PROCUFAIR COMPARATIVE REPORT

Buying Decent Work.

Public Procurement Strategies for the Improvement of Working Conditions in the European Service Sector

Promoting Decent Work Through Public Procurement in Cleaning & Private Security Services

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This report is based on six national reports that have been produced for the purpose of the study:

- Denmark: Report authored by B. Refslund, T.P. Larsen, J. Arnholtz
- France: Report authored by F.X. Devetter, J. Valentin
- Germany: Report authored by K. Jaehrling, D. Böhringer.
- Italy: Report authored by L. Dorigatti, A. Mori, R. Perdersini
- Poland: Report authored by J.Czarzasty, K. Duda
- United Kingdom: Report authored by S. Mustchin, E. Herman, D. Grimshaw, A. Koukiadaki

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(1) Introduction: Buying Decent Work (BDW) – why does it matter?

The revised European Public Procurement Directives from 2014 have paralleled and supported efforts in EU member states to move away from 'buying cheap' towards 'buying best value' and 'buying social' in public procurement practices. These efforts respond to an increasing awareness at the political level that public purchasers have the power to affect working conditions as well as private contractors' behaviour. In doing so, they can counteract the spread of precarious work and widening social divides between 'insiders' and 'outsiders' in the labour market. Social partners at the European level have also been proactive in requesting and supporting public authorities to exploit the available legal options to foster job and service quality when awarding contracts – examples include 'Best Value Guides' developed by social partners in Cleaning and Security Services (EFCI, CoESS & UNI Europa) that provide practical and technical expertise to both private and public clients on how to insert social and quality criteria when tendering cleaning and security services (see www.securebestvalue.org and www.cleaningbestvalue.eu)

Yet the emergent norm of 'buying social' , or more specifically, of 'buying decent work' – the term we suggest for the core topic of this report – can be at odds with aims and restrictions of competition law, and with financial restrictions and targets for debt reduction. Moreover, next to legal and financial constraints, a practical challenge for developing more inclusive variants of public supply chain governance is that this requires actors to experiment with new forms of inter-organisational coordination. Contracting authorities are expected to assume more responsibility and to some extent 'co-manage' working conditions in contracted firms. Employee representatives and employers are faced with a more active role of the 'invisible third hand', i.e. the public client, in the trilateral employment relationship between client, management, and employees of the contracted company.

Empirical research into the balancing of interests and the strategic experimentation in this configuration therefore taps into a facet of industrial relations that so far remains underexplored. This study investigates the strategies social partners, public purchasers, civil society organizations, state agencies and companies adopt, and the challenges they face, in their efforts to secure decent work through public procurement in two sectors – cleaning and security services. Further knowledge of different sector and country experiences is vital to illuminate what purchasers, social partners and other actors can do and do to keep up the recent momentum towards buying social, and more specifically, towards 'buying decent work'.

The following report is not providing a point-by-point comparison of BDW policies and practices in the countries and sectors under study, or a comprehensive overview, but is meant to highlight the most important findings; thereby providing signposts that invite readers to read the rich and fine-grained national analyses on which this report is based.

The report is structured as follows:

(2) introduces the analytical perspective and research design of the study

(3) explains the potential scope of 'buying decent work' and provides a taxonomy of different types of BDW strategies (setting, extending, enforcing labour standards, directly and indirectly)

(4) takes a look at the protective gaps in the two industries under study that could be the target of BDW strategies

(5) analyses legislative dynamics at European and national level with a view of the new legal options for BDW that have developed over the past 10 years

(6) gives a brief overview on the role of trade unions and employers in BDW policies and practices

(7) focuses on BDW practices with regard to the dimension of wages, and discusses challenges and learning processes

(8) analyses the efforts for BDW and challenges encountered when addressing other dimensions of job quality than wages

(9) discusses the reasons for and the challenges in local authorities' strategies to re-insourcing cleaning and security services

(10) concludes with key findings and lessons on how to overcome obstacles to BDW

(2) Experimentation in BDW: Key concepts, research questions and research design

By focusing on 'buying decent work' (in the following: BDW), the study aims to shed light on one particular aspect of 'socially responsible public procurement' (SRPP) that has been little explored in previous academic publications and practical guidance material under the new European Public Procurement regime. The most recent 'best practice' collection on SRPP by the European Commission (2020) similar to previous collections (e.g. Social Platform 2015) documents that the most common use of social considerations is in relation to *employment* opportunities for disadvantaged groups, e.g. through employment clauses for disadvantaged groups on the labour market or through reserved contracts for social enterprises, yet not (with a few exceptions) in relation to wages and working conditions. Accordingly, there is also relatively little evidence on the role and the strategies of social partners in this area. On the academic side, research on public sector outsourcing has mainly investigated its extent and its (predominantly negative) effects on collective bargaining, job quality and labour market segmentation (see eg. Grimshaw et al. 2015; Pensiero 2017, Godino/Molera 2019).

While these studies greatly enhance our understanding on the interplay between public sector outsourcing and the national and sectoral employment regimes, they provide limited insights into current efforts to *reshape the relations* between public purchasers and private contractors in a socially more sustainable way.

Analytical perspective: Experimentation in socially sustainable supply chain governance….

In making sustainable supply chain governance its core topic, the study can however contribute to the growing body of literature that investigates how inter-organisational relations in networked forms of production and service provision shape employment relations. Previous studies in this line of research have predominantly focused on the *relations between private sector firms*, both in global production networks (e.g. Locke et al, 2013; Barrientos 2019; Ponte et al. 2019) and in domestic supply chains – (e.g. Marchington et al, 2005; Flecker and Meil 2010; Weil 2014; Wright and Kaine, 2015). Next to providing ample evidence on the *fragmentation* of employment relations between firms, these studies also investigate strategies that consciously *transcend* organisational boundaries with a view to secure labour standards across the supply chain. They show that, while traditional actors of the industrial relation system (trade unions, staff representatives, employer associations, management) remain key players in this field – along with new players such as consumption-based social movement organisations (e.g. Reinecke and Donaghey 2015) – the strategies and policies they adopt often go beyond traditional forms of collective bargaining. Since there is a lack of institutionalised channels to aggregate, voice and negotiate the interests of the different parties in the supply chain, actors resort to "organisational and institutional experimentation" (Murray et al., 2020), i.e. tentatively develop novel forms of work regulation and sometimes then seek to institutionalise this experimentation into new understandings, norms and rules.

In this perspective, the expansion and transformation of global and domestic supply chains is one out of several "fault lines" that "disrupt traditional modes of work regulation, compelling actors in the

world of work to come up with strategies as best they can, but also opening up spaces for experimentation in the major arenas for the regulation of work and employment." (Murray et al. 2020: 4). The study seeks to contribute to this line of research, by analysing the 'experimentation' that takes place in public procurement with a view to safeguard working conditions in public supply chains. The perspective of 'experimentation' pays particular attention to tentative solutions and iterative processes of adaptation and learning that can ultimately either succeed or fail, be temporary or become more permanent. In adopting this perspective, the project is not only interested in strategies that result in 'best practices', but in any attempts that seek to diminish protective gaps left by established forms of labour market regulation and collective bargaining. The analysis of the resources actors mobilise, the alliances they build in the process, the support they receive and the obstacles they meet in implementing, stabilizing or expanding their experiment, shall help to gain a better understanding of both the potential and the limits of public procurement to secure fair working conditions.

…under contradictory trends: BDW in the context of an 'instutionalised co-existence' of marketization and de-marketization

While recent policy developments have strengthened support for buying social, including BDW, economic conditions have been more uneven across countries and less favourable overall for efforts to move away from 'buying cheap'. Debt reduction targets and austerity policies have placed significant constraints on public budgets, particularly in southern European countries, which have been hardest hit by the financial and economic crisis. The slow recovery from the crisis has recently widened the fiscal space, but the polycrisis (Covid 19 pandemic, war in Ukraine, soaring energy prices and inflation) has put fiscal constraints back on the agenda in many European countries. Even public authorities that have recently embarked on a strategy of 'buying social' find themselves under pressure to revert to 'buying cheap'.

Moreover, the new legal options for BDW practices remain embedded in a competition law framework that imposes legal restrictions and also contributes to a general sense of legal uncertainty – which, according to academic observers, stakeholders and other experts in the field of public procurement, has been one of the main obstacles to the adoption of innovative procurement practices in the past, despite efforts to clarify the legal scope through reforms and soft law. All in all, the social turn in procurement law after 2014 has not replaced the market-oriented interpretation of the EU treaties, but has led to an "institutionalised coexistence" of marketization and de-marketization of public procurement (Jaehrling/Stiehm 2022: 119ff), as we will see in the following sections.

…. and in different national and sectoral contexts: Empirical focus of the study

The study analyses BDW policies and practices, focusing on six European countries: Denmark, France, Germany, Italy, Poland and the United Kingdom. It thereby takes into account country-specific economic conditions as well as different regulatory contexts that are likely to affect the way public procurement is used to promote decent work. As previous studies have shown, the differential impact of policy and case law at the European level on member state legislation and practice is closely linked to the different industrial relations models in these countries (Seikel 2015; Jaehrling et al. 2018 ;

Refslund et al. 2020; Mori 2020). These studies mainly refer to the situation *before* the full implementation of the new EU procurement policy in national policies and practices. However, the interplay between industrial relations models and the public procurement regime can also be expected to influence the adaptation of national policies and practices to the changed European regulatory context *since* 2014. The inclusion of the UK in the country sample also provides a unique opportunity to study the changes in a regulatory context that has moved outside the scope of the European procurement regime.

By including countries from Northern, Southern, Eastern and Central Europe, the country sample also reflects important differences within Europe in terms of economic conditions and the extent to which countries were affected by the previous economic crisis; differences that are likely to impose more or less budgetary constraints on BDW.

The empirical analysis focuses on two sectors, security services and contract cleaning. There are two main reasons for this:

First, industrial relations sometimes differ more between industries within the same country than between countries (cf. Bechter et al. 2012). In order to take this into account and to allow for meaningful cross-country comparisons, it is therefore necessary to restrict the analysis to the meso-level of specific industries within countries.

Second, the analytical framework of organisational and institutional experimentation needs to focus on empirical settings where (a) there is a need for this kind of experimentation and (b) where actors have recognised this need and embarked on some kind of experimentation. This is the case in the two selected industries: In both security services and contract cleaning, traditional forms of collective bargaining tend to be patchy and fail to secure decent working conditions for a significant proportion of the workforce, as evidenced by a large number of atypical contracts and low-paid jobs. At the same time, these are industries where public procurement can potentially play an important role in securing decent work, as a significant proportion of jobs in these industries are covered by public contracts. The two sectors also stand out for the extent to which the social partners in both sectors have recognised this potential. As mentioned above, trade unions and employers' organisations have initiated various joint activities, starting with two sector-specific guides on 'Buying Best Value' which have been translated into many European languages.

Specific research questions, methods and empirical basis

The specific research questions that guided data collection and analysis can accordingly be summarised as follows:

(1) Protective gaps and goals: What are the most important protective gaps for employees under public contracts that are not sufficiently addressed by established forms of work regulation and that would therefore benefit from ‘organisational and institutional experimentation’ in public procurement practices? Which of these gaps do public purchasers and social actors target with their strategic experimentation on ‘buying decent work’?

(2) Strategies: Which tools and resources do actors mobilise for this purpose; to what extent do they seek to build alliances (between peer organisations; between representatives of employers, employees, customers, public purchasers and other types of organisations involved (e.g. control agencies, inspectorates)?

(3) Learning processes: What kind of conflicts and obstacles arise in the process and how do actors cope with them?

(4) Institutional constraints and support: What role do regulative and budgetary constraints play? To what extent and how has the new EU procurement regime stimulated new experiments? To what extent does subnational, national and European legislation and jurisdiction inhibit a stabilization of experiments or force actors to adjust their strategies?

(5) Lessons Overall, what are the lessons for trade unions, employers and governments in how to more effectively use public procurement for securing decent work?

The study addressed these research questions by collecting and analysing qualitative data both at the European level and in six European countries. To this end, the six national research teams conducted interviews with trade unions, employers' associations, industry experts, policy makers, municipalities and procurement managers. The empirical core of the study consists of 4-5 in-depth case studies in each country on the efforts of purchasers to buy decent work, often supported by social partners or other governmental and non-governmental actors. This was complemented by expert interviews at sectoral and national level, as well as some interviews at the European level. The data was triangulated with desk research of relevant policy documents, collective agreements, labour and public procurement legislation, and minutes of local municipal and parliamentary debates. In addition, preliminary findings were discussed and validated in national workshops with key stakeholders. A total of 179 (175 at the national + 4 at the European level) interviews were conducted and the report draws on a total of 25 case studies, mostly at local level).

The project was guided by a common approach shared by all team members (generic interview guide to be adapted to the specific context of each interview; common understanding of key concepts; templates for writing case studies and national reports) and developed through two steering committee meetings and regular videoconferences. The templates for writing up case studies was informed by the template developed by the Network on "Institutional Experimentation for Better Work" organised by the CRIMT (Interuniversity Research Centre on Globalization and Work)[1]. The case studies published in the national reports thus provide information on (1) key goals of the experimentation (2) the context and situation before the experimentation (3) the origins of the experimentation (4) the actors involved and strategies and resources used (5) the obstacles, constraints, conflicts and learning processes and (6) the outcomes and the impact on working conditions. Regarding the latter, as the experimentation had partly started only recently, and often take a while before bringing discernible results, the analysis is partly based on *expected* effects (based on the estimates of the experts interviewed and our own estimates).

The approach was also characterised by close cooperation between European employers' organisations (CoESS, EFCI) and EU trade unions (UNI Europa) and various research institutions. Building on the practical experience of key stakeholders contributed to an applied research design that aimed to increase the practical value of both the networking activities during the project and the results, thus increasing their impact. This approach also facilitated the researchers' access to interviewees at both European and national level, given the support of the partner organisations involved in the project.

[1] See CRIMT Partnership on Institutional Experimentation for Better Work. Template for Documenting Cases of Experimentation (September 2020) http://www.crimt.net/Files/Case-Template-Experimentation-CRIMT-Partnership-Eng-13-5-2021.pdf

(3) What does BDW entail? Setting, extending and enforcing labour standards

In line with the ILO definition, and similar to the notion of 'fair working conditions' in the European Pillar of Social Rights, the concept of decent work encompasses both job characteristics (pay, working time, job stability, occupational health and safety, skills and training) and aspects related to the social protection system that decommodify work, i.e. absorb typical risks and reduce the compulsion to take up *any* job regardless of its quality (e.g. access to affordable health care and adequate social benefits). It also covers issues related to collective bargaining and worker participation.

In the context of public sector outsourcing, some of these dimensions are targeted by so-called 'grandfather clauses', which seek to protect the rights of former public sector employees. However, as the few existing empirical and conceptual studies on socially responsible procurement practices show, public sector clients have a much wider range of tools at their disposal to shape working conditions and go beyond the simple provisions of temporary and socially selective grandfather clauses (see McCrudden 2012; Jaehrling 2015; Grimshaw et al. 2019; Mori 2020).

The most common classification of 'strategic' procurement practices distinguishes them according to the stages of the bidding process at which they are used. For example, Caimi and Sansonetti (2023, p. 72 ff) distinguish between the legal options available at the pre-procurement stage (e.g. preliminary market consultation), the procurement stage (e.g. defining selection and award criteria) and the post-procurement stage (e.g. defining contract performance conditions). While this type of classification provides valuable knowledge about the technical means of procuring decent work, **a different classification was adopted for the purposes of this study: It distinguishes the different types according to their potential use or effect on working conditions, i.e. according to their *purposes*.** Three different purposes can be distinguished

(1) ***Setting labour standards***: This includes measures that set certain minimum requirements for working conditions in contractors in response to the absence or low level of legal and collectively agreed labour standards.

(2) ***Extension of labour standards***: This includes measures that extend the scope of non-mandatory labour standards. In these cases, the standards have already been defined by actors outside the context of public procurement policy – usually by the social partners through collective bargaining; but also by other actors, such as the Living Wage Foundation in the UK.

(3) ***Enforcement of labour standards***: This includes measures that do not add to or raise standards, but simply ensure that standards set by law or by collective agreements that have been declared universally binding are met.

The three types or measures are related to the overall labour market regime in different ways: The first type (setting standards) assumes a *compensatory* role, as these measures compensate for the absence of standards. The second and third types, on the other hand, have a *complementary* role, as they support the legal and factual implementation of standards set outside the context of public procurement.

It is important to note that setting**, extending and enforcing labour standards is not limited to measures that explicitly and *directly* address working and employment conditions** – such as pay clauses or provisions requiring a newly contracted firm to take over the employees of the previous contractors. **The design of tenders can also include provisions that affect working conditions *indirectly*** – such as a reduced weighting of the price criterion, or provisions and practices aimed at identifying and eliminating "abnormally low bids" – thereby reducing the likelihood that contracted firms will resort to wage theft or other substandard working conditions to fulfil the contract. The tender can also include technical specifications that enable or encourage companies to design work organisation that better meets the needs of workers and avoids onerous working conditions. An example of this would be to include in the tender documents maximum values for square metres to be cleaned per hour – this would at least relieve the company of the pressure to calculate its price with unrealistically high figures in order to win the contract, and then to pass on the accordingly high workloads to its employees.

As the wording of the two examples suggests, **these indirect measures have a less direct impact because they don't target working conditions but factors that *may* have a positive impact on them**. Whether this actually works in favour of working conditions depends not only on how exactly these indirect measures are designed, but also on how they interact with other factors and how companies adapt to them. For example, the inclusion of quality-related aspects in the award criteria may encourage bidders to develop procedures to ensure service quality (at least on paper). However, if the costs of doing so are not adequately factored into the bid, or if the company that wins the contract on the basis of its quality approach does not use the increased budget to provide staff with the necessary resources to deliver better quality, this could actually lead to an increase in the workload of staff. Similarly, limiting the number of square metres per hour that companies can use to calculate their bid price does not prevent them from imposing a higher workload on their employees, unless there are additional checks and controls (see section 8 in this report).

