. It defines 'fair wages' as:

> "wages, hours of work and other conditions which are not less favourable than those established by collective agreement, arbitration award, or national laws, for work of the same character in the trade or industry concerned in the district where the work is performed".

As well as labour standards on public contracts, the Convention requires the establishment and maintenance of an adequate system of inspection and the imposition of specific remedies and sanctions.

3. The period between 1949 and 1980

In the period after 1949, ILO Convention 94 harvested only 60 ratifications, about one-third of the Members of the ILO, indicating that there was not widespread enthusiasm for this instrument. It should be born in mind, that in a number of countries, such as France, Germany and the Benelux countries, an another instrument of enforcing labour law had become more successful after the Second World War. This was the practice of extending collective agreements *erga omnes*, making agreements binding on an entire sector of the economy. Thereby, all companies, including companies not involved in business with the government, and not only those companies doing business with the government, were bound to the labour standards laid down in collective agreements. In these countries, the instrument of extension *erga omnes* of collective agreements was more comprehensive than the more Anglo-American instrument of the Fair Wages approach.

The Netherlands ratified ILO Convention 94 in 1952. No special legislation was adopted to implement the ILO Convention as it was thought that the existing Act on the Extension of Clauses of Collective Agreements, as widely applied, would suffice. When the Netherlands adopted new rules on public procurement in 2005 the social dimension of the issue was not addressed. The

[8] H.K. Nielsen, Public Procurement and International Labour Standards, in Public Procurement Law Review, 1995, no. 2, p. 94-101.
[9] See Report III (Part IB) to the 97th Session, 2008 of the International Labour Conference, ILO, Geneva, 2008, p. 67-68.
[10] ILO Recommendation nr. 84 suggests that in cases where private employers are granted subsidies or are licensed to operate a public utility, provisions substantially similar to those of the labour clauses in public contracts foreseen by the Convention should be applied.

licensing system in the Road Cargo Traffic legislation of the 1970s was based on the application of the collective agreement,[11] but this was abandoned in the 1990s.

In France, the old Code on public procurement had made provision for the insertion of labour clauses concerning public contracts.[12] More recent legislation adopted for the purpose of transposing relevant EU law now merely provides that 'the contractor is subject of the obligations arising from the laws and regulations relating to the protection of labour and to working conditions.[13]
In contrast, in Italy, although no general legislation on the 'extension *erga omnes*' of collective agreements could be adopted, the Fair Wages approach has been applied since 1957 by Acts of Parliament.[14]

In the Anglo-American world, during the first decades after the Second World War, the Fair Wages approach continued its victorious path.

In the United States, the McNamara-O'Hara Service Contract Act was adopted in 1965. This prescribes the payment of 'prevailing wages' (including fringe benefits) for employers who deliver services other than construction (for instance catering, cleaning, surveillance , etc) to the central US government above the value threshold of $ 2,500. For contracts under this threshold at least the Federal Minimum Wage must be paid.[15] Moreover, all companies doing business with the central US government are covered by the Contract Work Hours and Safety Standards Act (CWHSSA). This requires the payment of extra overtime remuneration and the application of safe working conditions in works valued over $ 100.000.[16] Other federal legislation contains labour clauses dealing with labour matters which are required to be included in public contracts of different types and values.[17]
Comparable statutes and regulations have been adopted by various States, countries and municipalities in the US, though their precise content diverges.[18]

In the United Kingdom the Fair Wages Approach flourished for many decades. In the 1970s, Kahn-Freund wrote that no government measure in the last three quarters of a century had done more to promote the use of the collective labour agreements than the Fair Wages Resolutions.[19] Others were less convinced,[20] mainly because the instrument clearly has its limitations.

A first limitation is that it only can be applied in those sectors of private business that are strongly dependent on public contracts. Other sectors are not touched by it. A second weakness of the Fair Wages Approach has been, that its terminology, always quite imprecise, became increasingly contested as regards its meaning. In the UK it required the employer to apply 'the going rate' to employees. But what exactly was 'the going rate'? Some argued that it was the level specified in the relevant national collective agreement, often only a minimum standard. Others maintained that it

[11] B.S. Frenkel/A.T.J.M. Jacobs, *Social Bestuur 1*, Alphen a/d Rijn, 1986, p. 221-225.
[12] See Decree No. 64-729 of 17 July 1964 concerning codification of regulatory texts on public contracts, ss 117-121.
[13] See Report III (Part IB) to the 97th Session, 2008 of the International Labour Conference, ILO, Geneva, 2008, p. 19.
[14] Act nr. 634 of 29.4.1957, followed by Art. 36 of the Statuto dei Lavoratori, 1970, which provides that the collective agreement must be applied by all companies, which make use of public finances. See S. Grasselli, *Contributo alla teoria del contratto collettivo*, Padova, 1974, p. 62-63; G. Giugni, *Diritto Sindacale*, 7th ed., Bari, 1984, p. 151.
[15] 41 U.S.C. § 351, et seq.
[16] 40 U.S.C. §§ 327-334.
[17] Report III (Part IB) to the 97th Session, 2008 of the International Labour Conference, ILO, Geneva, 2008, p. 18.
[18] See a comprehensive description in CCH Publications, *State Compensation Laws*, Chicago, 2000.
[19] O. Kahn-Freund, *Labour and the Law*, 2nd ed., London, 1977, p. 159-160.
[20] For instance B. Bercusson, 'The New Fair Wages Policy; Schedule 11 to the Employment Protection Act', *Industrial Law Journal* 1976, p. 134-135.

was the level of actual wages paid, as determined in local negotiations with shop stewards.[21] A third limitation is that a (Fair Wages) Resolution of the House of Commons, unlike Parliamentary legislation, does not have legally binding effect on employment contracts. Despite the Resolytion, an individual worker has no remedy if the employer does not apply the collective agreement.[22] So, apart from some cases where the Fair Wages clauses were included in statutes, there was only the sanction, which was in practice rarely applied, that an employer failing to comply with the collective agreement could lose orders, subsidies or concessions of the State.[23]

In contrast, in the US, the sanction is that an employer doing business with the government, who does not comply with the labour standards applicable under federal statutes, is subject to the potential sanction that the Department of Labor may deduct the relevant sum from the guarantee payment made by the company to obtain the government order, or from payments due to the company fulfilling the order. Further, the company may be disqualified for 3 years from doing business with the federal government.

4. After 1980: Declining interest in the Anglo-American world, increasing interest in continental Europe

In the period beginning in the 1970s, however, the Fair Wages Approach came under increasing challenge in the Anglo-American World.

In 1982 the Conservative government under Mr. Thatcher decided to abolish the Fair Wages Resolution.[24] At the same time the UK denounced ILO Convention 94. The UK government declared that procurement policy henceforth was to be based instead only on 'value for money' and aimed at the optimum combination of whole life cost and quality to meet the user's requirements.[25] Although both the Labour Party and the TUC had been committed to reviving the Fair Wages Resolution[26] this has not materialised after Labour came to power in 1997.[27]

In the United States also hostility against the Fair Wages Approach has grown substantially,in particular, among economists, employers and in the Republican Party. It is claimed that this instrument

[21] See the decision of the Industrial Arbitration Board in the *Crittall-Hope* case (which took the level of wage actually paid) versus the verdict of the High Court in the *Racal* case (which took the national minimum level), see B.A Hepple & P. O'Higgins, *Encyclopedia of Labour Relations Law*, London/Edinburgh, 1976, p. 1114; B. Bercusson, 'The New Fair Wages Policy; Schedule 11 to the Employment Protection Act', *Industrial Law Journal* 1976, p. 129-147; P. Wood, 'The Central Arbitration Committee's Approach to Schedule 11 to the Employment Protection Act 1975, and the Fair Wages Resolution 1946', in the *Industrial Law Journal* 1976, p. 68; J.G. Riddall, *The Law on Industrial Relations*, London, 1981, p. 89-93.

[22] See O. Kahn-Freund, *Labour and the Law*, 2nd ed., London, 1977, p. 159; P.A. Hepple & P. O'Higgins, *Individual Employment Law*, London, 1971, p. 60; B.A Hepple & P. O'Higgins, *Encyclopedia of Labour Relations Law*, London/Edinburg, 1976, p. 1114; J.G. Riddall, *The Law on Industrial Relations*, London, 1981, p. 85-86; J.B. Carby-Hall, 'The incorporation of the collective agreement into the individual contract of employment', in *Managerial Law*, Vol. 24, 1983, nr. 4, p. 17.

[23] K.W. Wedderburn, *The Worker and The Law*, 2nd. Ed. Hammondsworth, 1971, p. 204-207.

[24] A. Hillier, *Employment Act, 1982*, Croydon, 1983, p. 58; J.G. Riddall, *The Law on Industrial Relations*, London, 1981, p. 92-93; J. Clark & B. Wedderburn, 'Modern Labour Law – Problems, Functions, Policies', in Wedderburn/Lewis/Clark (eds), *Labour Law and Industrial Relations*, Oxford, 1983, p. 210; R.W. Rideout, *Principles of Labour Law*, 4th ed. London, 1983, p. 357-358.

[25] Report III (Part IB) to the 97th Session, 2008 of the International Labour Conference, ILO, Geneva, 2008, p. 64.

[26] *European Industrial Relations Review*, September 1985, p. 9.

[27] In March 2003 a code of practice on workforce matters in local authority services contracts was published, extended in 2005, but in its comments the TUC refutes the effectiveness of the code. See Report III (Part IB) to the 97th Session, 2008 of the International Labour Conference, ILO, Geneva, 2008, p. 64.

unnecessarily increases the costs for consumers and the burdens on taxpayers.[28] Although the Republican Party started to try to get rid of it,[29] this has not yet resulted in the repeal of the federal legislation containing the Fair Wages Resolutions approach. However, a number of States governed by Republicans have abolished legislation in this field.

On the other hand, in States, counties and municipalities governed by Democrats, the Fair Wages Approach still flourishes and increasingly is used to counteract the general downward trend of labour standards protection in the US. For instance, in a number of States, counties and municipalities governed by Democrats, public contracts are allocated preferentially to companies which have recognised trade unions (so-called 'project labor agreements'). Republicans are very opposed to this practice. The administration of Bush Sr. issued an Executive Order to forbid this practice in federal US procurement. The Clinton Administration repealed this order, but it was reinstated by the Administration of Bush Jr. in 2001. In the US the Fair Wages Approach has become a subject of serious political contention.

A comparable political fight over the Fair Wages Approach emerged a few years ago in Germany. Germany never has had a policy or practice of labour clauses in public contracts. Nor has Germany ratified ILO Convention 94. However, the deteriorating practice of application of collective agreements in recent years provoked a new interest in the Fair Wages Approach. In the 1990s some German 'Länder', governed by Social Democrats, such as Berlin and Niedersachsen[30] adopted legislation which required contractors and subcontractors to pay workers employed in the framework of a public contract at least the remuneration prescribed by the collective agreement locally in force. These pieces of legislation were already in those years strongly criticised by the German Monopoly Authorities (Kartellamt). In 2002 the then Social Democrat/Green coalition in the federal Government tabled a bill in the federal parliament, requiring collectively agreed wages in public procurement. Under that proposed 'Tariftreuegesetz', public contracts in the construction and local public transport would have been awarded only to those companies which declare that they pay wages in line with collective agreements applicable at local level. However, this bill was defeated in the German federal Parliament. Nevertheless the German Constitutional Court in 2006 has ruled that the Tariftreuegesetze of the various German 'Lands' were not in conflict with the German Constitution.[31] In 2008 the German Confederation of Trade Unions (DGB) has stated that in light of recent developments in the labour market it was necessary to ratify Convention No. 94 as a matter of urgency.[32]

In Portugal the General Confederation of Portuguese Workers (CGTP-IN) has also considered that ratification of Convention Nr. 94 would constitute a very positive step.[33]

In Sweden, a Public Procurement Committee in 2004 investigated how EU directives on public procurement should be transposed into Swedish law. The Committee concluded that it was uncertain if the obligations under ILO Convention 94 were compatible with the EU procurement directives and other EU law. Commenting on this conclusion, the Swedish ILO Committee took the view that, since no specific legal obstacles were identified, Convention No. 94 should be ratified. In March 2006, the Swedish Parliament decided in favour of a proposal from the Parliamentary Committee on the Labour

[28] J.P. Gould/G. Bittlingmayer, *The Economics of the Davis-Bacon Act*, Washington D.C. 1980.
[29] For example by trying to include in specific legislation supporting large government projects, such as on the Revitalisation of the Florida Everglades, special clauses excluding the application of the Davis-Bacon Act in casu; the attempt was unsuccessful in this case.
[30] See for instance the Landesvergabegesetz of the Land Niedersachsen, which was subject of the *Rüffert* case of the European Court of Justice. decision of 3 April 2008, Case C-346/06, *Rechtsanwalt Dr. Dirk Rüffert v. Land Niedersachsen*.
[31] See
[32] Report III (Part IB) to the 97th Session, 2008 of the International Labour Conference, ILO, Geneva, 2008, p. 105.
[33] Report III (Part IB) to the 97th Session, 2008 of the International Labour Conference, ILO, Geneva, 2008, p. 105.