However, the **more uncertain impact of these indirect means and the greater expertise they may require from purchasers** (in terms of devising appropriate conditions and criteria for the specific service) **do not make them any less important for effective BDW practices**.

The table below illustrates this taxonomy using the wage dimension as an example.

Table 1: Taxonomy of BDW practices – at the example of wages

	SETTING new standards	**EXTENDING** existing, non-mandatory **standards**	**ENFORCING** mandatory standards
Direct	requiring contractors to pay a procurement-specific minimum wage	requiring contractors to follow the terms laid down in collective agreements (not declared generally binding)	controls + sanctions for non-compliance with statutory minimum wages or collective agreements declared generally binding excluding bids of companies who failed to comply with labour laws and collective agreements in the past
Indirect	Excluding 'abnormally low bids'; Limiting the weight of the price in award criteria; Limiting the use of subcontractors; Designing technical specifications in a way that helps to limit burdensome working conditions (.e.g. maximum values for sqm/hour in cleaning)		

Source: Own compilation

(4) Legacies of 'buying cheap': Protective gaps and challenges in two service sector industries

Protective gaps are not a coincidental side effect of contracting out public services. Instead, saving on costs was the dominant rationale that motivated both public and private sector outsourcing of ancillary jobs from the 1970s onwards. In labour intensive industries such as cleaning and security services, a broad range of studies has shown that the so-called efficiency gains that according to the 'lean' approach to public management were to be expected from outsourcing non-core activities, were largely achieved through lower wages and further cuts in working conditions at the externally contracted companies. Thus, for several decades now, both industries have been shaped by practices of 'buying cheap'.

The extent of 'buying cheap' and its impact on working conditions certainly also depends on the collective bargaining systems in the two sectors, which vary considerably between the countries in the sample, ranging from countries with no or very low collective bargaining coverage (UK, Poland) to countries with almost 100% coverage (France, Germany).

- **UK, Poland**: single-employer agreements where they exist, with correspondingly low levels of collective bargaining coverage (UK; although still above the national average in the security sector) or almost non-existent (Poland).
- **Denmark, Italy**: Sectoral bargaining is the norm and coverage is high, but collective agreements are not extended by law and there is no statutory minimum wage setting a wage floor..
- **France, Germany**: Sectoral bargaining is the norm and collective agreements are extended by law. In Germany, this feature distinguishes the two sectors studied from the general labour market regime, since the extension of collective agreements depends on the active support of the most representative trade union and employers' association that concluded the agreement, and this remains the exception in Germany.

It is important to note, however, that even where workers are covered, significant gaps in protection remain for some or all of them.

Pay remains low, even in companies covered by collective agreements

Despite deliberate strategies on the part of (part of) employers associations in the two industries to distance themselves from the statutory minimum wage, also as a means of facilitating recruitment (FR, GER), the result is still that the wage premium (i.e. the difference between the statutory minimum wage and the lowest pay grade in the collective agreement) is not very large (see Table below). In France, the lowest pay grades in the security services industry have even fallen below the statutory minimum wage at times, making the statutory minimum wage the going rate. The latter can also be observed for cleaners in the UK, where the latest available figures show a near identity of the average hourly pay and the national minimum wage. Thus, **national minimum wages, where they exist, remain an important driver of wages in both countries with and without collective agreements.** In Italy, where no statutory minimum wage sets a wage floor, the relevant national collective agreements for the cleaning and security service industry were not renewed for 8

years since 2013 (cleaning) and 2015 (security) and were thus de facto frozen – resulting in the lowest hourly wages for both occupations in the countries of the sample, with the exception of Poland. According to several interviewees in Italy, employers' reluctance to agree to wage increases was partly connected to price pressures in public tenders (Dorigatti et al. 2023, p. 12).

Table 2: Collectively agreed wages (IT, GER, FR, DK) and average wages (UK, PL) in cleaning and security services

	Private security activities (NACE 80.1)		**Cleaning activities (NACE 81.2)**	
Italy	2013	2023	2013	2023
Collectively agreed hourly wages	€ 5,95 (armed) € 4,31 (unarmed)	€ 6,43 € 4,90	€ 6,70 (Level 2)*	**€ 7,36** (Level 2)*
Germany	2013	2023	2013	2023
Collectively agreed hourly wages	€ 7,50	€ 13,00	€ 7,56 (East) € 9,00 (West-)	€ 13,00
National minimum wage	(2015) € 8,50	€ 12,00	(2015) € 8,50	€ 12,00
France	2017	2022	2017	2022
Collectively agreed hourly wages	€ 9,63	€ 10,37	10,01	€ 10,73
National minimum wage	€ 9,76	€ 10,57	€ 9,76	€ 10,57
Denmark	2010	2020	2010	2020
Collectively agreed hourly wage	DKK 130	DKK 164 (~€22)	DKK 110	DK 133 (~ €17,9)
Poland		2020		2020
Average gross monthly wage		PLN 3650 (~ € 780)		PLN 3690 (~ € 790)
National monthly minimum wage		PLN 3600		PLN 3600
UK	2013	2020	2013	2020
average gross hourly pay	GBP 8,72	GBP 10,00	GBP 6,93	GBP 8,69
National hourly minimum wage	GBP 6,19	GBP 8,21/8,72***	GBP 6,19	GBP 8,21/8,72***

** The passage to level 2 is automatic after 9 months of employment*
**** before/after April 2020*

Source: own compilation based on PROCURFAIR national reports

Accordingly, a large share of employees in both occupations are low-paid workers (i.e. earning less than two-thirds of median hourly wage), even in France, where the national minimum wage sets a relatively high basic wage floor of roughly 60% of the median wage. In Denmark, where the collectively agreed hourly wages are the highest (in absolute terms) in our sample, this levels is still slightly below

the low wage threshold in the case of cleaners. Additional calculations however show that only a small share of cleaners and security agents are de facto paid hourly wage below the low wage threshold (Refslund et a.l. 2023, p. 5).

Overall, **in addition to low hourly wages, income security is further affected by low monthly wages due to (short and long) part-time contracts in particular among cleaners, yet also among security agents; and the cost-of-living crisis** over the past two years that have eaten good part of the nominal wage increases, even where these were more substantial; and even led to real wage decreases across Europe[2]. Furthermore, reports and inspection results of **non-payment of wages** are relatively common for the two industries in all countries under study, particularly among subcontractors. The high proportion of small and micro-enterprises in both industries makes it more challenging and resource-intensive for state labour inspectorates and trade union support services to enforce compliance with labour rights. The **problem of non-compliance through bogus self-employment and the extensive use of subcontractor**s is also highlighted in the 'buying best value' guide by the European Social partners for private security services: "In order to cut costs, private security services companies revert to shadow guards employment. It includes the provision of fewer security staff than contractually agreed. As a result, wage and social costs are often cut by switching to fixed-term and part-time labour and/or to "shadow self -employed" guards in order to by-pass collective agreements. The use of subcontracting for the sole purpose of circumventing wage and social costs is also becoming more frequent" (UniEuropa/CoESS, p. 14 and p. 27).

Other protective gaps with a co-responsibility of public purchasers

There are a number of other dimensions of job quality where **public sector outsourcing and the way it is carried out can be held partly responsible for today's protection gaps in the industrie**s.

The most obvious aspect is the **stability of employment and working conditions** in the event of a change of contractor. Legislation and collective agreements in some countries require the subsequent contractor to take on employees under the same working conditions, but either legal exit options or voids or non-compliance with legal obligations make these transfers a protection gap for at least part of the employees and a frequent subject of litigation.

Another, perhaps less obvious, aspect is the demand for flexibility in outsourced services, which, in combination with other factors, translates into **high levels of internal and external flexibility** used by the contractors: through very short working hours, unsocial working hours, fragmented working hours and split shifts and, in the case of security services, very long working hours including overtime; and a high level of use of atypical contracts – such as zero hours contracts (UK), marginal part-time work (GER) or 'civil law contracts' (PL). In the UK, for example, security guards are at least twice as likely to be on zero-hours contracts as the UK workforce as a whole. They are also more likely to work more than 40 hours a week, whereas public sector terms and conditions can provide for generally shorter working weeks (Mustchin et al. 2023, p. 12). Similarly, marginal part-time jobs account for a disproportionately high share in the German cleaning sector (28% of workers with

[2] see https://op.europa.eu/webpub/empl/lmwd-annual-review-leaflet-2023/ for the latest figures

cleaning as their main job), but also in the security services sector (16%), not counting the growing number of workers with a minijob as a second job (Jaehrling/Böhringer 2023, p. 5). A high prevalence of multiple employment can also be found in the French cleaning and security services sector, despite the fact that labour law and collective agreements in France require companies to offer their employees contracts with a minimum of 24 hours per week (or 16 hours per week in the case of the cleaning industry) - but it is possible to deviate from these rules on a voluntary basis (Devetter/Valentin 2023, p.).

However, in many cases the voluntary nature of these either very short or very long working hours can be questioned. Where survey data are available, they point to the often involuntary nature of these working arrangements. Moreover, even where workers 'prefer' these working patterns, they do so in the context of the given circumstances: Security workers are repeatedly reported to prefer long hours *in order to compensate for low hourly wages*, while short part-time jobs may be a way of reconciling work and family life, *because longer working hours would often require working on several sites and in the early morning and late evening*, which is incompatible with the opening hours of schools and kindergartens. Either way, the organisation of work in both sectors is highly dependent on the flexibility and the willingness of employees to accept much longer, shorter, and/or unsocial working hours, whether voluntary or not. **Unattractive working schedules, in turn, are often a response to the demands of clients who, in outsourcing services, have also become accustomed to abdicating with the responsibility for balancing the needs of service users with those of employees providing the services**. In the absence of collective bargaining on these issues or employee representatives at company level, it is often left to the unilateral decision of the contracted companies on how to reconcile customer specifications on working hours with employee preferences.

Other protective gaps and challenges are not necessarily related to pressures from public clients, but nevertheless a result of the vertical disintegration of ancillary services from private companies and the public sector, as they are more difficult to address because of the dispersed nature of the workplaces. This is a challenge for organising employee voice, and **representation gaps indicated by a low level of unionisation and company level staff representatives are observed across countries**, even in the Danish case (where shop stewards at company level are widespread in many other industries). **Occupational health and safety risks, which are salient in both industries, are also exacerbated**, as cleaners and security agents often work in isolation from other colleagues, thus are exposed to more psycho-social risks; and in the case of cleaners, the physical strain tends to be intensified by a higher work pace for outsourced as compared to in-house cleaner.

Re-regulation efforts helped to reduce some protective gaps…

Highlighting these protective gaps across countries and different labour market regimes is not intended to downplay important differences in working conditions between countries, nor to negate recent improvements in working conditions through legal developments or collective bargaining. A few trends and examples shall illustrate the potential of *general* (i.e. not specifically procurement-related) labour laws and collective bargaining to address the protective gaps mentioned above:

- *General labour laws*: In both Poland and Germany, the introduction or strong increase of the statutory minimum wage has led to significant wage increases in recent years for the occupational groups examined here (see table above). In Poland, the national minimum wage has almost

doubled between 2015 and 2023. Poland has also seen an important re-regulation of civil law contracts, with the introduction of social insurance and a minimum hourly rate for them (Czarzasty/Duda 2023, p. 5f).

- *Collective bargaining*: In France and Italy, and to some extent in the German cleaning industry, social partners have agreed on detailed provisions in collective agreements for the two industries that seek to secure employment stability and stability of working conditions in the event of a change of contractor. These collective agreements thereby seek to complement, refine and ensure the proper application of the national laws implementing the European TUPE (Transfer of undertakings) Directive (2001/23/EC). Collective agreements in both France and Italy also provide for regulations regarding a minimum of guaranteed working hours, per week (cleaning sector Italy: 14 hours; France: 16h), or even per shift (France, security services: 4h/shift, introduced in 2021). By obliging companies to offer their employees a minimum shift duration of 4 hours, the collective agreement also deliberately serves to change the demand-related behaviour of customers, as one trade unionist explains.

  > *"the aim was to ensure that there would no longer be such small shifts. We wanted it to be so expensive it would not be profitable. That's what we used to do in the temporary employment sector I come from. To avoid a client asking for an hour of temporary work we relied on flat rates that were so expensive that it was better to hire a worker for the day." (National workers' representative, April 2022, quoted after Devetter / Valentin 2023, p. 15f.)*

Experiences with these provisions in both France and Italy however also show that their correct application and enforcement is challenging, in particular with regard to the stability of employment conditions, including the previous volume of working hours (see section 7 and 8 below).

… but still important potential role for BDW, across countries and different types of industrial relations systems

Overall, then, the purchasing practices of both public and private sector clients are not the only, but certainly an important, factor in shaping working conditions - for better or for worse - in the two industries under review. As many of our interviewees pointed out, 'buying cheap' procurement practices are still the norm rather than the exception, and yet the resulting problematic outcomes for working conditions only rarely make the headlines and attract public attention. At the European level, some of these cases have been documented by the 'map of misery'[3] compiled by UNI Europa.

By implication, public procurement can also be turned into a lever to *raise* labour standards. The **proper application of existing laws and collective agreements and their enforcement is one of the main reasons why BDW is regarded as an important complement to the existing regulatory framework**. It could be assumed that setting standards is more important in the UK and Poland, while extending and enforcing standards is more important in countries with substantial collective bargaining coverage. In reality, however, as we shall see, there is no clear distinction here, but local level experimentation covers the different functions in all countries (see sections 7 and 8).

[3] https://www.uni-europa.org/news/map-of-misery-examples-of-publicly-funded-worker-exploitation-and-low-quality-services/

(5) Legal developments: New options for BDW – in a marketized environment

Studies commissioned by the EU on the implementation of European-level legislation in Member States tend to take a top-down perspective, focusing on changes in national law adopted in direct response to new European directives. However, in the multi-level system of the EU, this perspective covers only a small part of the legislative dynamics. For example, many studies have highlighted the strong influence of the case law of the Court of Justice of the European Union (CJEU). Through direct and indirect channels, European case law casts a 'long shadow' (Schmidt 2015, 2018) over European and national legislation, which often merely 'codifies' the CJEU's previous rulings. In contrast, other authors emphasise the remaining scope for non-compliance and a "modification" of European case law that reflects the constellation of power and interests at the national level (Martinsen 2015, Hofmann 2018). Both perspectives still focus relatively strongly on member states' *reactions to and anticipations of* impulses from the European level, and how these are processed and absorbed by actors at the national level.

While our study confirms the important role played by recent EU-level legislation and jurisprudence on public procurement, **our findings point to three key factors that contribute to the dialectic of legislative developments in public procurement within the European multi-level system**:

(1) the boomerang effect of the preceding trends towards austerity, marketized public procurement and deregulated labour markets as a paradoxical driver for BDW

(2) the persisting ambiguities of EU level legislation and jurisdiction in itself and its accordingly diffuse effect on member states' legislative development

(3) the importance of party politics and of the subnational level

Boomerang effect of austerity policies, marketized public procurement and deregulated labour markets as a driver for BDW

At the national level, it is not least the proliferation of low-paid and atypical jobs in many European countries that has led to public pressure and regulatory efforts to regain control over working conditions in companies providing publicly funded goods and services. **Progress at (sub-)national level towards BDW can thus be understood not only as an 'uptake' of newly codified legal options provided by European law (and then transposed into national law), but also as a boomerang effect of the preceding long phase of general marketization**, including deregulated labour markets and the financial as well as legal constraints that have channelled public purchasers' behaviour towards 'buying cheap' and contributed to widening protection gaps.

This highlights, firstly, the importance of the wider political context of procurement policies - in our case, in particular, fiscal and austerity policies that define the financial scope for public purchasing, and the shape of labour market regimes at national level - which in turn can also lead to changes in

procurement policies. Specific procurement policies at EU and national level are thus only one of several determinants of this wider context, and are themselves only one of several policies developed in response to the conflicts and problems around decent work - see the other policies briefly described above.Importance of members states trajectories of change – for both policy innovations and lack thereof

Secondly, it points to a dynamic of its own resulting from **path dependent conflicts and institutionalised compromises at the national level around public procurement**. These revolve around similar issues and are characterised by similar conflicting interests as those at the European level, namely the dispute between marketization and social politicisation. However, these conflicts and the resulting policies have to a large extent developed in parallel with, and in some cases prior to, specific European procurement policies, and in some cases have put these conflicts on the European agenda in the first place. The most prominent example of this is the 'Rüffert' ruling of the European Court of Justice: the ruling represents the (provisional) end point of a long-standing domestic conflict in Germany over the admissibility of prevailing wage laws, which was then taken to the European level - an example of 'strategic litigation' (Kelemen 2011) - and from there influenced legislative developments in other countries.

ECJ jurisprudence - and the EU-level legislation that codifies it - is thus often also a transmission belt for national-level conflicts over decent work. However, the transmission does not result in a straightforward policy transfer from one country to another via the European level. National responses to the 2008 ECJ 'Rüffert' ruling (C-346/06) partly led to a rollback of pay clauses in national procurement legislation (particularly in Germany), but also triggered policy innovations that supported the original goal of national-level solutions to extend protection to workers in public procurement, such as the living wage in the UK (Koukiadaki 2014) or the reinforcement of the use of pay clauses in Denmark, which paralleled the introduction of prevailing wage laws in Germany (Refslund et al. 2020).

Overall, therefore, **procurement legislation in Member States is also following its own particular trajectory. Important dynamics in favour of BDW have partly started before a stronger emphasis of European policy on SRPP**. This is illustrated by one of the French case studies (Rennes), where the more ambitious restructuring of in-house cleaning services with the aim of improving their working conditions also shaped the city's approach to socially responsible procurement once it started to outsource part of its cleaning services (see Devetter/Valentin 2023, p. 33ff). In a similar vein, a long tradition of social dialogue in the Trento region in Italy and a pre-existing tripartite procurement committee played a crucial role in the renewal of the regulation of public procurement (see Dorigatti et al. 2023, p. 43ff); and a similar trajectory can be observed in Wales (see Mustchin et al. 2023, p. .).