Market which it stated that it was important to ratify ILO Convention 94.[34] In Finland where the Convention has been ratified since 1951, however, the unions have drawn attention to the fact that contracts awarded by municipal authorities are not obliged to be included in the scope of the Convention, which may render the application of the Convention substantially ineffective as these authorities are the biggest actors in public procurement in Finland.[35]

5. The 2008 Report of the ILO Committee of Experts

The ILO Committee of Experts on the Application of Conventions and Recommendations thoroughly investigated the use of the Fair Wages instrument laid down in ILO Convention 94 for the first time in 2008.[36] It did its work, however, in what was revealed to be substantial degree of disinterest, as no more than 29 national workers' and employers' organisations from only 17 member states took the opportunity to express their views on this subject. [37]

The Committee, therefore, could not fail to observe that the Convention had suffered in recent years from a lack of interest. This situation was underpinned by 'modern' public procurement policies which promote competition at all costs among potential contractors. These policies conflict with the Convention's objective of requiring the observance by all bidders of the best locally established working conditions and call into question the effectiveness of the standards set out in the Convention.

The Committee noted that the rationale of the Convention, i.e. the notion that the State should act as a model employer and offer the most advantageous conditions to workers paid indirectly through public funds, does not seem to enjoy great popularity today. On the one hand, there seems to be little support for the idea that workers employed on public contracts need special protection in order to avoid social dumping in the sensitive area of public procurement. [38] On the other hand, however, the ILO Committee also noted that there is significant and growing international pressure to apply labour standards in public contracts as well as to private contracting in public-private partnerships under a variety of names, including 'sustainable procurement' or 'social considerations in public contracts'.

The Committee observed that public procurement is still an important part of the economy. It accounts for 15% of the world's gross domestic product. In Europe this is 16%, in some developing countries it is even more than 50%.[39] In recent years governments' move to privatise and contract out their activities has no doubt contributed to this current high level of procurement activity.

The ILO Committee, therefore, supports maintaining ILO Convention 94. The risks posed to workers' labour conditions by competition for public contracts in 1949 are still present today, namely, that the successful tender may well be that which pays the lowest wages, fails to provide safety equipment or coverage for accidents, and which has the largest proportion of informal workers, for whom no tax or social security is paid, and who are not covered in practice by any legal or social protection. There is a concern that international competition, especially the presence of multinational companies with large and efficient infrastructures, pushes bidding enterprises to compress labour costs. This often results in reduced wages, longer hours, and poorer conditions, such as inadequate sanitation, accommodation and

[34] Report III (Part IB) to the 97th Session, 2008 of the International Labour Conference, ILO, Geneva, 2008, p. 81/102.
[35] Report III (Part IB) to the 97th Session, 2008 of the International Labour Conference, ILO, Geneva, 2008, p. 106.
[36] Report III (Part IB) to the 97th Session, 2008 of the International Labour Conference, ILO, Geneva, 2008.
[37] Report III (Part IB) to the 97th Session, 2008 of the International Labour Conference, ILO, Geneva, 2008, p. 13.
[38] Report III (Part IB) to the 97th Session, 2008 of the International Labour Conference, ILO, Geneva, 2008, p. 59.

[39] Report III (Part IB) to the 97th Session, 2008 of the International Labour Conference, ILO, Geneva, 2008, p. 7-8.

eating facilities. Indeed, observations made 60 years ago are even more valid today, taking into account modern public authorities' outsourcing of public and support services via contract, and financial investment in public-private partnerships which today provide the types of public goods and services provided in the past through public contracting.[40]

The globalisation of public contracting in tandem with changes in procurement policy, privatisation and deregulation, and together with the consolidation of opinion within the international community concerning workers' rights – expressed in many forums, including also in the ILO's Declaration of Fundamental Principles and Rights at Work – raise the question of whether the approach to the standards of wages and working conditions set in Convention 94 and Recommendation 84 could now be improved.[41] The ILO Committee considers that the Convention proposes a clear, concrete and effective solution to the problem of how to ensure that public procurement is not a terrain for socially unhealthy competition and is never associated with poor working and wage conditions.[42] The ILO Committee is of the view that there is no contradiction between the requirements of ILO Convention 94 and the principles in the two EU public procurement directives.[43]

Nevertheless the ILO-Committee considers that the Convention may need to be revisited to address current procurement patterns and to enable the ILO to provide an appropriate response to challenges such as the increasing role of public-private partnerships, the emergence of new actors, including professional bodies, the absence of specific binding national legal provisions concerning labour conditions in the execution of public contracts and the lack of effective enforcement measures. Were the ILO to decide upon the partial revision of Convention 94, this would provide it with an opportunity to address some of the current limitations of the instrument, including the non-coverage of public cross-border contracting and the wide discretion in excluding contracts awarded by non-central authorities.

Even without partial revision, the Committee's view is that the purpose and object of the Convention remain intrinsically sound and that there is real potential in infusing new life into the Convention.[44]

6. Convention 94 confirmed at the 97the session of the International Labour Conference

ILO-Convention 94 and the report of the Committee of Experts on it were discussed at the 97th session of the International Labour Conference, May/June 2008.
The representatives of the employers hold the view that competition on labour costs is not bad in itself. Its advantages and disadvantages have to be weightened against each other. An adequate functioning of the labour market is based on competition and therefore also on competition on labour costs. The employers noted that Convention 94 had been poorly ratified by the Member states of the ILO and is thus apparently out of date and no longer useful. It is thus unnecessary to bring the Convention to life by an fresh promotion campaign or to modernise it.
The representatives of the workers considered the Convention as essential amidst increasing globalisation. They recalled that the Convention is also applicable on subcontractors and other chains of contractors. The Convention is simple in its principles and can be easily modernised or adapted to changing realities in order to continue the protection of the rights of the workers.