Conversely, path-dependent policy choices and established jurisprudence at national level can also inhibit the adoption of BDW policies and practices in their own right, even if there are no restrictions from EU level legislation and jurisprudence. To some extent, legislative developments in the UK post-Brexit confirm this point, at least as far as the national level is concerned: The new Procurement Act 2023 aims to "create a simpler and more transparent system that is not based on transposed EU directives", new options to indirectly support BDW, such as the introduction of the ‘most advantageous tender’ (MAT) instead of the ‘most economically advantageous tender’ (MEAT), were in principle already available via the Social Value Act of 2013 and therefore " might be described as more of a legislative clarification than anything truly revolutionary"; and that, even with regard to measures that directly address labour standards, the Bill "fails to explicitly address these in a tailored and progressive way" (Mustchin et al. , 2023, p. 16). At the same time, it would seem to be

no coincidence that it is only since Brexit that more proactive approaches to including clauses on employment and working conditions have been introduced into legislation at the sub-national level - notably in Wales and Scotland.

Ambiguities of EU level legislation and jurisdiction

First, the **ambiguities of legislation and jurisprudence at the European level**. These tend to diffuse the signals sent by European level policies, shifting the resulting conflicts and uncertainties to the Member States, and have partly led to a delayed impact of the new legal support for BDW policies and practices since 2014.

On the one hand, the updated 2014 EU Public Procurement Directive (2014/24/EU) introduced a stronger emphasis on social and environmental criteria for the selection of suppliers. Thus, the so-called 'horizontal social clause' in Article 18(2) of the directive, which requires member states to 'take appropriate measures' to ensure that contracting entities comply with environmental, social and labour laws and collective agreements, as well as a list of specific ILO conventions, is certainly an important achievement, as it is mandatory and applies to all stages of the procurement process, including selection and award criteria (pre-/procurement), and not only to the contract performance stage (post-procurement). In addition to this revised European 'hard law', the European Commission has also adopted a 'soft law' strategy to facilitate the uptake of 'strategic public procurement' (including socially responsible public procurement - SRPP) (see Commission Recommendation 2017/1805; and EU Commission 2017). As part of this soft law strategy, the Commission has published a number of guidance documents and best practice examples on SRPP (see most recently EASME 2020 and European Commission 2021).

However, the Directive itself merely codified a compromise and thus contributed to what Jaehrling/Stiehm (2022) have called the "institutionalised coexistence" of marketization and socialpoliticisation. Very importantly, with the 'link to the subject-matter', **the horizontal social clause in Article 18(2) of the Directive was accompanied by the introduction of a kind of horizontal clause restricting socially responsible procurement**: As Semple (2016) has pointed out, in return for opening up to social criteria, the European Commission used the reform for a "radical extension of the LtSM [link to the subject matter] requirement" (Semple 2016, p. 65), i.e. to extend this clause to all stages of the award process, whereas previously it had only been used in European case law in relation to selection criteria. **As a result, selection criteria, award criteria and contract performance conditions cannot take into account general company policies, but must relate to the duration and the specific tasks of the contract. This however impose severe restrictions and lead to more bureaucratic or altogether unfeasible solutions for social clauses**, as illustrated by one example provided by the interviewee of the Confederation of European security Services, CoESS:,

> *"They [the national courts] take an approach that is highly restrictive on the social clause and we disagree with these approaches (…) It's true that in some cases they [the courts] have tried to differentiate and to try to explain how these social clauses can be used (...) I give you one concrete example: Equality plans. Some purchasers were putting in the tendering documents that those companies having signed an equality plan with the trade union representatives, they should get X points in the awarding procedure. Well, this was declared as not valid. But they*

> *said that it could be legal or valid if this equality plan would just refer to those workers specifically assigned to the contract (Interview CoESS, 12/2021)*

Moreover, the Procurement Directives remains embedded in EU primary law and other secondary legislation based on it, in particular the 'Posting of Workers' (POW) Directive, which for a long time limited the legal extension of collective agreements and national labour law, including through public procurement. It was only the changed case law of the CJEU and the reform of the POW Directive (2018/957/EU), which enshrined this changed case law, that opened up new scope for the mandatory application of national labour legislation and collective agreements. However, even after this, **legal uncertainty remains, particularly with regard to regional collective agreements**, as the POW Directive limits the extension of collective agreements (that have not been declared legally binding or are 'generally applicable' through *erga omnes* regulation) to "collective agreements concluded by the most representative employers' and workers' organisations at national level and applied throughout the national territory" (Article 3(8) of the revised Directive 96/71/EC).

Finally, **a more indirect 'sword of Damocles' is the system of legal remedies** that all EU Member States have had to set up as a result of European legislation requiring them to introduce a new legal procedure allowing bidders to assert their 'right to competition' in public procurement procedures (Remedies Directive, Directive 89/665/EEC). Even some of the employers' associations interviewed are critical of this effect:

> *"So the public procurement law: it may have saved money for the municipalities, but it has not improved many things for our companies, but since it was introduced, prices have gone down. You really have to say that. So it has also brought a lot of disadvantages. Municipalities are afraid of lawsuits, public procurement lawsuits, which also delay everything, even if you win [the lawsuit] afterwards. But you do lose from time to time, and municipalities are afraid of that. They no longer take any risks in terms of procurement law; they only do what is absolutely safe. But the absolute safest thing to do in terms of procurement law is 'I'll take the cheapest', so nobody can complain. And those are the things that bother us. (regional employers association cleaning industry, Germany, quoted in Jaehrling/Böhringer 2023, p. 64)*

This anxiety of failing to comply with procurement law and having to face the consequences (remedies and reprimands from supervisors) is also raised by purchasers themselves. Caimi/Sansonetti (2023, p. 109f) report of a survey in the Czech Republic among public purchasers in 2022 which showed that the "fear of change and of making mistake in one's procurement practice, which might eventually result in punishment" was the most important barrier (89% of respondents) to the implementation of socially responsible procurement.

The subnational level and party politics matter

Finally, our empirical evidence highlights how **the subnational level is an important locus for BDW-oriented reforms, and these subnational policy dynamics are a case in point how partisan politics still matter, with left-led municipalities and regions more inclined to adopt BDW**. The influence of party politics at the subnational level has been highlighted by previous research on how member states adapt to EU level policies (Sack/Sarter 2018), or how local governments raise taxes (Högstrom/Lidén 2023) or what they buy (e.g. Riedel et al. 2020). Our empirical evidence also shows, confirming previous research (Sack 2010, Jaehrling et al. 2018, Refslund et al, 2020) that left-leaning local and regional governments tend to be first movers in developing BDW-

oriented legislation and practice, which can then spill over to other regions or the national level - such as the new generation of prevailing wage laws in Germany in some states (Berlin, Saarland, Thuringia, Bremen), which have paved the way for a national bill with the same content that is currently being negotiated. In France, too, social clauses in public contracts were first developed on the initiative of local authorities (e.g. in Nord-Pas-de-Calais, a long-standing stronghold of the Socialist Party) and only later taken up by the national government in the 2000s. In Italy, it was the regions with a left-wing government majority that developed regional laws and strategies for the correct application and enforcement of collective agreements. This was also in response to union demands and pressure. In the UK, the devolved administrations, both regional (Wales, Scotland) and local, that adopted more progressive BDW policies were led by parties of the political left (Labour, SNP).

However, **the finding that progress on BDW has tended to depend on the initiative of (left-leaning) subnational governments, also points to a problem**: it reflects policy choices at the European level, in that the European directives have included few mandatory provisions on BDW, leaving it to the discretion of member states to decide whether to introduce more mandatory provisions requiring public authorities to purchase decent work. However, the Member States in our sample have often used their discretion to devolve decisions to the subnational level or even to local authorities by simply replicating the largely optional nature and general wording of the regulations (see also Caimi/Sansonetti 2023). This also means that if subnational governments decide *not* to develop specific policies towards BDW, the adoption of the new optional rules remains the responsibility of local authorities or individual purchasing authorities (if any, i.e. if not prohibited by national legislation). As some of our case studies show, **the lack of precise laws and administrative regulations clarifying the somewhat vague wording of the EU Directive[4] represents a major hurdle or even an excessive challenge for actors at the lowest level of the state hierarchy.**

The limited professional skills of public purchasers, especially in smaller contracting authorities, is seen by many experts interviewed for the study as part of the explanation for the slow uptake of BDW options. Guidance materials and capacity building (see next paragraph) can certainly assist purchasers who, on the basis of a clear political mandate or individual political conviction, nevertheless make it their task to overcome these obstacles. However, they should not be used as an argument in the blame game over who is responsible for the limited uptake of BDW practices, and even less as a substitute for necessary legal reforms.

Soft law and capacity building: bridging or reinforcing ambiguities in the law?

In addition to the revised hard law, a wide range of guidance materials and capacity building activities have been developed by government agencies to encourage and support the uptake of the new options for 'strategic' public procurement, both at the European level (see Caimi/Sansonetti 2023 for an overview) and in the EU Member States studied (see national reports and OECD 2023 for a selection of other EU members states). Examples for the non-statutory soft law are circulars, manuals or best practice collections, and the capacity building activities include professional networks for peer

[4] Such as: award criteria may include "social aspects linked to the subject-matter of the public contract in question", Art. 67 of Directive 2014/24 EU.

exchange, advisory units (e.g. Denmark) and 'competence centres' (Germany) providing information and counselling services to purchasing managers and companies, or the redefinition of professional roles and new training programmes for purchasers (Poland, Italy) (which may be more or less closely aligned with the competency matrix 'ProcurCompEU' developed by the European Commission)[5].

However, there are three limitations: **Firstly, the focus of this emerging expertise infrastructure is partly very general (on 'professionalisation') or neglects social considerations at the expense of other aspects bundled under the term 'strategic' procurement**. In Germany, for example, there are three 'competence centres' dedicated to ecological procurement, innovative procurement and the procurement of fair-trade products, but there is no competence centre focusing on the procurement of decent work in domestic industries (Jaehrling/Böhringer 2023, p. 24); similarly, the report on Denmark finds that little attention is devoted to social goals in the additional trainings available to public purchasing managers (Refslund et al. 2023., p. 19). **Secondly, even where national soft law is developed with a particular focus on social considerations, it often remains preoccupied with employment clauses, reserved contracts for social enterprises or SMEs in general, reflecting the focus of soft law at European level**. This has tended to fill the term 'strategic procurement' with a rather narrow understanding of social justice (market access for disadvantaged groups) (Jaehrling/Stiehm 2022, p. 174f.). Finally, the soft law developed by the European Commission initially also meant to make sure that the new legal options for social considerations were not used by member states and purchasing authorities to disproportionally limit competition. The European soft law thus does not only point out the 'do's' but also the 'don't's' of 'buying social' practices (Jaehrling/Stiehm 2022, p. 170ff)[6]. **Thirdly, thus, the European soft law in itself thus has tended to re-iterate the ambiguities and restrictions built into the law.**

Still, it would seem that **the European Commission has started to apply less restrictive interpretations over time, at least in its Soft law**. This is suggested by the interviewee from the European Commission's Directorate for the Internal Market, Industry, Entrepreneurship & SMEs (DG GROW), which was key player in the reform of the European procurement directive to ensure that the 'link to the subject matter' (LSTM) is firmly enshrined in the new Directives. The interviewee from DG GROW confirms that the LSTM has been and still is seen as a core element of European public procurement law in order to "set a limit to the pursuit of certain policy objectives", such as excluding companies that do not have a certain corporate social responsibility (CSR) policy. However, the interviewee also reports that the LSTM remains a subject of debate even within the Commission, and is becoming increasingly so, since the more the Commission supports procurement practices geared towards 'policy objectives' and the more Member State administrations make use of the possibilities offered by the legal framework, the more it becomes apparent that the LSTM imposes restrictions and that there are also many 'grey areas'. In selecting the 'good practices' for the second edition of the 'Buying Social' guide (European Commission 2021), the Commission therefore deliberately took a less

[5] https://commission.europa.eu/funding-tenders/tools-public-buyers/professionalisation-public-buyers/procurcompeu-european-competency-framework-public-procurement-professionals_en

[6] For instance, the 'Buying Social Guide' of the European Commission explicitly rules out a "a requirement that bidders have a general corporate social responsibility" (since incompatible with the 'link to the subject matter' requirement), and recommends public purchasers "rather than requiring a company-wide policy, you should focus on the specific aspects of social responsibility, which it wishes to address in the contract" (European Commission 2021, p. 21).

restrictive view of the practices brought to its attention, in order to support " a bit more adventurous" practices:

> *I mean, to a certain extent, it's part of the field, so in some cases we ourselves are not fully sure, because there are some grey areas. So we try to be prudent in the selection of good practices, but sometimes there are things that we thought were quite good and, you know, in doubt we just wanted to showcase them. Or where we have doubts, but for policy reasons we have the interest to push the envelope a little bit. (…) I think it passes the message that, you know, you don't have to be so strict, legally speaking, anymore and it leaves you a little bit more of a free hand, to be a bit more adventurous, let's say, on supporting certain practices, or at least not directly criticising them. So I think towards certain practices we've taken a bit more of a of 'Yeah, let's wait and see what happens with this'- type of attitude" (Interview DG GROW, 12/2021)*

An example underlining this more flexible interpretation of the LSTM is the statement in the Buying Social guide that "In some cases, a corporate social responsibility policy may serve as (partial) evidence in relation to a specific requirement" (European Commission 2021, p. 21). This is illustrated at the example of a corporate policy facilitating whistle blowing. Still, the somewhat more generous attitude towards public buyers in the European Soft law still co-exists with enforcement activities of the European Commission (through formal letters of notice to Member States), as in the case of Latvia, where the European Commission auditors called into question, by referring to the missing the link to the subject matter, a pay clause obliging contractors to apply collective agreements (Interview UNI Europa, 12/2022)

In the six countries studied, there are a few examples for more advanced state-led guidance materials and agencies focusing on quality in work, partly with a focus on cleaning and security services:

- In Italy, the state agency ANAC - the national anti-corruption authority - was given a wide range of tasks by the new national procurement law in 2016, including the adoption of guidelines and other soft regulatory tools aimed at developing best practices. The resulting soft law also included a regulatory framework for social clauses. However, the 2023 revision of the national public procurement law abolished this regulatory function of the ANAC (Dorigatti et al. 2023, p. 28f).
- In France, the Prime Minister's Office issued a circular encouraging purchasers to integrate social and environmental issues, which initially (2008) included only environmental issues, but in 2013 introduced incentives to develop daytime cleaning, and finally in March 2023 included a new text specifically focusing on job quality in the cleaning and private security sectors (Devetter/Valentin 2023, p. 23).

The effects of the new pro-BDW soft law and expertise infrastructure– where it exists – is difficult to assess. On the one hand, some interviewees express their doubts regarding the practical impact of this non-binding soft law, as illustrated by the following quote from a French trade union representative: *"(…) the problem is that you can always produce guides to good practice, but if authorities don't regulate it, it doesn't work." (*quoted after Devetter/Valentin 2023. p. 24). On the other hand, across countries and for both sectors studied, interviewed experts from trade unions, employers and state agencies generally shared the view that further professionalisation was needed in order to support BDW; and that this also requires as *industry-specific professional expertise* as possible. That is one reason why the social partners in several countries have also started to be quite active in developing soft law and capacity building for BDW (see section 6).

Results: New direct and indirect regulations supporting BDW, and their limits

Overall, the research conducted for this study illustrates how the interplay of the various factors discussed above has led to more dedicated policies geared towards BDW. The remaining ambiguity in both European and national level legislation and jurisdiction – their oscillation between, or rather the 'institutionalised co-existence' of, marketization and BDW – has however accompanied the legislative developments in member states over the past 10 years, and partly only led to **delayed changes towards policies unambiguously opening up the legal framework for BDW**. In Italy, for example, the 2016 Code already introduced the extension of the 'most representative' collective agreements to all public contracts, but the lack of more precise rules on *which* collective agreement could be applied, combined with a national jurisprudence in favour of 'freedom of enterprise', meant that this still left room for tenderers to choose collective agreements with lower terms. This was only remedied by a legal clarification in 2023, which made it mandatory for contracting authorities to specify the collective agreement in the tender documents and impose it on contractors. Similarly, in Germany, the legal uncertainty as to whether prevailing wage laws that extend collective agreements (including at regional level) are in line with EU law was only remedied by the revision of the EU Posting of Work Directive (2019) and has since led to a new legal dynamic regarding the reintroduction of pre-Rüffert prevailing wages.

The **oscillation between marketization and BDW, and the resulting limited effectiveness of the new legal options**, also emerged in our interviews **in relation to *indirect* ways of buying decent work**.

- For example, several PROCURFAIR reports (on Germany, Italy and France) discuss the limited effectiveness of the possibility to exclude abnormally low bids, not least due to a restrictive interpretation by national courts (see also section 7 of this report).
- The obligation to open up competition to small and medium-sized enterprises is the main reason for restrictive legislation and jurisprudence, both at EU level and at national level, with regard to efforts to limit subcontracting (see the 'Vitali' ruling of the CJEU, and Jaehrling/Böhringer 2023, p. 25 for German jurisprudence).
- In addition, the obligation to open up competition to small and medium-sized enterprises also leads to the splitting of larger lots into smaller ones, resulting in short working hours and multiple employer situations (see e.g. Devetter/Valentin 2023 for France).

The table below gives an overview of major legislative changes in the six countries studied, using the distinction between objectives (setting, extending, enforcing standards) and means (direct/indirect).

Overall, this overview shows that

- firstly, despite the limitations discussed above, the **last decade has seen some important innovations with regard to both direct and indirect ways to buy decent work.** For the most part, these innovations paradoxically have a 'conservative' or 'restorative' character: they serve to oblige public buyers to respect and enforce standards that have already been established – in particular through collective agreements, but also through general legislation and voluntary charters (e.g. 'living wage') – but de jure or de facto have a limited prevalence in publicly

funded service. They are also meant to restore standards that have previously been perforated by legal exit options as a result of the deregulation of labour markets – one example is the newly introduced obligation in Poland to use employment instead of civil law contracts, another one is the requirement in Scotland to refrain from an "inappropriate" use of zero-hour works contracts. The new procurement law in Poland also illustrates how mandatory regulations are needed in order to overcome public buyers reluctance to make us of optional clauses : There, the most serious barrier to make us of pro-employment clauses such as asking bidders to use employment instead of civil law contracts "was the expected increase in cost services after its application, which in turn could have resulted in the allegation of mismanagement on the part of the public spending control authorities (…) It was only in 2016, when the public procurement law required contracting authorities to impose on contractors the obligation to employ employees based on employment contracts in certain situations, that officials' fear of the accusation of mismanagement was largely reduced" (Czarzasty/Duda 2023, p. 12).

- Thus, secondly **rather than making public procurement a pioneer in raising employment standards, the innovations so far are for the most part doing the much more basic job of preventing the state's purchasing power from fuelling a race to the bottom and thereby lowering or undermining standards**. This emphasis on the 'conservative' role of innovation in the context of current BDW policies is by no means meant to exclude more ambitious goals and a pioneering role for public procurement – this is certainly needed, especially in environments with very low or non-existent standards. Rather, it should serve as a reminder that the - still often controversial - shift in procurement policy towards opening up to BDW is an absolute minimum in order to heal the market distortions caused by 'buying cheap' practices.

- Thirdly, the overview also illustrates that **there is untapped scope for more progressive policies even within the existing European legislative framework**. For instance, although the (restrictive) 'Vitali' ruling of the CJEU on subcontracting concerned an Italian law, this has not prevented Italian legislation from still imposing significant restrictions on subcontracting in labour-intensive services such as security and cleaning – unlike in other countries such as Germany.

Any legislative progress will depend very much on the effective implementation of the new mandatory and optional rules. The following sections turn to this non-trivial task of procurement practice.

Table 3. Most important legal innovations for BDW in the countries under study[7]

	SETTING new standards	**EXTENDING** existing, non-mandatory **standards**	**ENFORCING** mandatory standards
Direct	**GER** (2017ff): procurement specific minimum wages above the level of statutory minimum wages in several federal states	**PL** (2016): Mandatory use of employment contracts (instead of civil law contracts) **GER** (2019ff): new prevailing wage laws making 'most representative' collective agreements mandatory in several federal states **DK** (1996/2014): labour clauses mandatory for state level authorities, optional for regional + local authorities **IT**: (2016/2023): mandatory application of collective agreements signed by 'most representative' trade union. -→ 2023: The contracting authority has to point out this specific CA in the call for tenders and include mandatory requirement in contract **UK/Scotland** (2018): Fair Work First policy requires contracting authorities to secure fair pay (.e.g. LWF living wage) + not make inappropriate use of zero-hour contracts, among other things **UK/Wales** (2023): Social Partnership and Public Procurement Bill	**IT** (2016/2023): mandatory inclusion of specific social clauses aimed at promoting the employment stability (=enforcing TUPE law), for labour-intensive activities → 2023: for all works and services. **DK** (2022): joint control units on labour clauses across administrative units made explicitly lawful
Indirect	**IT** (2016): using lowest price as sole award criteria not permitted for labour intensive services, i.e. contracts for which labour costs represent more than 50% of all operating costs. **IT** (2016): restrictions on sub-contracting: in labour-intensive contracts, the share of subcontracted work cannot exceed 50% of the contract volume **IT** (2016): contracting authorities have to a) indicate labour costs of reference based on national tables with standard labour costs provided by the Ministry of Labour and Social Policies and based on collective agreements b) assess labour costs indicated by bidders against these rates calculated ex-ante, in order to determine abnormally low bids **UK** (2023): 'Most advantageous tender' (MAT) replaces 'Most economically advantageous tender (MEAT)		

Source: Own compilation based on PROCURFAIR national reports

[7] One innovation that is difficult to categorise according to the scheme is the main legal innovation in France, where the 2014 EU Directive led to an obligation for local authorities with annual purchases of more than €100 million to draw up a scheme for the promotion of socially and environmentally responsible public procurement (SPASER). So far, however, the social clauses implementing this obligation remain focused on employment opportunities for vulnerable groups, not on job quality (Devetter/Valentin 2023, p. 23), which is another reasons why this innovation is omitted from the table.

(6) BDW practices: The role of social partners

Social partners have actively participated in the legislative processes at European and at (sub)national level. The EU sectoral social partners in three service industries (private security, cleaning and contract catering) have recently issued 'Joint Declarations' highlighting the persistent shortcomings of the current procurement legislative framework and the resulting purchasing practices and calling for a revision of EU public procurement rules, for example to exclude the use of the lowest price criterion for labour-intensive industries or to make the application of collective agreements mandatory (see UNI Europa & CoESS 2022 for private security services[8], UNI Europa & EFCI 2023 for cleaning industry[9]). UNI Europe is also leading the EU-level campaign 'No Public Contract Without Collective Agreement' which has won the support of more than 170 EU Parliament members and calls likewise for a revision of the EU procurement rules.[10] At the (sub)national level, trade unions have also pushed for the introduction of labour clauses in procurement legislation, and employers' organisations have lobbied for the strengthening of quality-oriented procurement through appropriate regulations.

The focus of this study is however on procurement *practices*. As we shall see, the involvement of employers' and workers' representatives in the promotion of BDW extends beyond the legislative process and also covers the actual implementation, amendment and enforcement of new legislation and optional provisions. On the basis of the six country reports, three main areas of activity can be identified.

Building up pressures to move away from ‚buying cheap'

As we have seen above, new legal options for BDW are often voluntary and do not automatically translate into widespread use of these options. As the case studies for this research project document, it is often the negative outcomes of 'buying cheap' practices, either in terms of quality of services or quality of jobs, that trigger public scandals and initiatives to move away from these practices. In several cases, trade unions have helped to expose the problematic consequences of these practices in the first place – facilitated by their network of shop stewards or trade union-organised support services for individual grievances, such as the *ufficzi verteze* in Italy or the *Arbeit und Leben* and *Faire Mobilität* agencies in Germany – and then to challenge and scandalise these practices and mobilise for a more general change in local or sectoral procurement strategies (see in particular the cases of IT-2 (Dorigatti et al. 2023, p. 43ff), PL-1 (Czarzasty/Duda 2023, p. 17ff) or DK-2 (Refslund et al. 2023, p. 28ff). Sometimes workers' groups outside the trade unions also take on this mobilising role, as in the case of UK-3, where a women's group, supported by lawyers and a favourable court decision, took the lead (Mustchin et al. 2023, p. 38ff).

[8] https://www.uni-europa.org/news/uni-europa-coess-joint-declaration-on-public-procurement-and-collective-bargaining/

[9] https://www.uni-europa.org/wp-content/uploads/sites/3/2023/03/20230221_Publicprocurement_collectivebargaining.pdf

[10] https://www.uni-europa.org/eu-affairs/procuringdecentwork/page/9/?acf=related_posts

Soft law and capacity building

While trade unions and other employee representatives have played a particular active role in initiating new experimentation on BDW, by using their ties to left-leaning parties and building up public pressure (through strikes, press campaigns, demonstrations), the focus of employers representatives activities, as documented by the national reports, is more on the development of soft law and capacity building. This is not merely developed by state agencies (see previous section), but also by social partners, or with the support of social partners.

The best known examples are the 'best value' guides jointly developed and disseminated by the social partners at European level, including in the cleaning and private security sectors, and updated after the 2014 reform of the public procurement directives (see www.securebestvalue.org and www.cleaningbestvalue.eu for the latest versions). Most importantly, these **guides provide purchasers with *sector-specific* know-how, in particular on how to define 'quality'** in relation to the service in question, how to translate this definition into appropriate quality-related (exclusion, selection and award) criteria in the tender documents, and how to assess the tenders against these criteria. **In both the cleaning and private security best value guides, criteria relating to skills, health and safety and good working conditions for staff play a prominent role**, as they are seen as key requirements for service quality in these labour-intensive industries. This feature is important to retain, as it distinguishes these 'collectively negotiated' guides from other guides unilaterally produced by professional associations, which may attribute a subordinate role to job quality (see the example of contract catering in Germany described in detail in Jaehrling/Stiehm 2022, p. 192ff).

In addition to these European-level social partners' guides – which have been translated into many languages – the reports on France, Germany and the UK highlight additional activities at national level involving the social partners in the two sectors under review, in particular employers' organisations, but also trade unions, law firms and civil society organisations. These may include additional sector-specific recommendations, examples of good practice and practical tools (model tender specifications, checklists). **Overall, these *sector-specific guidelines for labour-intensive services* help to fill a gap left by governmental bodies at both European and national level in most countries**.

Second, in some countries, employers' organisations and, to some extent, trade unions are also actively involved in **disseminating this know-how by providing training programmes and advice to public purchasers** (Devetter/Valentin 2023, p. 23f; Jaehrling/Böhringer 2023, p. 24, Refslund et al. 2023, p. 38).

Finally, a third element of 'capacity building' with the support of the social partners is the **systematic monitoring of calls for tender in order to identify poorly drafted tender specifications**, which are bound to lead to poor quality bids and thus pave the way for non-compliance with labour and quality standards. This is an approach that has been adopted very systematically in Spain, where both in the cleaning industry and in the private security sector the social partners jointly operate so-called 'observatories', which at least monitor tenders with a high financial volume (interview EFCI, and interview CoESS, 12/2021). In addition to providing advice at the pre-tender stage, they examine the published tender documents and provide feedback to the commissioning bodies in cases where certain provisions may not comply with Spanish legislation, including labour law, collective agreements and

labour clauses. However, this systematic monitoring seems to remain the exception, at least there are no similar observatories in the countries in our sample. Nevertheless, some of the experiments at regional level in Italy do entrust the trade unions with a similar monitoring objective, at least with regard to the stability of employment conditions (section 8); and this is also supported by procedural rights for social partners anchored in laws or collective agreements (see next point).

Procedural rights for social partners

A third element of social partner involvement, which has more recently gained in importance, is new institutionalised rights relating to their contribution to the design and effective implementation of BDW practices, both in individual tenders and in decision-making on procurement rules. While in the past the use of social partners' expertise has been rather informal and occasional, either through public purchasers consulting social partners in the pre-tender phase or social partners approaching contracting authorities to highlight problematic tender specifications or problems with contracted companies, there are also a few cases where these links are put on a more systematic basis through procedural rights granted to social partners.

- In the case of Denmark, for example, the legislation on labour clauses explicitly recognises the role of the social partners by providing that public authorities may consult relevant stakeholders, including trade unions. This seems to have actually led public authorities to make greater use of this possibility (which certainly existed on an informal basis before) and to seek the assistance of trade unions in correctly interpreting the collective agreements made mandatory by the labour clause (Refslund et al. 2023, p. 38).
- In Wales, a 'Social Partnership and Public Procurement Act' was passed in 2023, establishing a Social Partnership Council for Wales and providing for a greater role for trade unions in procurement decision-making. The Act builds on a long history of previous collaborative structures between local authorities, social partners and community groups who had “worked together to lobby businesses to pay the real living wage, but also to lobby the Welsh Government to provide the funding to enable the payment of the real living wage” (Mustchin et al. 2023, p. 47). While it is too early to assess the impact of the new law, it was seen as a very innovative practice in the UK context:

  > *“it's the Scandinavian model, of getting the issues out on the table and coming up with solutions and you end up with less industrial disputes and more productivity is the aim…(…), we're hoping their [trade unions] members will be the eyes and ears, if there's any issues, they know how to report it. (Wales urban council procurement manager, quoted in Mustchin et al. 2023, p. 46)*

The most comprehensive examples in our sample of this kind of formal involvement of the social partners were found in Italy, where several regions in northern Italy have adopted regulations that actively involve trade unions, and in some cases employers' associations, in the design and proper implementation of labour clauses to ensure the stability of employment and employment conditions, both in the pre-tender and post-tender phases (Dorigatti et al. 2023, Part 3, p. 33ff). These practices are discussed in more detail below (see sections 7 and 8). The cases illustrate the (so far largely untapped) potential of a more systematic involvement of key stakeholders in the organisation of fair public supply chains for domestic services, as well as some of the challenges involved, in particular the resources needed by the social partners for this time-consuming task.

(7) Experimentation in setting, extending and enforcing wages

Ensuring decent wages is one of, if not the core of, BDW practices in all countries. This may be surprising, as one might expect this regulatory role of BDW to be more or less important depending on the national context. As we have seen above (section 4), there are important institutional stabilisers for decent wage levels in the general labour market regime (minimum wages, collective agreements), but to different degrees in the countries in our sample. A working hypothesis might therefore be that BDW practices are of relatively little relevance in settings with full coverage by collective agreements through extension mechanisms (France and Germany), or at least that *the different roles of BDW* distinguished above are more or less important in the countries in our sample:

(1) **SETTING standards** for decent pay could be expected to be the main function of BDW in the **UK and Poland**, i.e. in settings with a statutory minimum wage but very low coverage by collective agreements, with a view to raising wages above the statutory minimum.

(2) **EXTENDING standards** could be expected to be the main function of BDW in **Denmark and Italy,** i.e. in settings with a high degree of collective bargaining coverage, in order to effectively extend the coverage of collective agreements to all companies in an industry and thus compensate for the lack of a statutory minimum wage and general extension mechanisms[11].

(3) **ENFORCING standards** would, if anything, be the core role assigned to the BDW in **France and Germany**, i.e. in settings with full coverage by collective agreements (in the two industries studied) through extension mechanisms, as gaps in wage protection would presumably be mainly due to non-compliance with statutory rules.

However, as seen above, even in countries with high to universal coverage by collective agreements, hourly and monthly wages for the majority of cleaners and security guards must still be considered low in relation to national income levels and the cost of living, and are made more precarious by practices of non-compliance with laws and collective agreements. Moreover, the fact that wages are set at rather low levels does not preclude significant challenges in enforcing even these wages in all countries. This is reflected in the summary table on the selection of case studies that focus on the wage dimension of job quality. It shows that, **empirically, the BDW landscape is much more diffuse than the clearly delineated country clusters** that would correspond to the working hypotheses above.

[11]However, Italy is to be classified somewhere between countries with and without extension mechanisms, as there is a long established jurisdiction that has extended pay rates set by national collective agreements to all companies of an industry.

Overview on BDW practices with regard to wages: Varieties of pay clauses

Table 4. Setting, extending, enforcing wages: Overview on case studies

	SETTING	EXTENDING	ENFORCING wages
Direct		**UK-4.** securing real living wage for outsourced and in-house workers	
		PL-1: pay clause security services (Poznán): higher than minimum wages as award criterion	
		GER-1: Regional pay clauses + inspection unit (Berlin)	
		GER-5: Municipal pay clauses (Karlsruhe): application of collective agreement as award criterion	
		DK-2: specifying applicable collectively agreed wages (+ working conditions) for security services	**DK-1**: State-level inspection unit
		DK-3 + DK-4: municipal labour clauses and cross-municipal control units (Copenhagen area + Funen)	
		FR-1: Imposing higher hourly wages, paid overtime and stricter controls (MUCEM, Marseille)	
		IT-1: labour clause imposing application of 'most representative' CA + comprehensive re-hiring obligations (including number of working hours, seniority) + supporting their enforcement with bi-partite technical committee	
		IT-2: Labour clause specifying applicable wages, comprehensive re-hiring obligations + enforcement unit + limits for weight of price criterion (max. 15%) (Trento region)	
Indirect		**IT-3 + IT-4**: Labour clauses specifying applicable wages + limits for weight of price criterion + limits on subcontracting (Emilia Romagna region)	

Source: Own compilation based on PROCURFAIR national reports

The vast majority of BDW practices revolve around labour clauses, which require contractors to pay their employees a certain hourly wage, in line with ILO Convention 94 which stipulates that public contracts shall include clauses ensuring that wages, hours of work and other conditions of labour "are not less favourable than those established for work of the same character in the trade or industry concerned in the district where the work is carried on" (Article 2 ILO Convention 94). These labour

clauses are usually based on specific legislation, but can also be a result of individual contracting authorities' initiatives. **A rough distinction can be made between two types: Compensatory pay clauses and complementary pay clauses**.

(1) *Compensatory* pay clauses set wage standards themselves and come into force where there are no other mandatory minimum wages or where these are considered to be too low.

- One example is the procurement-specific minimum wage in Germany, which sets hourly wages above the statutory minimum wage, similar to the Real Living Wage in the UK. Contracting authorities in several German federal states are obliged to include these procurement-specific wages as a contract performance condition. Before the sharp increase in the statutory minimum wage in 2022, these mandatory procurement-specific wage clauses could be more than 25% above the statutory minimum wage (€12.5 instead of €9.82 in Berlin) and even significantly above the collectively agreed wage group for cleaners and security guards (Jaehrling/Böhringer 2023, p. 18).
- In Poland, there are no specific legal provisions on pay clauses, but case PL-1 illustrates how individual contracting authorities can still seek to raise wages above the level of the statutory minimum wage: Here, the contracting authority included wage levels as an award criterion and awarded tenderers extra points if the wages paid to their employees were above the statutory minimum wage (score increases up to a level of 17% above the statutory minimum wage) (Czarzasty/Duda 2023, p. 17ff).

(2) *Complementary* pay clauses are linked to collective agreements. In these cases, the level of pay is set by the social partners rather than by the legislator or the contracting authority. The main purpose of these pay clauses is to increase the coverage and enforcement of collective agreements.

- In Denmark, the use of collectively agreed labour clauses is mandatory by law for contracts awarded by ministries and government agencies at national level, but increasingly also for purchasers at regional and local level. Accordingly, the number of municipalities applying labour clauses has increased from only around 50% in 2017 to more than 80% in 2021 (Refslund et al. 2023, p. 11).
- In Italy, the national procurement law from 2016 has also made the extension of collective agreements mandatory for all levels of government. However, the experiments of some Italian regions documented in the case studies (Dorigatti et al. 2023, p. 33) show how the proper application of these mandatory pay clauses is complicated by legal loopholes and required additional efforts.
- In the case of FR-2, the purchasing unit of the MUCEM in Marseille also wanted to pay 'more than the minimum' – in this case more than the lowest pay grade for security guards in the general collective agreement, which was not above (and sometimes below) the national minimum wage. A legally compliant way of doing this was to set higher qualification requirements that corresponded to higher pay grades in the collective agreement (Devetter/Valentin 2023, p. 41ff).