[40] Report III (Part IB) to the 97th Session, 2008 of the International Labour Conference, ILO, Geneva, 2008, p. 99/107-108.
[41] Report III (Part IB) to the 97th Session, 2008 of the International Labour Conference, ILO, Geneva, 2008, p. 99.
[42] Report III (Part IB) to the 97th Session, 2008 of the International Labour Conference, ILO, Geneva, 2008, p. 60.
[43] Report III (Part IB) to the 97th Session, 2008 of the International Labour Conference, ILO, Geneva, 2008, p. 86.
[44] Report III (Part IB) to the 97th Session, 2008 of the International Labour Conference, ILO, Geneva, 2008, p. 107-111.

Many governments supported the application of the Convention, regaring the possibilities it offers in a globalising world.
The discussion resulted in the conclusion that an overwhelming majority of the governments and the workers had emphasised the relevance of the Convention. Further research was considered desirable. Possibly already during the November 2008 session of the Governing body a proposal will be tabled to organise a tripartite expert meeting. The ILO has already prepared a 'Pratical Guide to Convention no. 94' in order to promote the awareness of the Convention.

7. The *Rüffert* case

The *Rüffert* case was a preliminary ruling requested by a German Court. The Land Niedersachsen Law on the award of public contracts contained provisions on the award of public contracts above a minimum value of EUR 10 000. The preamble to the Law states:

> 'The Law counteracts distortions of competition which arise in the field of construction and local public transport services resulting from the use of cheap labour and alleviates burdens on social security schemes. It provides, to that end, that public contracting authorities may award contracts for building works and local public transport services only to undertakings which pay the wage laid down in the collective agreements at the place where the service is provided."

Paragraph 3(1) of the Ländesvergabegesetz, headed 'Declaration that the collective agreement will be complied with' states:

> "Contracts for building services shall be awarded only to undertakings which, when lodging a tender, undertake in writing to pay their employees, when performing those services, at least the remuneration prescribed by the collective agreement at the place where those services are performed and at the time prescribed by the collective agreement. For the purposes of the first sentence, the term 'services' means services provided by the principal contractor and by subcontractors. The first sentence shall also apply to the award of transport services in local public transport."

In the *Rüffert* case a company, Objekt und Bauregie, was awarded a public contract. The company employed as a subcontractor another undertaking established in Poland. In summer 2004 this undertaking came under suspicion of having employed workers on the building site at a wage below that provided for in the 'Buildings and public works' collective agreement. Following investigation, Länd Niedersachsen terminated the contract with Objekt und Bauregie based on the fact, inter alia, that Objekt und Bauregie had failed to fulfil its contractual obligation to comply with the collective agreement. A penalty notice was issued against the person primarily responsible at the undertaking established in Poland, accusing him of paying 53 workers engaged on the building site only 46.57% of the prescribed minimum wage.

The issue came went at first instance to the regional court in Hannover and then to the higher regional court, which stayed the proceedings and referred the following question to the European Court of Justice (ECJ):

> "Does it amount to an unjustified restriction on the freedom to provide services under the EC Treaty if a public contracting authority is required by statute to award contracts for building services only to undertakings which, when lodging a tender, undertake in writing to pay their employees, when performing those services, at least

> the remuneration prescribed by the collective agreement in force at the place where those services are performed?"

The ECJ read the Posting of Workers' Directive 96/71/EC[45] in the light of Article 49 EC. The ECJ held that the German federal legislation did not satisfy the conditions regarding minimum wages in the host country which are binding on a service provider as regards payment of posted workers. According to the court, the legislation did not declare collective agreements generally applicable, and applied only to a part of the sector (public contracts). Nor did the legislation satisfy the criteria laid down in Article 3(8) of the Directive. The ECJ gave a very restrictive interpretation of Article 3(7) of the Directive, which states that paragraphs 1 to 6 shall not prevent application of terms and conditions of employment which are more favourable to workers. In sum, the Court came to the conclusion that a Member State is not entitled to impose such legislation on contractors. Directive 96/71, interpreted in the light of Article 49 EC, precludes a Member State from adopting legislation such as that in force in Land Niedersachsen.

The argumentation of the Court is also questionable in respect of the basis for the European social legislation, namely Article 2(1) EC in combination with Article 136(1) EC. In fact, these provisions describe the objectives of the Community i.a. as promoting a "high level … of social protection" and the objectives of Community's social policy as "improved living and working conditions, so as to make possible their harmonisation while the improvement is being maintained". In the latter 'harmonisation upwards' is clearly called upon. Although Article 136(1) EC could be considered primarily as a programmatic provision, the Court itself has made it clear that it has also legal effect by pointing out that the objectives of social policy laid down in Article 117 (now Article 136 EC) "constitute an important aid, in particular for the interpretation of other provisions of the treaty and of secondary community legislation in the social field."[46]

The ECJ judgment is in many ways problematic from a legal point of view. We do not present any general critique of the conclusions in the *Rüffert* case and only discuss some issues related to ILO 94. It has, however, to be stated that in *Rüffert*, contrary to what was argued to be the case in the *Laval* judgment[47], the wage level was transparent and easy to ascertain in advance. It is also clear that the legislation is valid on national level and binds German companies that take part in a public procurement procedure in Land Niedersachsen. The *Rüffert* judgment is, in our view, the first where the ECJ no longer requires that competition be on equal terms between national and foreign service providers. Rather, the Court takes the position that foreign service providers are to be allowed a competitive advantage by paying lower wages, contrary to what is provided by the federal law referring to the wage level in the sectoral collective agreement.

8. ILO 94 and the *Rüffert* case

The 'Land' legislation in Land Niedersachsen complies precisely with the obligation imposed by ILO Convention 94 on those states that have ratified it. Article 2 of Convention 94 states:

> "Contracts to which this Convention applies shall include clauses ensuring to the workers concerned wages (including allowances), hours of work and other conditions of labour which are not less favourable than those established for work of the same

[45] Directive 96/71/EC concerning the posting of workers in the framework of the provision of services. OJ 1996, L18/1.
[46] Case 126/86, *Zaera*, ECJ 29 September 1987. ECR 1987, 3697 para 14.
[47] Case C-341/05, *Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet, Svenska Byggnadsarbetareförbundet, avd. 1, Svenska Elektrikerförbundet*, Opinion of Advocate General Paolo Mengozzi, 23 May 2007, ECJ decision, 18 December 2007.

character in the trade or industry concerned where the work is carried on – (a) by collective agreement…".