Overall thus, pay clauses may often be based on specific procurement legislation that allows or even obliges contracting authorities to use them, but **the uptake of voluntary legal pay clauses and their proper implementation, even where they are mandatory, is far from trivial and requires more than just putting them on paper** – hence the importance of active buyer

engagement and innovative BDW practices. In addition, where there is no specific statutory labour clause, or where neither labour clauses nor general extension mechanisms provide for a decent wage level, **some contracting authorities develop new ways to raise wages above the legal minimum on their own. Again, this is challenging and requires expertise**.

Three sets of challenges shall be discussed here in more detail.

EXTENDING standards: which collective agreements and which provisions apply?

In the three countries in our sample where they exist (Denmark, Italy, Germany), compensatory clauses referring to collective agreements are formulated in general terms, i.e. they oblige contracting authorities to impose the terms from the 'most representative' collective agreements on their tenderers. Without further specifications in the administrative rules on how these 'most representative' collective agreements are to be identified, this leaves the possibility of misinterpretation and the selection of collective agreements with 'less favourable' conditions than those prevailing in the sector and region where the contract is to be performed. As there is a lack of legal clarity as to what 'most representative' means, both at national and European level' (for the Danish case, Nielsen 2022, quoted after Refslund et al. 2023), this can be difficult to assess, particularly in industries where there are several competing collective agreements that may claim to be representative, depending on the indicators used (as in the Danish cleaning industry, for example, see Refslund et al. 2022: 31). Even where there is a clearly dominant collective agreement in terms of its de facto coverage and the representativeness of the bargaining parties, there may still be competing collective agreements with lower terms, concluded with 'yellow' or at least smaller unions (see the case of DK-2), or collective agreements that overlap in terms of the business areas they cover through the existence of cross-industry collective agreements ('multi-service' or 'facility management' agreements) alongside industry-specific collective agreements for cleaning or security services (see the cases of IT-2 and IT-1).

Much of the experimentation at sectoral or regional/local level analysed in the PROCURFAIR country reports is therefore concerned with defining the specific collective agreements and the specific provisions of these collective agreements that economic operators have to comply with. The social partners sometimes play an important role here: In the case of IT-2, the provincial government is entrusted with the task of identifying the reference collective agreements for the activities carried out under public contracts, after consulting the relevant social partners. In the case of IT-1, it is a bipartite committee involving the trade unions that specifies the mandatory labour clause for large service contracts, including the identification of the reference collective agreement (Dorigatti et al. 2023, pp. 35f. and 42f.).

In any case, the actors involved have to cope with legal uncertainties, as in the case of DK-2, where the government agency charged with deciding which collective agreement is the 'most representative' in the case of private security services (after scandals had occurred) had to put aside doubts about the interpretation of what 'most representative' means (Refslund et al. 2023, p. 30). Similar uncertainties accompanied the implementation of prevailing wage laws at regional level in Germany (Jaehrling/Böhringer 2023, p. 20f.). In Italy, prior to the most recent revision of the Public Procurement Code in 2023, several rulings by national courts had held that specifying a particular collective agreement in the tender documents was not in line with the principle of freedom of enterprise and

thus not in line with European law. This interpretation ultimately also limited the effectiveness of the experiment at regional level (Dorigatti et al. 2023, pp. 39f), however, the matter seems to have been resolved by the new national legislation, which unequivocally declares this to be legal.

It is important to emphasise that in cases where collective agreements set very low entry wages, as in the Italian and French case studies, the extension of collectively agreed hourly wages is not sufficient to secure decent wages. BDW practices in these cases therefore include or even focus on other elements of the wage bill, such as securing paid overtime instead of full annualisation of working time accounts (FR-2), or securing collectively agreed seniority pay increases and volume of hours worked (i.e. monthly wages) – which is particularly challenging in the case of a change of contractor (Italian cases).

ENFORCING standards: A key element of almost all cases

The establishment of procedures for monitoring and sanctioning non-compliance is a key element in almost all of the cases in our sample involving pay clauses. Such comprehensive approaches are a significant step forward, demonstrating that public purchasers have come to recognise that ensuring the enforcement of standards is crucial to any attempts to use public procurement as a lever to raise standards – rather than the reverse view, where the lack of capacity to effectively enforce decent work in contracted companies is used to justify a 'hands-off' approach by public purchasers, i.e. abstaining from efforts to raise wages.

The main challenge is certainly to have adequate staffing levels, and the “chronic underfunding of oversight authorities” (Bosch et al. 2023, p. 79) reported in the general literature on enforcement and compliance is also an issue raised in the case studies. Beyond that, it also requires adequate procedures to detect non-compliance, to remedy the situation (e.g. by paying workers their outstanding wages), and to devise sanctions with enough 'bite' to prevent non-compliance in future tenders. However, European legislation and jurisprudence provide little guidance on these aspects of enforcement. This is despite the fact that, as Bruun (2022) points out, both the new (2014) EU Directive and the CJEU emphasise that enforcement is one of the fundamental principles of EU public procurement law, thus a 'cardinal value' (CJEU) similar to the other fundamental principles such as non-discrimination and transparency, and that Member States are therefore obliged to implement relevant measures. Yet, as Bruun notes,

> *“The detailed EU regulation of public procurement is basically silent on the issue of enforcement. (…), the CJEU has stated that it must be possible to follow up and control different clauses and conditions in public contracts, but neither the legislation nor the Court ’ s practice tell us anything about how follow-up and enforcement should take place when the contract has been signed and is in the stage of implementation” (Bruun 2022: 440).*

On the negative side, this leaves public authorities with little indication; on the positive side, it gives them the freedom to set up inspection infrastructures that they consider most appropriate. In the cases in our sample, this results in a wide variety of approaches, reflecting to some extent the different instruments and strategies of general labour inspectorates discussed in the literature (see, for example, the overview in Bosch et al. 2023, pp. 76ff). Some of the differences and their respective advantages and shortcomings are highlighted in the following:

Detecting compliance: Paper-based versus on-site controls

In the majority of our cases, the units set up to detect non-compliance have a proactive approach, i.e. they do not simply react to individual or collective complaints (as in IT-2), but carry out spot checks without any specific suspicion. However, many of them are limited to checking pay slips (e.g. GER-1, PL-1, IT-1); only in the three Danish cases do the inspection units carry out unannounced on-site checks. Paper-based controls are considered rather ineffective by the experts interviewed. A clear indication that on-site inspections are significantly more effective is that in the German case, the paper-based inspection of the procurement-specific inspection unit detected almost no cases of non-compliance in the first two years, despite the fact that it targeted the private security and cleaning sectors, while the on-site inspections carried out by the general labour inspectorate (controlling the statutory minimum wage) regularly detect a considerable number of irregularities in the same sectors (Jaehrling/Böhringer 2023, p. 37). As the experiences in the Danish cases shows, on-site inspections are also faced with important challenges, in particular in settings with a high share of migrant workers, for various reasons, and are thus unlikely to detect all cases of non-compliance. Still the overall impression of interviewees here is that the control unit has a preventive effect (Refslund et al. 2023, p. 25)

Sanctioning and preventing non-compliance: ex-post versus ex-ante approaches, deterrence vs. negotiations and persuasion

By 'ex-post' approaches we refer to the most common strategy of monitoring compliance at the post-procurement stage. In some cases, however, this is complemented by pre-procurement (ex-ante) strategies to prevent non-compliance in the first place. For example, in the case of the cross-municipal enforcement unit in the greater Copenhagen area (DK-3), individual municipalities regularly hold meetings on their public procurement procedures, where they also provide information on labour clauses and their enforcement (Refslund et al. 2023, p. 39). Spreading knowledge about the standards to be met and the potential sanctions that may apply is certainly a way to improve compliance. An even more comprehensive approach has been developed in the Italian region of Tuscany (case IT-1), where a provincial law created a bipartite technical committee involving the purchasing authority and the trade unions. Its remit includes drafting the call for tenders and the precise wording of the mandatory labour clauses so as to leave little room for wilful or inadvertent misinterpretation by future contractors; it is also tasked with developing evaluation criteria to reward companies that offer stronger labour protection elements (Dorigatti et al. 2023., p. 36) – which can arguably also help to reduce the likelihood of non-compliance.

Where non-compliance is detected, contractors can face a wide range of consequences, from persuasion and problem-solving dialogues to punitive measures such as financial fines, contract cancellations or even consequences under criminal law. Punitive measures are considered by part of the literature as an important element in order to deter companies from future non-compliant behaviour. This is however a weak spot of all enforcement strategies documented in the case studies. The limited 'bite' of sanctions in case of detected non-compliance is due to several reasons.

- A first limitation stems from **legal constraints: the 'self-cleaning' option** made mandatory by the 2014 EU Procurement Directive can offer companies a relatively easy way to avoid the sanction of being excluded from public tenders for several years, depending on the national legislation transposing the directive. In Germany, for example, a company that has been found guilty of not paying taxes and social security contributions "can restore its reliability simply by

subsequently fulfilling its obligations and settling the outstanding claims or committing itself to the payment of the claims" (Dentons 2021, p. 24); and thus can then no longer be excluded from future tenders.

- Second, the bite of sanctions is limited by **competing logics embodied in different roles within the administration**, combined with the limited competences of the specific control units. In both the German and Danish cases, the control units merely report cases of non-compliance to the contracting authority and can recommend sanctions (chosen from the range of possible sanctions laid down in the procurement laws), but the decision whether and how to sanction remains at the discretion of the contracting authority itself. However, these are in a dual position, which is typical of actors who self-enforce their own value chains: They may be interested in ensuring decent work, but they are certainly also interested in ensuring the smooth and complete performance of contracts (rather than their premature cancellation and the consequent need to find a new contractor); and also in NOT deterring companies as future bidders, at least in contexts where there is a shortage of potential suppliers. In both the Danish and German cases, these logics were seen as sometimes outweighing the objective of protecting wages and working conditions..

Partly as a result of these constraints, in all the cases studied, the purchasing authorities often rely on a dialogue-based approach in which they seek to establish whether the non-compliant behaviour is in fact due to ignorance or deliberate circumvention of the rules, and to find a solution to remedy the situation. It should be emphasised that this approach can produce valuable improvements for the workers directly affected. A good example is documented in the Tuscany case study (IT-1), where the above-mentioned bipartite technical committee is also responsible for monitoring the correct implementation of the labour clause in the post-procurement phase and provides a permanent negotiating table for irregularities brought to its attention. In some cases, this could even be used to include additional aspects of quality in work beyond those laid down in the contract, such as a working time organisation that avoids split shifts in cleaning (Dorigatti et al. 2023, p. 41).

Self-enforcement and Co-enforcement: untapped potential

Social partners, in particular trade unions, are partly involved in enforcement strategies. However, the extent of their involvement varies considerably. The biggest possible difference in our sample is between the case study in Berlin (GER-1) and the Italian cases. In Berlin, the social partners were not consulted or in any form involved in the work of the local inspection body at any time. The social partners were not even aware that the control unit had made private security services and the cleaning industry its main targets in the first two years of its operation. By contrast, in three Italian cases, (IT-1, Tuscany, and IT-3 + IT-4, Emilia Romagna), an information, consultation and negotiation table was set up, involving both trade unions and employers. Somewhere between these two poles are the cases in Denmark (DK-3 and DK-4), where the social partners are not formally involved (with the notable exception of the Municipality of Copenhagen), but where there are more informal forms of cooperation between the enforcement team of the cross-municipal inspectorate and the trade unions and employers. For example, some members of the enforcement team are former trade unionists; and unions and employers have provided advice and in some cases even training on the interpretation of their various collective agreements (Refslund et al. 2023, p. 38).

Overall, there remains untapped potential for the involvement of social partners.

- Trade unions usually don't have procedural rights to enforce labour clauses, i.e to file collective lawsuits for non-compliance, unlike in cases of non-compliance with collective agreements, whereas German trade unions have no rights here either). Trade unions and workers' representatives at the enterprise level usually play an important role in the enforcement of labour standards. However, they have few means of obtaining information, let alone taking collective action, in companies that are not signatories to the collective agreement – especially if there are no union members in these companies who can report their grievances. Their monitoring role is likely to be further hampered by the fact that the labour clauses do not apply to *all* employees of a company covered by the labour clause, but only to those who carry out a public contract – as a result of the 'link to the subject matter' constraint. This makes the information on these rights also more difficult to disseminate among employees – and thus further weakens individual and collective self-enforcement.

- There is also untapped potential with regard to efforts of employers to (self-)enforce collective agreements. In the cleaning industry in Germany, there are various approaches to self-monitoring of service quality and working conditions – including voluntary associations in which member companies agree to be inspected once a year by external auditors who check compliance with collective agreements and other aspects (Jaehrling/Böhringer 2023, p. 39). However, there is a lack of cooperation between these structures and the monitoring body in Berlin. Even if this might not be the primary obstacle, it is the public procurement law again – more precisely, the 'link to the subject-matter' – that imposes restrictions on relying more on these voluntary forms, since, for example, it cannot be made a selection or award criterion whether or not a bidder is a member of such a voluntary association. It could, however, at least be used as an indicator for more targeted and efficient controls by the state inspections (by exempting these companies from spot checks unless they are informed of complaints).

- Finally, the establishment of rights and support structures for individual grievances can also be seen as a strategy that not only helps to remedy underpayments, but also to identify non-compliance in the first place. However, this is a shortcoming in the German Case, where it is not part of the sanctioning repertoire to compensate individual workers for lost wages; and there is no guidance on whether and how they can claim their outstanding wages through individual litigation. In Denmark, on the other hand, workers must be paid all outstanding wages and there is a possible penalty. In minor cases, the most common procedure is for workers to be paid the outstanding wages, for example for overtime, with no penalty for the company.

Overall, the recommendation to make better use of this untapped potential is in line with the academic literature that emphasizes the benefits of "co-enforcement" approaches that are more actively and consciously involving stakeholders in the implementation of control strategies (Fine/Barley 2019; Iskander/Lowe 2021; Bosch et al. 2023), instead of resorting to more 'soft' approaches or to more 'market-based' solutions (e.g. Boersma/Berdfod 2021). These are rather seen as a complement, not as an alternative to direct state enforcement capacities

INDIRECT BDW practices: an essential supplement of labour clauses

Even when pay clauses are precisely formulated and unmistakenly made mandatory, problems remain. Pay clauses may oblige companies to confirm ex-ante that they will comply with collectively agreed wages; however, as the risk of inspections is relatively low, they may nevertheless choose to calculate with lower wages. An indirect instrument to prevent this is the **exclusion of 'abnormally low**

bids' (Art 69 (3) of Directive 2014/24 EU), i.e. bids that are significantly lower than those of the other bidders. In addition, contracting authorities sometimes use detailed tables of collectively agreed labour costs against which they compare the bids received to check whether they are sufficiently high to comply with the mandated wages. The exclusion of tenders with suspiciously low prices, however, comes up against the limits of a relatively restrictive jurisdiction in several countries in our sample:

- In Germany, specific benchmarks developed by the State labour inspectorate together with the social partners for prices below which non-compliance with wage standards can be assumed – e.g. in the cleaning industry, a premium of 70% on top of labour costs based on collectively agreed wages – have been challenged by court rulings; this can only be an approximate benchmark and can be justified, for example, by zero costs for management functions or zero profit margins (Jaehrling/Böhringer 2023, p. 26).
- Similarly, in Italy, case law has established that deviations from the labour costs indicated in the ministerial tables used by the contracting authorities to assess the reliability of tenders do not justify automatic exclusion, but that the contracting authority must assess whether the deviations are in fact justified by some reason (Dorigatti et al. 2023, p. 24) – again opening the door to justifications difficult to challenge by public authorities, or else justifications some public authorities gladly accept if their primary concern is the price.
- The case-by-case decisions of purchasing authorities and courts on whether a bid is 'abnormally low' can sometimes indeed be difficult to understand, as the following quote from a French employer representative illustrates:

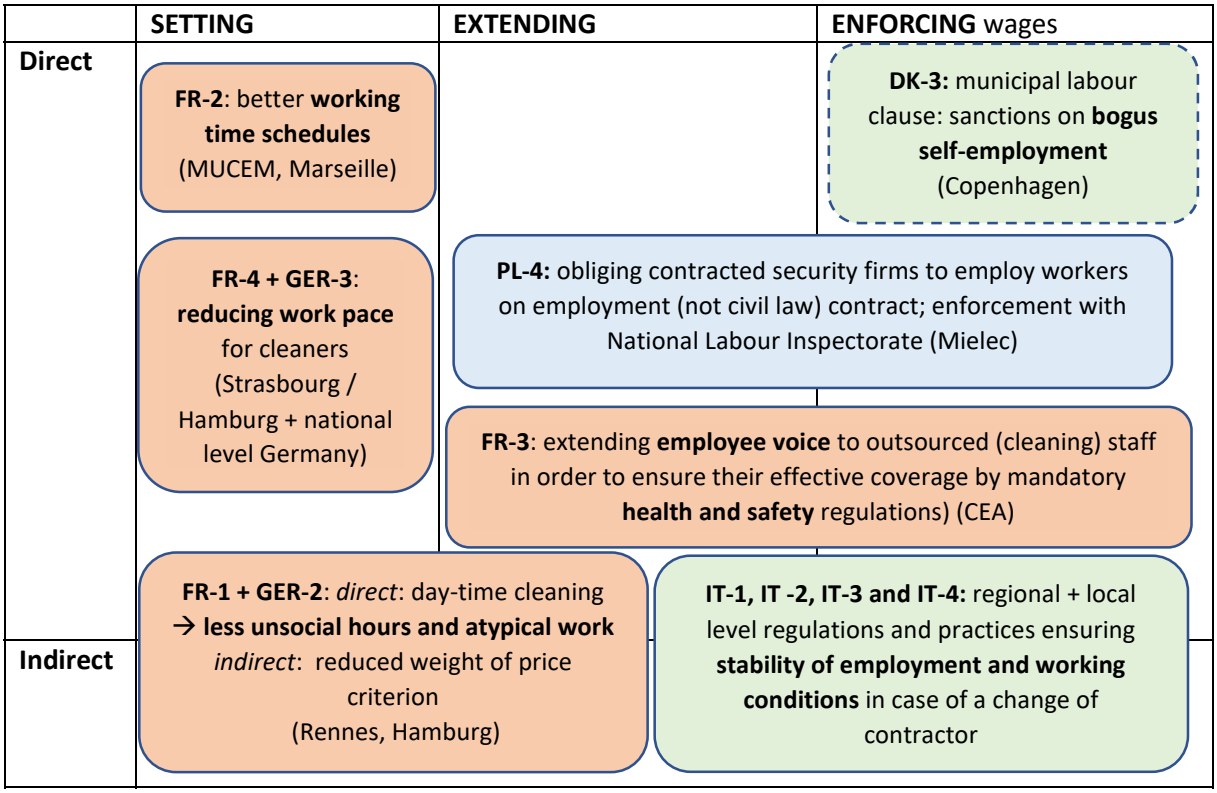
  > *"we lost the contract, so I wanted to understand why, so I asked them to send me the details. The hospital was buying a fire safety service, including the management of an SSI [fire safety system], at a rate of 15 euros per hour! (…) We went to court (…). The judge ruled against us, because he considered that the rate was higher than the hourly wage! That's real life, it doesn't make sense" (Employer representative in private security industry, 2022, quoted after Devetter/Valentin 2023, p. 26).*

These restrictions on the exclusion of abnormally low bids run the risk of awarding contracts to noncompliant firms, particularly if the lowest price is the only selection criterion. Another indirect means, which according to many respondents would be an important complement to the exclusion of non-compliant firms, is therefore the **inclusion of award criteria other than price**. As seen above, Italian national legislation stands out in this respect (prohibition of the lowest price criterion in labour-intensive services) and is even surpassed by regional legislation, as in the case of IT-2 (Trento), where regional regulations stipulate that the weight to be given to the price cannot exceed 15% in the case of labour-intensive contracts. However, and again, **mandating these other award criteria on paper is not sufficient**, as will be discussed in more detail in the next section

(8) Beyond Wages: Co-Management of job quality

While pay clauses (if properly enforced) can help to limit wage competition in public tendering, they do not address the other protective gaps mentioned above, like unsocial working hours, short or excessively long working hours, high workloads, health and safety issues. In the worst case, they may even further redirect competitors' cost-cutting strategies towards reducing 'unproductive' paid hours and increasing work intensity, and other means that are detrimental to the overall job quality. A number of the cases examined address these other aspects of job quality - see the overview below.

Table 5. Setting, extending, enforcing other dimension of job quality: Overview on case studies



Source: Own compilation based on national reports

While requiring companies to pay their employees certain hourly wages does not affect the way work is organised, many of these BDW practices do: They have a profound impact on the internal processes of the company, and partly also on the client organisation where the cleaning or private security service is provided, such as schools, museums or office buildings. **The BDW practices in these cases thus amount to a kind of 'co-management' of aspects related to job quality**, involving the purchasing authority, the contracted company, the user organisation and sometimes representatives of other organisations such as trade unions and works councils (see e.g. FR-3 and the Italian Cases).

This kind of co-management of job quality again requires a lot of expertise on all sides, as well as sound cooperation structures; some of the challenges and solutions to them shall be highlighted in the following.

The basic challenge: how to measure and reward quality?

There is generally a broad consensus – even in settings where certain conditions are made mandatory, such as the compliance with collectively agreed wages, or the obligation to use employment instead of civil law contracts in Poland (PL-4, see Czarzasty/Duda 2023, p. 30f.) - that it is additionally important to reduce the weight of the price as an indirect means to support both the quality of service and job quality. It could be argued that quality-related considerations can simply be imposed on all bidders through contract performance conditions or exclusion and selection criteria – such as a minimum number of references from contracts performed in the past which indicate a sufficient level of professional ability; or certain levels of skills and experiences of the staff assigned to the contract, or a certificate confirming the existence of a quality management system in the company – and that price can therefore still be used as the sole award criterion for the remaining bids that meet these basic requirements.

However, a frequently discussed risk is that this all too often leads to a 'ticking of boxes' exercise whereby companies simply promise to meet the requirements without necessarily having factored in the associated costs, so that when they are awarded the contract on the basis of their lower price offer, they end up cutting costs by compromising in some way on the quality of the service and/or the jobs. In the view of the interviewed representative from CoESS, **the design of tender documents according to this 'ticking boxes' pattern is also a result of purchasers' anxiety to comply with European procurement law, more specifically with the requirement to have objective and transparent award criteria**

> *"If you put yourself on the side of the public procurer, you could tend to concentrate on the less risky way: 'If I judge purely on price or I judge purely on ticking a box, nobody's going to tell me that I made the wrong decision. So, the easier way is price, and if it's not price, it's to say 'We commit to 10 additional working hours and we commit to putting up a camera'' And this is not quality, this just leads to low cost companies entering the services. If you want to count with sound private security companies, it's not the number of hours, it is the skills you're trying to get. It's the content of the training program; how you deal with the workers. (Interview CoESS, 12/2021)*

In their 'buying best value' manuals, the European social partners of both industries therefore also emphasise the need to reduce the weight of the price *as an award criterion* in favour of quality-related criteria, and provide detailed guidance on how to best define and measure more valid quality criteria.

And yet, **the problem of 'ticking boxes' does not seem to be limited to tenders where price is weighted at 100%.** Instead, in several of the countries in our sample, respondents reported that even in tenders where the price weighting is less than 50%, even as low as 30%, the tender documents can be poorly designed and end up rewarding price rather than quality (see e.g. Dorigatti et al. 2023, p. 46). This is particularly the case when contracting authorities are satisfied with vague concepts or standard information that can be easily conjured up by all companies alike, rather than properly checking the reliability of these written commitments ex-ante; as in the following example quoted by an employer representative in the German security industry:

> *An award criterion used in a tender was: "Do you have a quality management system according to DIN 77200? Please describe this." In that case, as the interviewee points out, companies can then simply answer in the affirmative and copy what is written in the DIN norm, without ever really having dealt with it and having built up corresponding structures in the company*

> *(Interview regional employer association in security services, Germany, quoted in Jaehrling/Böhringer 2023, p. 26)*

Hence, **regardless of whether qualitative criteria are made mandatory or used as an award criterion, the most important challenge seems to be how to properly define and assess service and job quality ex-ante – and how to effectively monitor and enforce it ex-post.**

The following quote illustrates the challenges in controlling for the contracted quality commitments ex-post. In that particular case, the rate and quality of supervision was used as a criterion (likely to positively impact job and service quality) and was secured in the contract with a cleaning company.

> *"On one part, there's a form of trust. On others we can verify it, on products or machines, etc., we can certainly verify it. But when it comes to training and agents, of course we can't verify it, but we do have to hold a review meeting every year. They have to tell us about all the training they've done, everything to do with learning French. It's also harder to keep track of supervisory staff. The number of hours they put in the contract we can see, but checking that these hours are done is another matter." (Interview Head of the operations department Rennes, 3/2023, quoted after Devetter/Valentin 2023, p. 27)*

The example illustrates that **specifying valid quality criteria and checking their implementation is more challenging in the case of services in general, due to their specific features**: Unlike products, services are intangible, highly variable, and can neither be pre-produced nor stored, all of which makes it more difficult to assess their quality ex-ante, i.e. before being purchased, and to control their outcome ex-post. The same applies to certain aspects of job quality, such as work intensity, the training provided to the staff performing the work, or measures relating to occupational health and safety during the performance of the service contract. Purchasers cannot directly observe these immaterial aspects ex-ante, but have to reflect on the organisational prerequisites that they require and ideally build these into the contractual relationship with service providers – for instance by asking bidders to provide written concepts how they seek to secure certain aspects, then contractually committing the selected company to these concepts. Moreover, the co-management role of the public client ex-post, i.e. during the contract term, is often secured through procedural provisions that provide for reporting requirements of service providers, regular exchanges and interventions by the purchasing authority. This active co-management of the client can be called into question by the service providers with reference to the freedom of enterprise (see e.g. the interventions in training schedules in the case of the MUCEM in France (see Devetter/Valentin 2023, p. 45). The relationship the public client must maintain with the service provider can thus be described as “a permanent balancing act between collaboration and control in a context of asymmetric information” (ibid.).

All of this requires extensive market knowledge and technical expertise in the service in question. However, after decades of outsourcing these services, public sector customers often lack this expertise. The challenge for them is to build this expertise internally or buy it in externally. It is probably no coincidence that in two of our case studies, where the impact on work and service quality was judged by all sides to be particularly positive, people with many years of professional experience in private companies in the same industry (FR-1, MUCEM/Marseille and GER-4, Düsseldorf) were responsible for drafting tender specifications and managing contracts.

In addition to these technical challenges relating to the specific features of service work, other challenges relate to budgetary constraints, legal constraints, and competing logics embodied by

different roles in the administration (users of services, purchasing, contract management, control); as the following examples illustrate.

Working time: Balancing the needs of service users and employees

In both the cleaning and private security industries, working hours are primarily determined by the needs of the client. This often results in high demands on flexibility, very long or very short working hours, split shifts and unsocial working hours for employees. These features not only have a negative impact on the quality of work for employees, but also help to explain why companies in both sectors are increasingly concerned about recruitment and retention problems, and sometimes about a lack of commitment that affects service quality. Efforts to adapt the organisation of working time to the demands and needs of employees in our sample of case studies included a return to overtime pay instead of highly variable monthly working hours (FR-1, MUCEM/Marseille), or efforts to bundle cleaning hours allocated to different buildings into employment contracts with longer working hours (UK-3, Scottish City Council; GER-4, Düsseldorf) and the introduction of daytime cleaning (FR-1, Rennes and GER-2, Hamburg). However, these efforts are particularly challenging and require close cooperation between the service provider, the client and the building users, both before and during the contract period.

This will be illustrated here at the example of the experimentation with daytime cleaning. A shift towards more daytime cleaning is high on the agenda of both employers and trade unions, as evidenced by the joint statement of EFCI and UNI Europa from 2022[12] and further activities of the social partners at European level; yet also by statements and campaigns of social partners at the national level, e.g. in Germany and France. This measure is associated with a wide range of positive effects: higher monthly salaries due to the possibility of offering longer continuous working hours, better work-life balance, avoidance of the negative effects of night work (insecurity, health problems) and, finally, increased visibility of cleaning work and of the workers themselves, as well as their better integration in the workplace; all of which should also work to the benefit of recruitment and retention of cleaners which is experienced as increasingly difficult by cleaning companies in some countries.

Daytime cleaning is also a prime example of the fact that it is not enough to specify different cleaning times in the tender documents. Shifting cleaning times to match or at least overlap with the opening hours of the buildings to some extent also requires the users to adapt their processes. Daytime cleaning in schools appears to require significantly more communication and, in some cases, to raise resistance from users (see case study GER-2, Hamburg, Jaehrling/Böhringer 2023, p, 42ff.) than in office buildings (see FR-1, Rennes, Devetter/Valentin 2023, p. 33ff). Both case studies also show that it takes some time for building users, employees and other stakeholders, such as local site managers, to get used to the new processes and make adjustments where necessary. Reliable contacts and communication processes are therefore particularly important in the initial phase.

The **introduction of daytime cleaning also requires close consultation with staff**. Despite the many benefits of daytime cleaning, there is a need for support and, in some cases, reluctance on the part of cleaning staff. This is because daytime cleaning in the presence of building

[12] https://www.uni-europa.org/wp-content/uploads/sites/3/2022/10/20221005_Daytimecleaning_statement.pdf

users also means less undisturbed cleaning and requires more flexibility from cleaning staff in carrying out their work, more communication and possibly conflicts with users. Appropriate skills are required for this. Therefore, in the context of daytime cleaning, tenderers' qualification concepts become even more important. Furthermore, while it is certainly the case that visibility of cleaning work and cleaning staff can also contribute to greater appreciation of their work and better social integration in the workplace, this is not automatic. In a qualitative study, Rabelo & Mahalingam (2019) show that cleaners often feel invisible precisely when they do their work in the presence of others, but are actively ignored by them. Moreover, visibility also means that cleaners are subject to greater control over their work by supervisors and building users, which can have a negative impact on their sense of autonomy and discretion over how they carry out their work (see Devetter/Valentin 2023, p. 37). Training and other forms of involvement of cleaners were therefore also part of the experimentation in both cases studied. In direct comparison, such a participatory approach was particularly extensive in Rennes, where daytime cleaning was also more widely implemented, not just in individual buildings.

Budgetary constraints did not play a major role in either case, but may affect the uptake of daytime cleaning and the impact on jobs. This is because, according to experts, **daytime cleaning is more expensive, at least in the initial phase, and therefore requires a clear political mandate, i.e. support from top authorities and local politics**. Furthermore, as the example of Rennes shows, even daytime cleaning cannot prevent cost savings from being made by reducing the number of hours with a limited budget.

However, the overall positive effects of daytime cleaning – longer and more consecutive working hours, improved work-life balance, easier recruitment, greater job satisfaction – are also confirmed by our case studies.

Work intensity in the cleaning industry

In the cleaning industry, as in other sectors, wages are more or less fixed in many countries by binding collective agreements. As a result, price competition often takes the form of a (nominal) increase in productivity – in the cleaning industry, for example, an increase in the number of square meters per hour. The problematic consequences for quality of work and service of this widespread practice of cost cutting are widely recognised, and demands for an effective end to this practice are now being made not only by trade unions but also by employers' organisations and employers themselves. In the countries in our sample, purchasing authorities, industry experts and social partners have therefore begun to develop various tools and methods to return to 'reasonable' or 'fair' performance figures. Some employer or quality associations, as well as trade unions (in Germany, see Jaehrling/Böhringer 2023, p. 42), have contributed to the development of standardised performance indicators for different types of premises (e.g. offices, stairwells, toilets, etc.). However, some of the employers' representatives are ambivalent about this type of standardised figures, as they do not sufficiently take into account the various factors that can increase or decrease the cleaning speed, such as the type of surfaces, the user behaviour, the cleaning technology and equipment used, the tasks assigned to the cleaners, etc. While they therefore caution against using them as a basis for tender documents, other experts interviewed generally share the concern about ill-adapted standardised figures, but nevertheless support their value as a starting point from which to develop specifications for each building. Thus, **even with the guidance published by industry experts and social partners, the key challenge for purchasing authorities remains to assess the 'right' performance figures for each building they put out for tender,** if they are to effectively

avoid excessive work intensity (and poor cleaning quality – which seems to be more often a primary concern).

This however again requires substantial efforts and expertise, as the three case studies covering the issue of work intensity (GER-3 (Hamburg) and GER-4 (Düsseldorf) and FR-4 (Strasbourg), illustrate, and the implementation of the new practices are partly characterised by "trial-and-error" strategies**. In some cases, procedural safeguards are also being put in place, with the aim of incorporating technical expertise, but also to ensure that the previously dominant logic of cost savings is kept in check**: In Strasbourg, for instance, purchasing managers consciously ‚work in pairs' with site managers who are likely to have a greater interest in service quality than the purchasing manager. „By bringing these two types of players together, the hope is that they will balance each other out and reach the best possible compromise. The indirect, but expected, effect is to get closer to the "right pace" (which also respects working conditions) and the "right price" (which respects company margins)" (Devetter/Valentin 2023, p. 61). In Germany, the specifications of maximum performance values can be altogether commissioned to certified external experts who are specialised in service quality (Jaehrling/Böhringer 2023, p. 57). These procedural measures can limit the impact of budget restrictions at least at the point of drafting the tender documents.

Overall, the companies surveyed were all positive about contracting authorities' efforts to ensure 'reasonable' performance figures in tenders, and this was seen as an effective way of reducing price competition and crowding out low quality suppliers. However, employer representatives were more ambivalent about the issue of monitoring agreed performance levels, for example by checking the number of hours cleaners actually worked on the premises (by site managers or by special task forces set up by the contracting authority). Companies were rather critical of these measures, and some questioned their legal validity. In Germany, the issue has been the subject of legal proceedings, but the courts have ruled that a contractor can be required to provide both clean rooms and a contractually agreed number of hours worked by its employees (Jaehrling/Böhringer 2023, p. 59). In addition to legal uncertainty, however, the more important obstacle seems to be the limited amount of resources that public purchasers are able or willing to spend on controls, as one purchasing manager in Strasbourg explained: "Given that we have just under 200 sites, it's difficult to really control the number of hours actually spent on each site" (quoted in Devetter/Valentin 2023, p. 62).

As it is not automatic that workers actually get more time for their work during the performance of the contract, a mere control of the quality of cleaning does however not seem to be an appropriate way to enforce a reduction in work intensity. The more recent legal obligation for employers to record working time (following the CJEU's 'time clock' ruling of May 2019 (C-55/18 CJEU)), combined with new digital tools that facilitate record keeping, could provide a basis for developing more efficient and less time-consuming controls on this aspect in the future. In the meantime, clear communication of contracted hours to workers and further participatory forms supporting self- and co-enforcement would certainly also help to reap the benefits of these practices for workers

Stability of employment and employment conditions

A change of contractor as a result of re-tendering a service regularly poses risks to the stability of employees' jobs and terms and conditions because of de facto or de jure gaps in national TUPE legislation. In practice, some employees may not be re-employed, or may lose seniority bonuses and other pay supplements that are not effectively secured by pay clauses and extension mechanisms, or may lose part of their hourly volume, and/or may have to accept working for multiple employers if

they want to keep their hours, as only part of their contracted hourly volume has been transferred to competitors.

In our sample, these issues are mainly addressed by the Italian regional experiments (Dorigatti et al. 2023). This is probably no coincidence: as seen above, collectively agreed wages are among the lowest here, so it is important to secure more than just these low hourly wages. The regional BDW practices have developed 'strong' labour clauses to this end, as opposed to the weaker and more flexible versions based on the 2016 Public Procurement Act. These stricter and more comprehensive rehiring obligations are not limited to ensuring that workers are taken on, but also that the number of hours worked and other wage elements are guaranteed. In the case of Trento (IT-2), for example, the regional law obliges contracting authorities to take into account the number of employees already employed and the labour costs of each employee when calculating the (maximum) cost of the contract to be re-tendered. This information is also included in the tender documents and is therefore transparent to bidders.