Germany has not ratified Convention ILO 94. However, Convention Mr. 94, which was adopted in 1949, and entered into force on 20 September 1952, has been ratified by a considerable number of Member States: Austria (1951), Belgium (1952), Denmark (1955), Finland (1951), France (1951), The Netherlands (1952), Italy (1952), Spain (1971) and the UK (1950, though it was denounced by the UK in 1982). Among the new Member States, at least Bulgaria (1955) and Cyprus (1960) have ratified the Convention. Also Norway, Member State of the E.E.S. ratified the Convention. Germany, however, has not ratified ILO Convention Nr. 94 and this may be the formal reason why neither the A.G. in his Conclusion of 20 September 2007 nor the ECJ in its Judgment of 3 April 2008 in case C-346/08 (Rueffert) have dealt with Convention Nr. 94.

In light of this, the ECJ's interpretation of the Posting Directive in the *Rüffert* case is remarkable. When both adopting and implementing the Posting Directive, the Commission declared that the Directive was fully consistent with ILO Convention 94. The position after *Rüffert* is that the legal situation will vary from Member State to Member State. Those Member States that have ratified ILO 94 before being bound by the Treaty can, according to Article 307 EC, still apply ILO 94, at least during a lengthy transitory period if it is to be denounced.

At first glance it may seem that the implications of the judgment might be limited in scope. It does not apply to public procurement exclusively within a Member State (where there is no cross-border posting of workers). In fact it seems that it will be difficult to preserve the present legislation even on a national level after the judgment. Most public procurements nowadays must have an open character allowing firms from other Member States to make an offer. And in these cases one may ask whether so called reverse discrimination of German companies is allowed. Politically it can clearly not be upheld. So in fact the German legislation will be amended. In Germany there is now already the first case in which the court ordered the Land Bremen to revise its public procurement on public transport because of the Ruffert judgment of the ECJ.[48]

So although the Rüffert judgment does not formally apply when posting is of workers from a non-EU Member State; and it does not apply when cross-border work is performed in the context of public procurement in forms which do not involve posting of workers, the national legal regime will have to change as a consequence of the Rüffert judgment.

The starting point for regulation of public procurement in the European Union has been that the Member States should be free to stipulate national standards, including for wage regulation, provided there is equal treatment and no discrimination whatsoever is allowed in respect of foreign service providers. This starting point is fully compatible with the ILO 94. Now the Rüffert judgment has changed this. When it comes to posted workers the Land legislation is not applicable. This is not only contradictory to ILO 94. It is also in clear contradiction with the explicit starting points that were proclaimed when the new Directives on public procurement were adopted. When the debate on the new Directives took place in the early years of 2000 the Commission issued an Interpretative Communication where it presented the starting point for the regulation on public procurement with the following words:[49]

"*In general, any contracting authority is free, when defining the goods or services it intends to buy, to choose to buy goods, services or works which correspond to its concerns as regards social policy*

[48] See a Press statement of the Landesnaheverkehrsgesellschaft Niedersachsen, June, 2008.

[49] See COM (2001) 566 final, Brussels, 15.10.2001, Interpretative Communication of the Commission on the Community law applicable to public procurement and the possibilities for integrating social considerations into public procurement p. 7.

including through the use of variants, provided that such choice does not result in restricted access to the contract in question to the detriment of tenderers from other Member States."

9. Legal consequences of a collision between ILO Convention Nr. 94 and Community Law.

If the conclusion is justified that there is collision between ILO Conventions Nr. 94 and Community Law the question arises: what are the options for action?

A collision between ILO Conventions and Community Law is regulated by Art. 307 EC Treaty. According to paragraph 1 the rights and obligations arising from agreements concluded before 1 January 1958 or, for acceding States, before the date of their accession, between one or more Member States on the one hand, and one or more third countries on the other, shall not be affected by the provisions of the EC Treaty. The EC Treaty solves potential conflict situations between the EC Treaty and prior Treaties concluded by the Member States along the lines of integration in conformity with international law.[50] According to the principles of international law (see Art. 30 (4) (b) of the Convention of Vienna on the Law of Treaties), Art. 307 (1) EC Treaty establishes that the application of the EC Treaty does not infringe on the obligations of the Member States to comply with the rights of third countries based on prior treaties and to fulfil the corresponding obligations.[51] ILO Convention Nr. 94 has been ratified by France and Austria in 1951, Belgium, the Netherlands and Italy in 1952, Bulgaria and Denmark in 1955, Cyprus in 1960 and Spain in 1971, so in all these cases before the EC-Treaty came into force or before the Member State joined the EC. Therefore ILO-Convention Nr. 94 is to be considered as a prior agreement in the meaning of Art. 307 (1) EC Treaty with the consequence that the said Member States cannot be blamed for infringing Community Law when they are fulfilling their treaty obligations out of this ILO Treaty even if it would collide with Community Law.

However, to the extent that agreements, which fall under Art. 307(1), are not compatible with Community Law, the Member States are obliged under Paragraph 2 of Art. 307 EC Treaty to take all appropriate steps to eliminate the incompatibilities established. This implies, for instance, that the Member States in question are obliged to work in the direction of an amendment of the international treaty which would bring it in conformity with Community Law. If this fails or is not effective, then, according to the second phrase of Art. 307(2) the Member States are obliged to denounce[52], suspend or resign from the Treaty. If the colliding treaty contains the possibility to denounce, then its denunciation on the next possible date would not encroach upon the international obligations of the Member State. [53]

This happened for instance in 1991 when the European Court of Justice required the Member States to denounce Convention nr. 89 as it considered the prohibition of night work contained in this Convention incompatible with Directive 76/207/EEC on Equal Treatment of men and women.[54] On account of a similar situation in July 1992 the German government denounced Convention Nr. 96 on Placement Offices.[55]

Art. 14 of Convention Nr. 94 contains the right of denunciation for the Member States. Any Member State that has ratified the Convention, may denounce it after a lapse of 10 years after the

[50] Schmalenbauch, in Calliess/Ruffert (ed.), EU-/EG-Vertrag, 3. Aufl. 2007, Art. 307 EG-Vertrag Rn. 1.
[51] ECJ 14 October 1980, Case 812/79 (Burgoa), JUR 1980, 2787, Rn. 6.
[52] ECJ 4 July 2000, Case I-84/98 (Commission vs Portuguese Rep.), JUR 2000, I-5215, Rn. 58.
[53] ECJ 4 July 2000, Case I-84/98 (Commission vs Portuguese Rep.), JUR 2000, I-5215, Rn. 55-58.
[54] ECJ 25 July 1991, Case C-345/89 (Stoeckel), JUR 1991, I-4047; ECJ 2 August 1993 (Levy), JUR 1993, I-4300.
[55] See R. Birk, in MuenchHdbArbR, 2nd Ed. 2000, § 17 Rn. 62.

date of first coming into force. The denunciation must be notified to the General Director of the ILO who will register it. One year later the denunciation becomes effective. ILO Convention Nr. 94 has come into force on 20 September 1952, so it could be denounced for the first time by 20 September 1962. If Member States do not avail themselves of this possibility than according tot Art. 14 (2) of Convention Nr. 94 they remain bound to this Convention for a further period of 10 years. Next Convention Nr. 94 may be denounced after the lapse of a further 10 years.

From the EC Member States that had ratified Convention Nr 94 until now only the United Kingdom in 1982 has availed itself of the right to denunciation in Art. 14 of Convention Nr. 94. For all the other Member States that have bound themselves to Convention Nr. 94 the next possibility of denunciation is at 20 September 2012. If this occasion is omitted then the Member States remain bound to ILO Convention Nr. 94 a further 11 years: until 20.9.2022 plus one year.

However, Member States are only under an obligation to denounce a Convention if a collision between the Convention and Community Law has become obvious, notably on the basis of a judgment of the European Court of Justice.[56] In the Rueffert case the European Court of Justice did not deal with Convention Nr. 94. Therefore at the moment it is not at all established that Convention Nr. 94 is incompatible with Community Law and therefore must be denounced by the Member States that had ratified it. To reach that conclusion nothing less than an explicit determination of a collision by the European Court of Justice is needed.

10. The dimension of the collision between Convention 94 and Community Law.

Prima facie there is on two vital points a collision between Convention 94 and Community Law as it has now been interpreted in the Rueffert case (in the wake of the Viking and Laval cases): a collision with the Posted Workers Directive 96/71 and a collision with the free movement of services, Art. 48 et seq. EC Treaty.

a) Collision with the Posted Workers Directive 96/71EG

Decisive on the question of compatibility with the Posted Workers Directive 96/71/EC are the considerations of the European Court of Justice in the Rueffert Judgment under nrs. 21-35 and especially nr. 33 et seq.

> "As regards the matters referred to in Article 3(1), first subparagraph, (a) to (g), Directive 96/71 expressly lays down the degree of protection for workers of undertakings established in other Member States who are posted to the territory of the host Member State which the latter State is entitled to require those undertakings to observe."

Following Art. 3(1) of Directive 96/71/EC this concerns work and employment conditions, which are determined by statutory or administrative rules and/or (in the construction industry) by collective agreements extended erga omnes or by arbitration awards. Consequently, according to the ECJ,

> "the level of protection that must be guaranteed to workers posted to the territory of the host Member State is limited, in principle, to that provided for in Article 3(1), first subparagraph, (a) to (g), of Directive 96/71,……"

[56] ECJ 30 March 2004, case 203/03 (Commission v. Austria), JUR 2005, I-935, Rn. 62; see also Schmalenbauch, in Calliess/Ruffert (ed.), EU-/EG-Vertrag, 3. Aufl. 2007, Art. 307 EG-Vertrag Rn. 13.

These requirements are not fulfilled by the collective agreement for the construction industry, which – according to the Public Procument Law of the Land Niedersachsen - must be applied by every contractor. And such for two reasons:

At first the scope of the collective agreement does not cover all construction activities in its territorial scope, but only for those which are contracted out by public procurers. Secondly the collective agreement has not been declared to be of universal application.

If that is true – as may be provisionally assumed here – Convention Nr. 94 collides with the Posted Workers Directive 96/71/EC on the same ground. This because Convention Nr. 94, Art. 1 has only to be applied on contracts to which an authority is a party. According to Art. 2 (1) of Convention Nr. 94 are the procurers covert by the Convention always obliged to ensure "to the workers concerned wages (including allowances), hours of work and other conditions of labour which are not less favourable as those established for work of the same character in the trade or industry concerned in the district where the work is carried on by collective agreement…" There is no requirement that the collective agreement must be declared to be of universal application.

Moreover Convention Nr. 94, according to Art. 1, is not only applicable on public procurement in the field of the construction, alteration, repair or demolition of public works, but also on contracts for the manufacture, assembly, handling or shipment of materials, supplies or equipment, or the performance or supply or services.

Convention nr. 94 surpasses the Poster Workers Directive 96/71/EC as far as it prescribes the application of conditions of employment laid down in collective agreements.

b. Collision with free movement of services, Art. 48 et seq. EC Treaty.

Point of departure of the considerations of the ECJ on the free movement of services is the assessment in the Rueffert case, that legal rules requiring undertakings performing public work contracts and, indirectly, their subcontractors to apply the minimum wage laid down in a collective agreement, may impose on service providers established in another Member State where minimum rates of pay are lower an economic burden that may prohibit, impede or render less attractive the provision of their services in the host Member State. Such a measure is capable of constituting a restriction within the meaning of Article 49 EC.[57]

ILO Convention Nr. 94 imposes on the Members of the ILO for which the Convention is in force, the obligation to ensure the more favourable conditions of labour laid down in a collective agreement in that Member State also on companies, which are established in a Member State in which the conditions of labour are less favourable . Therefore Convention Nr. 94 is also to qualify as a restriction of the free movement of services.

At the same time the question arises whether the restriction of the free movement of services which results from Convention Nr. 94 could be justified by mandatory public interests. The ECJ is bound to deny this if it sticks to the reasoning it has developed in the Rueffert case, referring to the Viking and Laval cases. For the ECJ has its interpretation of the free movement of services essentially based on the same two points as in the interpretation of the Poster Workers Directive 96/71/EC:

The ECJ has referred to the fact that the rate of pay fixed by a collective agreement as indicated by the State Law on Public Procurement of Niedersachsen only applies to a part of the construction sector falling within the geographical area of that agreement, since, first, that legislation applies solely to public contracts and not to private contracts, and, that collective agreement has not been

[57] ECJ 3 April 2008, Case C-346/06 (Rueffert), nyp, point 37.

declared universally applicable. According to the Court such a measure cannot be considered to be justified by the objective of ensuring protection for independence in the organisation of working life by trade unions.