The experimentation in these cases illustrate once again the importance of three factors:

Firstly, **the usefulness of involving stakeholders ex ante**, i.e. in the pre-tender phase. In Italy, for example, the collective agreements in the two sectors oblige the outgoing company to provide detailed information on the number of employees and their weekly working hours before the end of the contract. This makes it easier for employee representatives to monitor the correct implementation of the re-hiring obligations and to intervene in good time. This is also supported by regional legislation, which involves trade unions in the pre-tender phase, in a kind of "'in advance bargaining' for the safeguarding and protection of workers employed under service contracts" (regional regulation in Tuscany, cited in Dorigatti et al. 2023, p. 35). This includes, for example, their participation in the development of evaluation criteria for tenders that reward companies that offer stronger employment protection elements (ibid.). These **pre-emptive bargaining rights provide unions with an effective means of intervening in the design of tenders and correcting vague and non-binding re-employment obligations** (see e.g. Dorigatti et al. 2023, p. 59f).

While trade unions experience that their interventions can effectively help to improve working conditions, they are however also aware that these procedural rights require "a constant 'use' by actors, through monitoring and the mobilization of power resources" (Dorigatti et al. 2023, p. 50). This is time-consuming and proves to be challenging given trade unions limited resources, in particular in contexts where unions don't have members in the companies concerned. As one trade unionist explains;

> *"a few years ago we started a methodical intervention, even where we did not have members and there was no employee representation at workplace, therefore with a significant commitment in terms of resources, and we realized that instead there were some problems (…) it is very difficult to stay, especially in the field of cleaning, on all the contract changes. Also because it is a job that must be done painstakingly, because you have to contact the workers, hear from them, understand for their part how that contract works, then hear from the outgoing company and hear from the incoming company" (Interview FISASCAT CISL 6/2023, quoted in Dorigatti et al. 2023, p. 50)*

Secondly, **budgetary constraints**: Even carefully designed re-hiring clauses can fail to secure the volume of working hours or even the take-over of all employees if the clauses are coupled with reductions or freezes in the public budgets allocated to the contract (see e.g. Dorigatti et al. 2023, p. 40). This is a recurring finding throughout the reports and expert interviews. **If the budgets are**

not adjusted to the higher expectations of the contracting authorities in terms of quality of jobs (and services), innovative BDW practices may not only fail to be effective, but may even backfire – for instance by discouraging reputable companies from bidding, as the following example from a tender in Spain reported by the COESS representative illustrates. In this case, the contracting authority had even developed close cooperation with both the trade unions and the employers' association in the pre-tender phase:

> *It was a fantastic public procurement procedure with social clauses, the role of the trade unions in the follow up, price was 40%. (...). And finally, the budget was insufficient. So, the whole efforts were destroyed at the last moment. And, as a consequence, only four companies [not affiliated to the employer association] were applying for the contract, so the efforts of several years were useless. What's my message: That finally, there are so many issues that you have to consider and to take into account, so many pieces; (…): a sound budget etc. So, unless you are able to put all the pieces into the basket, the final outcome can be a wrong one" (Interview COESS, 12/2021).*

Finally, **legal restraints and uncertainty:** As with experimentation on other aspects, such as the extension of specific collective agreements, experimentation on stability of employment and employment conditions is accompanied by legal constraints and legal uncertainty on the part of key actors as to whether these specifications are compatible with 'freedom of enterprise' rights and public procurement law. In the Italian cases, doubts have been expressed by both contracting authorities and employers (Dorigatti et al. 2023, p. 40). It should be emphasised that these doubts have accompanied, rather than hindered, experimentation. But the fact that these legal uncertainties exist means that **innovative BDW practices depend on the willingness of contracting authorities to test the waters of national and European procurement law, or on their confidence that their BDW practices won't be challenged in court even if they enter legal grey areas,** as bidders may have an interest in 'not biting the hand that feeds them'. (see e.g. Jaehrling/Stiehm 2022, p. 282).

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(9) Bringing services back in-house as an alternative to BDW

As a first step in the case selection process for this study, expert interviews were conducted with social partners and industry experts at the national level. They were also asked to provide information on municipalities and other contracting authorities where progressive BDW practices had been implemented. Unexpectedly, in some countries the research teams were repeatedly alerted to cases where local authorities had chosen to bring some or all cleaning and security services back in-house. Our sample of case studies therefore includes some of these cases. Studying them allows us not only to assess the **challenges and impact of re-insourcing on working conditions**, but also to analyse the **links between BDW practices and re-insourcing, both in terms of causes and consequences**.

This analysis is based on case studies in the UK, Poland and one in Germany. As our selection of cases is not a representative sample, this country focus may be coincidental. However, the focus on Poland and the UK, two countries where the protection gaps for cleaners and security guards are particularly large, may help to explain why the insourcing of these services into public sector employment is on the agenda in these countries. Some of the UK cases also involve regions and local authorities which, against the dominant trend in the 1990s and 2000s, had deliberately pursued a policy of keeping cleaning and security services in-house or of transferring them to so-called 'arms-length organisations' owned by the local authority, i.e. an alternative form of outsourcing, but to a public sector body (UK-1, UK-2, UK-3) – but which then partly also worked with private sector companies providing some of the staff (UK-2). Tensions over working conditions are not absent in these cases, and the case studies highlight efforts to resolve these tensions, including decisions to bring workers back under the control of the council's facilities management function (UK-2, UK-3).

Table 6: Overview on case studies on keeping or bringing cleaning and security services in-house.

Cleaning	Security services
UK-1.: maintaining the workforce of an arms length organisation on local authority terms and conditions (North England)	**UK-2.** Improving working conditions of security guards working in arms length organisation (North England)
UK-3. insourcing cleaning services run by arms length organisation (Scotland)	
UK-4. securing real living wage for in-house workers (Wales)	
GER-4. Increasing the share of in-house cleaners to 50% (Düsseldorf)	
PL-2 + PL-3. Re-insourcing cleaners to Hospital (Kraków + Rzeszów)	

Source: own compilations based on PROCURFAIR national reports

Re-insourcing: a response to failures of BDW or of marketized procurement?

Starting with the *causes* linking BDW and re-insourcing efforts, an immediate question that arises from the evidence discussed so far is **whether efforts to bring services back in-house are a direct response to, or follow on from, 'failed' BDW practices in the past**. Such 'failures', or at least undesirable outcomes from the perspective of contracting authorities, may include

- that BDW practices generate *too high transaction costs*, given the level of expertise and resources required to design well-targeted tender documents and to set up monitoring and control measures capable of effectively enforcing the contractual provisions;
- that BDW practices *increase the price of the services purchased*, reflecting higher expectations of the quality of work and services, thereby exceeding the available public budgets
- that BDW practices have *proved ineffective* or have brought only minor improvements in working conditions, which are unfavourably related to the effort involved (higher price, higher transaction costs).

There might as well be other reasons: Re-insourcing could for instance also merely be a response to failures of marketised procurement practices (poor service quality, exploitative working conditions). Furthermore, financial incentives, in particular a decreased public-private sector pay gap might also prompt municipalities to bring services back in-house.

In fact, all three reasons play a role in the cases in our sample:

Firstly, **Insourcing is partly facilitated and incentivised by a decreased wage gap between public and private sector pay**. In two cases in Poland, the decision of the hospitals to re-insource cleaning staff were primarily motivated by price increases on the part of the private service providers. They followed the introduction of a minimum hourly rate for workers on civil law contracts – the predominant employment form for external cleaners at the time (see Czarzasty/Duda 2023, p. 25). The wage gap can thus decrease, on the hand, due to *wage increases in private sector jobs*, following a re-regulation of labour markets and increases in minimum wages. On the other hand, as the cases in the UK and also in Germany show, the wage gap can also decrease due *to austerity-driven freezes on public sector pay scales* (UK) or deliberate decisions to lower wages in the public sector ancillary services with a view to make them cost-competitive with private sector service providers (Germany).

Still, the financial disincentive to continue outsourcing is not always sufficient to bring about the decisions to keep services in-house or re-insource them. As the case studies show, this is often requires a strong political support by local and regional level governments, which in turn partly responds to pressures from trade-unions and grass-roots organisations.

Secondly, **Efforts to re-insource services are also partly a response to 'failed' BDW practices**, as in the case of UK-3: Here, the city council was about to implement a range of measures to ensure decent working conditions for outsourced workers (including those in arms-length organisations), but

> *"tendering companies could claim they were working towards these goals rather than having achieved them all, and post-contract monitoring of progress was problematic. The procurement*

> *function had become increasingly complex – legal challenges were more frequent, pre-tender supplier engagement was more extensive, social and economic goals were an increasingly significant part of tenders, and wider concerns with sustainability, trafficking, forced labour, organised crime, supply chain analysis, and preparing for economic and price shocks were much more significant priorities than they had been previously (Mustchin et al. 2023, p. 38).*

Thus, generally higher expectations of (inter alia) social considerations and associated transaction costs, as well as doubts about their effectiveness, contributed to pressure from women's organisations to reinsource cleaning services. Similarly, in a Danish case (not listed above), serious violations of the labour clause led a municipality in Denmark (Odense) to reinsource cleaning services (Refslund et al. 2023, p. 44).

In most cases, however, the decision to insource is made without any prior experimentation with innovative BDW practices. Instead, as several cases show, they are primarily motivated by **failures of marketized procurement practices that may not only trigger a turn towards BDW practices, but may also support efforts to re-insource services**. This was for instance the case in Düsseldorf (GER-4), where price competition had become more fierce among cleaning companies since the beginning of the 2000s, after the new marketised procurement law began to take effect, and complaints about the quality of cleaning services (in particular in schools and child care facilities) became more pressing (Jaehrling/Böhringer 2023, p. 63ff). In the UK, the questioning of the role of the private sector in delivering public services have reached a larger scale, following the equally large-scale failures of marketized procurement practices, including the collapse of the Carillion group, as well as other "numerous examples of underperformance, failed and in some cases fraudulent gain of public money during rushed procurement processes associated with the pandemic" (Mustchin et a. 2023, p.17).

Thus, the **evidence from our study suggests that it is not failed BDW practices, nor the working conditions of outsourced employees that are the primary concern triggering re-insourcing efforts, but rather the failure of outsourced services to deliver 'value for money'**. Still, our case studies also document that the insourcing decisions are additionally supported by a growing conviction that attention to the working conditions of outsourced staff is *normatively required* – either in following the 'spirit' of new procurement legislation emphasising social considerations, or because the legitimacy of the insider-outsider divide is being challenged by court rulings and activists' claims based on equal pay norms (see in particular the case of UK-3) – and *useful*, supported by an increased awareness of the value of 'essential workers' during the pandemic; and that this is easier to achieve by bringing them back in-house, as one interviewee explains :

> *"But what you tend to find is if you want to do the social value and terms and conditions and that sort of thing you probably do have to have control over it through in-house (...)because that way then you've got more control over where you spend the money and how it looks like and what you get for that money. (Interview ethical public sector consultancy, UK, quoted in Mustchin et al. 2023, p. 21)*

Again, **the conviction that in-sourcing can bring a better 'value for money', including social value, is not sufficient to make public authorities revise their outsourcing decisions, yet this seems to require strong pressures from all sorts of organisations** representing the interests of employees – including, but not limited to, trade unions – and organisations representing the interests of service user, such as parents or employees of schools.

Challenges and impact of re-insourcing on working conditions

Re-insourcing cleaners and security guards presents a similar challenge to implementing BDW practices: Taking more responsibility for working conditions - in the case of insourcing**, more *direct* responsibility - requires considerable industry and management expertise, much of which has been lost to public sector organisations as a result of decades of outsourcing**. In the case of security services, this is a more significant challenge due to the wide range of sector-specific legislation and regulation aimed at ensuring the suitability and reliability of the staff and management structures responsible for the sensitive public good 'security'. In the case of UK-2, these requirements also acted as a barrier to the re-insourcing of larger numbers of security guards, since "council-level management was undertaken with minimal numbers of staff and the complexity of organising the employment of security guards, licensing and insurance requirements, staffing and covering shifts would be highly resource intensive and not feasible given the capacity levels of management" (Mustchin et al. 2023, p. 37). In the case of Düsseldorf (GER-4), industry expertise (through an external consultant and a purchasing manager with experience in the cleaning industry) also proved to be a critical success factor in increasing the number of in-house cleaning staff, as the ambition here was to accompany this with the definition of feasible performance targets (for both in-house and external cleaning services), to define the level and quality of services, set up a quality management system, and organise working hours that allowed for higher hourly volumes than many outsourced workers previously had.

Re-insourcing thus also means bringing back challenges that were previously outsourced, and this also applies to working conditions, as the case of UK-3 shows: Here the cleaning function was outsourced around the same time as the local authority began to develop equal pay policies for the remaining council staff. However, the predominantly female cleaning staff did not benefit from these efforts, but were, so to speak, left out of the equation and transferred to an arm's length organisation where pay was lower than the local authority's collectively agreed terms and conditions. This unresolved gender pay gap was also the main driving force behind demands by female workers for the reintegration of cleaning services, supported by women activists and lawyers, and later (albeit initially reluctantly) by the male-dominated trade unions. However, the problem of pay inequalities was not solved by the re-insourcing of cleaning staff alone; the creation of a new pay scale that took account of equal pay issues took longer than expected, not least because of the council's financial difficulties (Mustchin et al. 2 023, p. 42).

This is a finding that cuts across the other in-house cleaning case studies: **the work does not end with the transfer of outsourced staff back into direct employment within public sector organisations**. There are undeniable immediate benefits, as the case studies show, most notably an improvement in hourly pay and other bonuses and allowances. However, the difficulties of balancing the needs of employees and service users in terms of working hours do not disappear with re-insourcing, nor do budget cuts. Therefore, in a number of cases

- reductions in staff numbers to cope with budget cuts and the resulting intensification of work were reported (see the case of UK-4);
- the **volume and scheduling of working hours** remained a source of dissatisfaction, although this was something that the authorities were working on – for example, by trying to bundle cleaning hours allocated to different buildings into employment contracts with longer

working hours (UK-3, GER-4). The high demand for flexibility was also mentioned as a rather negative effect in the case of the University Hospital in Krakow (PL-2), where according to one cleaner

> *"Sometimes I am tired, and the new work schedules look nice, but only on paper, because they have nothing to do with reality - there are very often changes in schedules and overtime work" (in-house cleaner, quoted in Czarzasty/Duda 2023, p. 26).*

- Finally, direct employment contracts also expose employees to **more direct control by the service users**, rather than having to abide by the contractual terms agreed with the external service provider – which can also put more pressure on employees, as the case of the University Hospital in Krakow illustrates: The clearly defined job profiles in the contracts between the public client and the purchaser was not replicated in the direct employment contracts of the in-house cleaners. As one cleaner explains:

> *"However, not everything is as rosy as we thought it would be. We were given additional tasks, such as serving meals to patients on the wards, which had previously been handled by other people in cooperation with an external company delivering meals. I believe that we have a lot of responsibilities, and because of new ones, we cannot always manage to do everything while working." (in-house cleaner, quoted in Czarzasty/Duda 2023, p. 26)*

Some of the negative effects or unresolved issues are similar to those observed in cases of innovative BDW practices for outsourced staff – as in the case of MUCEM in Marseille (FR-2), where improvements in some aspects of working conditions were accompanied by expectations of their commitment to accept more overtime, among others. "As a result, this balance can appear rather fragile and conflicts can arise" (Devetter/Valentin 2023, p. 46). The practices of either **insourcing or 'buying decent work' in outsourced services may thus be guided by implicit or even explicit expectations that workers will have to pay a 'price' in return**, for example in terms of functional or temporal flexibility. While this may seem logical from the point of view of the public purchaser, who is often under pressure to justify and contain any budget increases associated with the experimentation, it is certainly not a logic that imposes itself from the point of view of employees, who may simply expect the shortcomings of the previous situation to be corrected. Thus, **while the incomplete control of the public client over the working conditions of outsourced staff may act as an obstacle, or at least a challenge, for public purchasers to effectively monitor and enforce the improvements they seek to achieve through BDW practices, the more direct control of public purchasers does not automatically translate into improved management approaches and overall working conditions for insourced staff. Negotiating a fair balance therefore remains an ongoing challenge, and the outcome depends very much on management attitudes and employment relations at the workplace.**

A final aspect that the case studies shed some light on is the **impact of re-insourcing on the remaining outsourced staff: To what extent do these practices renew or reduce the insider-outsider divide**, i.e. what consequences does re-insourcing have on the working conditions of those who continue to work for external service providers? The question arises because it does not seem to be an exception that only part of the cleaning staff or security guards are brought back or kept in-house (see the cases of GER-4, UK-2, FR-1), or that a decision is made to insource some occupational groups but not others (UK-4). In principle, more in-house staff certainly reduces the gap in terms of

numbers, as there are more 'insiders' working under the better conditions of public sector employment (with the caveats mentioned above). As the case of Düsseldorf (GER-4) illustrates, the impact on outsourced staff may be ambiguous: Here, some negative effects on working hours were reported by cleaning companies, in particular the public authorities' practice of 'cherry picking' good buildings in terms of location and working hours for in-house staff, and outsourcing the less attractive locations to private service providers (Jaehrling/Böhringer 2023, p. 70). Still, the overall approach in this case also included efforts to re-organise the procurement procedures for the remaining external service providers, which seems to have effectively contributed to the crowding out of low-cost providers, which in turn arguably indirectly also benefits employees. The lack or representativeness of our case studies does not allow us to conclude on a general trend here, but it is worth highlighting that **bringing or keeping staff in-house is embedded in a wider demarketization strategy in several of the cases studied, and is thus sometimes at least accompanied by efforts to improve the quality of services and jobs at outsourced service providers** (see also UK-1, UK-2, UK-4, and FR-1).