As the scope of Convention Nr. 94 is also restricted to contracts awarded by the public authorities, it may be assumed that the ECJ will not come to another result if it has to interpret the free movement of services in the light of Convention Nr. 94. So Convention Nr. 94 must be incompatible with the EC freedom of movement as well.

11. Can Convention Nr. 94 and Community Law be reconciled?

Up until now the ECJ has struck the balance between fundamental freedoms and colliding fundamental rights by way of a restriction of the fundamental freedoms. This explains why the ECJ in the Rueffert case has devoted only one phrase to the question of the justification of the freedom of services by collective agreements. However striking the balance between fundamental freedoms and fundamental rights may alternatively be done by way of establishing a practical concordance between fundamental values of the same rang.

If this would be the approach there is a way of reasoning possible that can result in a reconciliation between Convention Nr. 94 and Community Law. That reconciliation may arise from the obligation of the ECJ to interpret Community law in an international law friendly way. This obligation is implied in Art. 307 of the present EC Treaty and can also been derived from Art. 53 of the EU Charter of Fundamental Rights and from Art. 2 of the EU Treaty as it will be reformed by the Treaty of Lisbon.

a. The obligation ex Art. 307 (1) EC-Treaty.

The ECJ has gathered from Art. 307 (1) EC Treaty the tacit obligation of the Community against its Member States not to impede the performance of the obligations of Member States which stem from a prior agreement. Otherwise Art. 307 would not achieve its purpose. [58] In this respect the institutions of the EC are obliged within the limits of what is legally possible, to avoid a conflict situation with prior agreements by an international law friendly interpretation of EC Law. [59]

aa. The relevance of ILO Conventions for Community Law.

Partly Community Law explicitly takes into account this obligation to an international law friendly interpretation and therefore consideration of ILO Conventions. For instance in the preamble consideration nr. 6 of Directive 2003/88/EC it is provided

"Account should be taken of the principles of the International Labour Organisation with regard to organisation of working time, including those relating to night work."

And in the Preamble of the Community Charter of the Fundamental Social Rights of Workers of 9.12.1989[60] it is said:

"Whereas inspiration should be drawn from the Conventions of the International Labour Organisation....."

[58] ECJ 14 October 1980, Case 812/79 (Burgoa), JUR 1980, 2787, Rn. 9.
[59] Schmalenbauch, in Calliess/Ruffert (ed.), EU-/EG-Vertrag, 3. Aufl. 2007, Art. 307 EG-Vertrag Rn. 17.
[60] Social Europe 90/1, p. 46 et seq.; COM (89) 248 final.

For the rest the ILO standards form the background to a number of policies, laws and collective agreements in the Member States and at European level. "The standards and measures of the ILO also complement the *acquis* in areas which are not covered or only partly covered by legislation and Community policies, such as labour administration and inspection, trade union freedom, collective bargaining and minimum standards in terms of social security. [61]

Also in the past the ECJ has invoked Conventions of the ILO to the interpretation of Community Law.[62]

bb. Convention Nr. 94 as an instrument to effectuate the hard core of labour laws.

In the framework of the required international law friendly interpretation the ECJ has to take into account that Convention Nr. 94 is an instrument to the effectuation and the promotion of universal labour norms.[63] In 1998 the International Labour Conference has adopted a Declaration of Fundamental Principles and Rights at Work. In this declaration it has been declared that the Members of the ILO irrespective whether they have ratified the respective Conventions, are obliged to "to observe, to promote and to effectuate the principles as regards the fundamental rights which are object of these Conventions." Although it is not explicitly determined what Conventions are meant, it can be derived from the genesis of the so called Declaration of Philadelphia and the current practice, that it refers to the Conventions Nrs. 29, 105, 87, 98, 100, 111 and 138 which were considered as fundamental at the moment of adoption, as well as Convention nr. 182 adopted in 1999.[64] The said Conventions are about Forced Labour (Nrs. 29 and 105), Discrimination (Nrs. 100 and 111), Trade Union Rights and Collective Bargaining (Nrs. 87 and 98) and the suppression of Child Labour (Nr. 138 and Nr. 182). De rights and obligations rooted in these Conventions are considered Fundamental Principles and Rights at Work. These Fundamental Principles and Rights at Work are applicable to all Member States irrespective whether they have been ratified or not.[65] The Member States of the EU are all at the same time Members of the ILO. Therefore the Fundamental Rights and Principles at Work are applicable throughout the EC.

Because of this, for instance, the EC in its general system of preferences, has made the transposition of the Fundamental Principles and Rights at Work a precondition for the reduction of import duties of the common tariffs for the import of goods in the EC.[66]

Although Convention Nr. 94 in itself is not part of the general recognised Fundamental Principles and Rights at Work, its aim is the promotion of collectively agreed conditions of employment for all workers employed within the framework of public contracts. In that way it serves the equal treatment of workers on the one hand and on the other hand it promotes the proliferation of collective legal standards and prevents at the same time social dumping on the labour market. In

[61] Communication from the Commission of 24 May 2006, Promoting decent work for all, COM (2006) 249, p. 4.
[62] For instance ECJ Case 43/75 (Defrenne), JUR 1976, p. 476 Nr. 23; ECJ Cases 110 and 111/78 (van Wesemael), JUR 1979, p. 53, nr. 31 et seq; Case C-41/90 (Hoefner), JUR 1991, I-1979; Case C-158/91 (Levy), JUR 1993, I-4287; Case C-13/93 (ONEM./.Minne), JUR 1994, I-371; See Brinkmann, 55 ZIAS 1994, 271; von der Groeben/Schwarze (Ed.), Kommentar zum Vertrag ueber die Europaeische Union und zur Gruendung der Europaeischen Gemeinschaft, 6. Aufl. 2004, Art. 307 Rn 23.
[63] Report III (Part IB) to the 97th Session, 2008 of the International Labour Conference, ILO, Geneva, 2008, p. 99.
[64] Oelz, Die Kernarbeitsnormen der Internationalen Arbeitsorganisation, ZIAS 2002, p. 319 et seq.
[65] Krebber, Aufgaben, Moeglichkeiten und Grenzen des Arbeitsvoelkerrechts im liberalisierten Welthandel, JZ 2008, 53 et seq.
[66] General System of Preferences 2006-2008, Reg. (EC) nr. 980/2005 of 25.6.2005 on a scheme of general duty preferences, O.J., L 169/1; see Oelz, Die Kernarbeitsnormen der Internationalen Arbeitsorganisation im Licht der neuen handelspolitischen Sozialklausel der Europaeischen Union, ZIAS 2002, p. 319/359; Daeubler, Die Implementation von ILO-Uebereinkommen – Erfahrungen und Ueberlegungen in Deutschland, in: FS 25 Jahre Arbeitsgemeinschaft Arbeitsrecht im Deutschen Anwaltsverein, p. 1201.

other words: it is an instrument for the effectuation and promotion of the Fundamental Principles and Rights at Work.[67]

b. Obligation derived from Art. 53 of the Charter of Fundamental Rights.

The Charter of Fundamental Rights of the EU of 7 December 2000 will become binding to the institutions of the EU and therefore also for the ECJ when the Treaty of Lisbon comes into force. Art. 21 of this Charter guarantees the Principle of Non-discrimination, Art. 28 the right of collective bargaining and actions whereas in Art. 53 the rule is expressed that nothing in this Charter shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognised, in their respective fields of application, by Union law and international law and by international agreements to which the Union or all the Member States are party. So, although Convention Nr. 94 in itself does not guarantee a Fundamental Right, it constitutionally ensures the Fundamental Rights, laid down in Art. 21 and 28 of the EU Charter of Fundamental Rights. In the assessment of the question whether the infringement on the freedom of services by Convention Nr. 94 is justified by mandatory public interests, the ECJ should take into account that Convention Nr. 94 benefits the observance of the universally applicable Fundamental Rights and Principles at Work, which are guaranteed by art. 21 and 28 of the EU Charter of Fundamental Rights.

The term 'international law' in Art. 53 of the Charter includes international customary law.[68] Apart from the question whether international customary law already embraces the Fundamental Principles and Rights at Work, it is for sure that they are covered by the international agreements, to which all Member States are a party. The same applies to Convention Nr. 94, as, according to the current case law of the ECJ[69], it suffices that all Member States have participated in the adoption of the international Convention. It is not necessary that the international Convention is ratified by all Member States.[70]

c. Obligation ex Art. 2 of the Reformed EU Treaty.

Finally, the obligation to an international law friendly interpretation can also be derived from Art. 2 (5) of the EU Treaty, as it will be reformed by the Lisbon Treaty. According to this article the EU must contribute to the strict observance and further development of international law.

12. **Conclusion**

The *Rüffert* case is an illustration of the unwillingness of the ECJ to take into account national features of collective bargaining when assessing EU law. On practice principles of subsidiarity, collective autonomy for the social partners and the fundamental right for trade union to bargain collectively is given very little weight in situations of posting. In this respect the *Rüffert* case is following the path of the *Laval* case where the ECJ paid some lip service to the Swedish social model, but put up criteria clearly undermining it.

The *Rüffert* case has created confusion, uncertainty and the risk of different rules applying among Member States. The conclusion is that the Posting Directive 96/71/EC, as interpreted by the ECJ in the light of Article 49, must be clarified in order to be in harmony with ILO Convention 94.

[67] Report III (Part IB) to the 97th Session, 2008 of the International Labour Conference, ILO, Geneva, 2008, p. 99.
[68] Von Danwitz, in Koelner Gemeinschaftskommentar zur Europaeischen Grundrechte-Charta, 2006, Art. 53 Rn. 17 m.w.N.
[69] Besselink, Common Market Law Review 1998, 650 et seq.
[70] Von Danwitz, op. cit.; Rengeling/Szczekalla (Ed.), Grundrechte in der Europaeische Union, 2004, § 7, Rn. 497.

This could quite easily be done by inserting a clause into the Directive that wage standards linked to or clearly defined in collective agreements in a specific sector, at national or federal level, can be considered as part of the minimum standard that foreign service providers are obliged to apply. Now the fact that Germany is a huge country with internal regional differences in wage levels are taken as a reason for restricting the obligations to follow the minimum wages of the region. Furthermore the ECJ-judgment denied the specificity of the public sector in wage setting. In connection to public procurement this is a very strange approach. In fact the whole adoption of specific Directives on public procurement is based on the notion that specific procedures and requirements can be applied in the public sector. It would therefore be quite logical to argue for an interpretation according to which the public sector could be regarded as a separate sector within the meaning of the Directive (Article 3(8)). This could also be indicated in the text of the Directive.

It is important that the European Union Member States defend the freedom of all Member States to continue to adhere to ILO Convention 94, and even to improve the progressive principles on which it is based.

The statement in the Commission´s fresh Renewed Social Agenda clearly seems to support this conclusion by calling "upon all Member States to set an example by ratifying and implementing the ILO Conventions classified by ILO as up to date".[71] ILO has earlier included Convention 94 on those that are regarded to be up to date.

A reasonable measure therefore could be to amend the EU Directives 2004/17/EC and 2004/18/EC on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts. These Directives in future should contain a clause that in substance implements the obligations contained in Article 2 of ILO Convention 94.

Such a clause could read:

"1. Contracts to which this Directive applies shall include clauses ensuring to the workers concerned wages (including allowances), hours of work and other conditions of labour which are not less favourable than those established for work on the same character in the trade or industry concerned in the district where the work is carried on (a) by collective agreement or other recognised machinery of negotiation between organisations of employers and workers representative respectively of substantial proportions of the employers and workers in the trade or industry concerned; or (b) by arbitration award; or (c) by national laws or regulations.

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

3. The terms of the clauses to be included in contracts and any variations thereof shall be determined by the competent authority of the Member State, in the manner considered most

[71] See COM (2008) 412 final, Brussels 2.7.2008: Communication from the Commission to the European Parliament, the Council, the European Economic and social Committee and the Committee of the Regions. Renewed social agenda: Opportunities, access and solidarity in 21st century Europe.

appropriate to the national conditions, after consultation with the organisations of employers and workers concerned.

4. Appropriate measures shall be taken by the competent authority, by advertising specifications or otherwise, to ensure that persons tendering for contracts are aware of the terms of the clauses."

However, the most fundamental approach of the possible collision between ILO-Convention Nr. 94 and Community law should come from a U-turn in the debate in the European Union on the relationship between fundamental freedoms and fundamental rights. This debate must be continued in future, intensively and offensively.