(10) Key findings and lessons

Drivers towards BDW: boomerang effects and dialectics of change in the European multi-level system

The evidence presented in this study clearly documents that there have been some important improvements in the legal frameworks that facilitate 'buying decent work' practices. This was a result not only of the revised European Procurement Directives adopted in 2014, and then transposed into national laws, but to a more complex dialectic in the multi-level EU system, including in particular practical and legislative experimentation at the subnational level which partly preceded and paved the way for subsequent legislative changes in the national and European framework. This pioneering role was also assumed by (left-leaning) local and regional level experimentation after the 2014 reforms, and is a reflection not least of the largely *optional* character of many provisions aimed at facilitating 'strategic' public procurement, thereby making the uptake of these provisions strongly dependent on pressures from civil society organisations, a decisive political will of local and regional governments, or convictions of individual purchasing authorities. These drivers for change are in turn often a result of experienced failures of marketized procurement practices ('buying cheap') in the past.

Legal ambiguities and uncertainty: a legacy, not a phantom of the past

However, a core problem and basic framework condition of current efforts to move away from 'buying cheap' is that the legal framework continues to be characterised by an 'institutionalised coexistence' of marketization and social politicisation (Jaehrling/Stiehm 2022). It is this ambiguity of the legal framework and the resulting legal uncertainty that emerges as one of the key challenges for those public purchasers who nevertheless engage in BDW practices. It can certainly be questioned whether 'legal uncertainty' is always the primary obstacle to a more widespread adoption of BDW practices, or whether this is merely a justification by public purchasers to mask other concerns, in particular budgetary constraints, or a general reluctance of public sector organisations to engage in innovative practices unless they are required to do so. However, this assumption would seem ill-fitted in cases where, as in most of the practices studied for this research project, actors are credibly trying to move away from buying cheap, but still encounter limits and problems, whether due to clear-cut restrictions imposed by legislation and jurisprudence at European or national level, or simply due to a lack of clarity in the rules. The manifold obstacles encountered by actors which are positively engaged in BDW practices as documented throughout this report can therefore be interpreted as clear indication that the legal constraints can and should not be dismissed as misinterpretations and phantoms of the past, but that they are real and need to be addressed. This is true even if part of the legal uncertainty would rather result from outdated lessons learnt under a more unambiguously marketized procurement law. To the extent that this kind of 'procurement legends' indeed persists, they are a factual legacy of the past and a real obstacle as well that would benefit from clarifications - through soft *and* hard law.

Some of the legal ambiguities and constraints enshrined in (the national transpositions of) the revised European Procurement Directives in fact have already been addressed by European and national level reforms in the decade following the reform and helped to successively overcome some of the obstacles against which local level experimentation had come up, in particular with regard to pay clauses (see section 7). Others by contrast remain to be solved (see below).

Budgetary constraints have not prevented but shaped BDW practices

Another basic contextual condition embedding BDW practices is the ubiquitous concern to avoid cost increases or even to reduce public expenditure. On the positive side, our case studies document that budgetary constraints, as well as legal constraints, have not prevented (some) public authorities from engaging in BDW practices. On the other hand, BDW practices do not escape budgetary constraints – even if in some cases they seem less pressing than in others – but are shaped by them. This tends to limit the impact, as efforts remain partial and are sometimes not followed through, particularly where few resources are devoted to enforcing BDW provisions in the post-procurement phase. Our case studies also illustrate innovative ways of coping with budgetary constraints in a more socially sustainable way, for example by pooling resources for the enforcement of labour clauses in cross-municipal inspection units, allowing smaller municipalities to benefit from the infrastructure set up by larger municipalities in the region (Denmark); or by relying more on the support of social partners as a source of expertise and monitoring capacity (e.g. Italy). However, the latter potential remains largely unexploited so far.

Professional expertise is key, yet governmental soft law and capacity building still lacks a focus on BDW and needs to be complemented by industry expertise

A wide range of guidance material and capacity building activities have been developed by public authorities to encourage and support the uptake of the new options for 'strategic' public procurement. However, the focus of this emerging infrastructure of expertise is sometimes very general (on 'professionalisation') or neglects social considerations at the expense of other aspects bundled under the term 'strategic' procurement. Moreover, even where soft law is developed with a particular focus on social considerations, it often remains preoccupied with employment clauses, reserved contracts for social enterprises or SMEs in general, reflecting the focus of soft law at European level which continues to be primarily motivated by the goal to *remove barriers to market access* for both individuals and businesses. Finally, European soft law itself has tended to reiterate the ambiguities and restrictions built into the law by also spelling out the 'don'ts' of socially responsible procurement. In recent years, this has receded into the background in favour of a somewhat more expansive interpretation of the European legal framework promoted by the European Commission's communications such as the ‘Buying Social’ Guide from 2021. However, changes in soft law alone cannot substitute for necessary legal reforms, as evidenced by the fact that the more expansive interpretation continues to be contradicted to some extent by the European Commission's ongoing enforcement activities challenging Member States' BDW practices.

There is also a broad consensus that BDW practices also require as much industry-specific expertise as possible, including detailed knowledge of collective agreements, work organisation and also industry-specific malpractices to be avoided. Social partners in several countries have been quite active in developing this kind of industry-specific soft law and capacity building. However, the impact of these guides and trainings depends on the willingness and capacity of the actors to use them, as they don't provide standard solutions and templates for all purposes, but require purchasers to adapt them to the specific services being tendered. Some of the BDW practices that were considered to be particularly effective were characterised by a particular effort on the part of contracting authorities to either build or buy in this expertise for their tendering procedures.

Re-insourcing an alternative to bypass problems with BDW?

Bringing services back in-house is a strategy chosen by some public clients in several countries. In the context of our study, this raises questions on the links between BDW practices and re-insourcing, both in terms of causes, challenges and consequences. In terms of causes, a question is whether efforts to bring services back in-house are a direct response to, or follow on from, 'failed' BDW practices in the past. Such 'failures', or at least undesirable outcomes from the perspective of contracting authorities, may include that BDW practices generate too high transaction costs, come along with higher (immediate) costs, or remain ineffective. In the cases studied for this research project, other reasons would seem to play are a more important role: re-insourcing is rather chosen as a response to failures of marketised procurement practices (poor service quality, exploitative working conditions, high labour turnover), as well as financial incentives, in particular a narrowing of public-private sector pay gaps. In terms of challenges, these are similar to the challenge when implementing BDW practices: Taking more responsibility for working conditions – in the case of insourcing, more direct responsibility – requires considerable industry and management expertise, much of which has been lost to public sector organisations as a result of decades of outsourcing. Re-insourcing also means bringing back challenges that were previously outsourced – such as equal pay between male and female dominated occupations. In terms of outcomes, as the cases show, the work does not end with the transfer of outsourced staff back into direct employment within public sector organisations; as for instance the difficulties of balancing the needs of employees and service users in terms of working hours do not disappear with re-insourcing, nor do budget cuts. Therefore, negotiating a fair balance remains an ongoing challenge even after the transfer back in-house, and the outcome depends very much on management attitudes and employment relations at the workplace.

BDW practices can also act as a barrier to insourcing, as evidenced by some cases where re-insourcing was on the political agenda, but the pressure to ultimately re-insource services was less strong because the employment conditions of the outsourced workers had been maintained at the same or similar levels to those of in-house staff. In other cases, the difficulties and challenges mentioned above, such as the complexity of the management function in the case of security services, have deterred public authorities from re-insourcing. However, and paradoxically, re-insourcing is likely to gain momentum as more local authorities embrace the general spirit of caring for essential workers (if only because of problems with recruitment and quality of service) and start experimenting with BDW, under two conditions: first, if securing decent work through BDW remains as complicated as it is now (high transaction costs, not least because of legal constraints), and if BDW practices are not effective, i.e. if they are not properly designed and enforced.

Lessons for the legislative framework

Since the adoption of the revised EU Procurement Directives in 2014 and their transposition into national law, there has been ongoing debate as to whether the sluggish uptake of 'buying social' practices points to a need for a new reform of the legal framework or whether the existing legal framework should simply be better exploited through national legislation and procurement practice (see e.g. Caimi / Sansonsetti 2023, p. 66f). The results of the present study make it clear that there is a need for both. This is a view shared by both trade unions and employer organisations interviewed for this study, thus the dividing line here is not between the social partners, unlike the findings reported in Caimi/Sansonetti based on interviews with EU-level business federations (BusinessEuropa, SMEUnited). There seem to be quite diverging views on this issue within the group of employers' associations, as evidenced by the recent 'Joint Declarations' by EU level social partners that, amongst

other claims, call for a revision of EU public procurement rules (see UNI Europa & CoESS 2022 for private security services[13], UNI Europa & EFCI 2023 for cleaning industry[14] and EFFAT & FoodServicesEurope for contract catering[15]. While these claims may not be representative for all industries either, they certainly deserve to be taken into account in the political debate as they are voiced by social partners in labour intensive industries with a much higher share of public contracts than many other industries represented by BusinessEurope, and thus by social partners in industries where working conditions are overall more strongly affected by the procurement rules.

Our own findings confirm and complement these claims. More specifically, the analysis of procurement policies and practices in 6 European countries leads us to suggest in particular the four following recommendations for a revision of the legal framework:

- Except collective agreements from the 'link to the subject matter' criterion. This is in line with a key demand of the above-mentioned joint statements as well as UNI Europa's 'No public contracts without collective agreements' campaign. By explicitly exempting collective agreements, it would even be possible for public authorities to restrict participation in public tenders to companies that are actually *party to* a collective agreement - and not just to *adhere to* (some of) the terms laid down in a collective agreement, limited to the duration of the contract and to the staff carrying out the public contract. As the case studies in our national reports repeatedly show, the second variant of pay clauses ('adhere to') – already used in some countries – tends to make their design and, in particular, their enforcement much more complicated and to limit their effectiveness. In contrast, admitting only companies that are *party to* the (most representative) collective agreement restricts bidder competition to companies where collective agreements are already in place and where compliance with the terms and conditions is likely to be higher, not least because of familiarity and established procedures for self-enforcement (e.g. by trade unions, works councils). There is an occasional objection that this may restrict competition too much, particularly in settings with very weak collective bargaining coverage, so that public authorities may end up without any bids. This concern could be addressed by making coverage by a collective agreement an award criterion (not a selection criterion) and/or by an opening clause allowing public authorities to apply the first type of pay clauses ('adhere to') in cases where they can justify it. However, an equally likely outcome could be that, over time, public authorities receive more bids rather than fewer, as companies either join collective bargaining in order to gain access to public tenders, or as companies that have long been covered by collective agreements return to public tenders after having abandoned this segment of the market following too many sobering experiences of being 'too expensive'.

- Except corporate policies to promote decent work from the ‚link to the subject matter' criterion. Corporate policies to ensure decent work are not limited to signing and adhering to collective agreements, but can go beyond this, for example, corporate policies to limit the share of atypical forms of work, or to offer their employees continuous working hours rather than split shifts. If such criteria are linked to the 'link to the subject matter', this also means that they tend to be more difficult to design and enforce (see the example cited on p. 20 of this report of a company's 'equality plans', which were only considered legitimate if they restricted themselves to the workers

[13] https://www.uni-europa.org/news/uni-europa-coess-joint-declaration-on-public-procurement-and-collective-bargaining/
[14] https://www.uni-europa.org/wp-content/uploads/sites/3/2023/03/20230221_Publicprocurement_collectivebargaining.pdf
[15] https://effat.org/in-the-spotlight/effat-and-foodserviceeurope-joint-declaration-on-public-procurement-and-collective-bargaining/

specifically covered by the contract). Moreover, it is difficult to see why companies that excel in terms of their working conditions should not be allowed to benefit from their efforts in public tenders, or why contracting authorities should not be allowed to give positive consideration to whether a company offers above-average working conditions when deciding whether to award a contract. This is something that private purchasers are perfectly free to do when awarding contracts to another company. A common justification for stricter requirements for public purchasers has long been the anti-corruption objective, i.e. the assumption that public purchasers could use their discretion to apply social or other non-price criteria for favouritism. This may well be a risk and in some cases a reality. However, it should be clear by now that modelling legislation on the worst-case scenario, and basing procurement legislation on a kind of generalised distrust of public purchasers, results in significant 'collateral damage' to the quality of services and jobs..

- Allow or even impose limitations on subcontracting. Much of the BDW practice analysed for this study is aimed at combating non-compliance with labour laws and collective agreements, which is to a large extent facilitated by the use of subcontracting. This is not confined to the construction industry, where calls to limit subcontracting through specific legislation, including changes to procurement laws, have been on the agenda for some time[16]. Limiting subcontracting levels to a maximum of one or two sublevels, as called for by the EFBWW, or limiting the amount of work that can be subcontracted to a certain maximum percentage of the contract value, as provided for in an Italian law (see Dorigatti et al. 20-23), can be elements of a more effective "strategic approach" to enforcement (Weil 2010, Bosch et al. 20-23, p. 85ff), which is not limited to monitoring and sanctioning non-compliance after the event, but which seeks to address the structural causes of non-compliance and thus reduce non-compliance in the first place. However, EU public procurement rules impose severe restrictions on rules limiting subcontracting (or at least this seems to be the dominant interpretation by national governments and courts), not least justified by the objective of allowing SMEs to participate in public procurement as subcontractors. However, if this excludes even reasonable restrictions on subcontracting in order to avoid the well-documented enforcement gaps associated with it, the objective of opening up markets as much as possible would again prevail in an absolutist manner. It is therefore necessary to clarify that this is possible, at least for labour-intensive industries such as security, cleaning and construction, among others.

- Avoid austerity policies and provide adequate public budgets. This admittedly bold and unspecific recommendation serves as a reminder of the wider context of public procurement rules – which can be as open as possible to promote decent work, but are still likely to result in weak uptake if not accompanied by the necessary financial resources available to procuring authorities. Budgetary constraints are likely to discourage public authorities from implementing BDW because of the expected increased costs, and where they do not prevent BDW, they may limit its effectiveness as public authorities cut corners (e.g. expenses on enforcement) to minimise the increased costs. Thus, even if BDW can contribute to reducing public expenditure in the long term and in particular when taking into account externalised costs (such as public expenditure on social benefits, or the cost of repairing damage caused by poor quality public services), they often require additional financial resources in the short to medium term, at least from the limited perspective of the budget item from which they are financed.

[16] See most recently the campaign 'Who's the boss? Stop exploitation in subcontracting chains' by the European Federation of Building and Woodworkers (EFBWW) https://www.limitsubcontracting.eu/

These recommendations have so far refrained from specifying the level of legislation (European, national) at which these clarifications and amendments should be made. The answer is clearer with regard to the first two recommendations: The 'link to the subject matter subject matter' was deliberately strengthened at European level with the last reform (Semple 2016), as a kind of horizontal clause restricting socially responsible procurement, in order to counterbalance the horizontal clause in Art. 18 (2) opening the framework for socially responsible public procurement – a perfect example of "institutionalised coexistence". Reform must therefore start at the European level, but will of course also require changes in national legislation. With regard to the third recommendation (subcontracting), the so far uncontested Italian law suggests that national legislators have room for manoeuvre. However, if the prevailing interpretation is indeed that EU-level legislation does not allow for this kind of restriction – which is the case in some of the countries included in our study (e.g. Germany) – it would seem necessary to clarify this also through legislation at EU level.

Lessons for local level politics, purchasing authorities and other actors involved in BDW practices

The overview in the above chapters and, very importantly, the detailed case studies in the national reports are intended to help local level politics, contracting authorities, social partners and other interested actors to identify opportunities within the existing legal framework and to gain insight into the challenges involved. While some of the (mostly) local level 'experiments' are based on specific national or sub-national legislation and therefore may not be easily replicated outside this context, many of the case studies can indeed serve as a blueprint for actors in other countries. The following points highlight a few general lessons that emerge from the cases studies:

- Adopt comprehensive approaches. The effectiveness of BDW practices benefits from comprehensive approaches that are not limited to putting better terms on paper, but include measures to properly *enforce* these terms and to support their implementation by provisions that both *directly and indirectly* promote decent work. Among the latter, the most important measures are thorough checks in order to exclude abnormally low bids, well-designed quality criteria and limits (wherever legally possible) or at least checks and controls regarding subcontracting.

- Involve social partners. Both the design and the proper enforcement of BDW require considerable technical knowledge and sector-specific expertise. Trade unions and employers' organisations have this expertise and sometimes actively offer it to public purchasers, but the potential for involving the social partners remains largely untapped. Consulting social partners and allowing them to play an even more active role before, during and after the tendering process brings several advantages. As well as benefiting from their expertise, it can help purchasers to identify risks and potential conflicts, allow them to use additional resources to monitor contracts effectively, and can reduce the risk of either legal complaints or non-compliance by bidders by clearly communicating their expectations regarding working conditions to the potential bidders in advance.

- Embrace legal uncertainty as a feature, not an obstacle. Trial and error' processes are not uncommon in experimentation with BDW practices and should not be seen as failures, but rather as learning processes that may be necessary given the innovative nature and largely uncharted territory of BDW. For the same reason, legal uncertainty should be embraced as a feature of experimentation rather than an obstacle that needs to be first and foremost removed before starting to developing practices that deviate from established standard procedures. Internal and

external legal expertise should therefore be used as a resource during the process, not as a gatekeeper.

- Secure a robust political mandate. In many of the cases studied, the experimentation was initiated and supported by local or regional governments or the top management of administrations (sometimes following pressure from media reports and campaigns by trade unions or civil society organisations). Indeed, it seems advisable to secure a political mandate to support procuring bodies engaging in BDW practices, both because of the above-mentioned 'trial and error' processes, which imply potential delays in tendering procedures, and because of the higher costs that may be associated with BDW practices, at least in the short term. A strong political mandate that includes an awareness of these potential consequences (and not just a stated will to buy decent work), and a willingness to deal with them, frees public purchasers from the urge to minimise ambitions, time and resources spent on BDW in order to avoid the potential consequences at all costs. As noted above, higher costs and trial and error processes are quite common and should be explicitly recognised by those in charge of the innovative practices and those with political responsibility.
- Go beyond securing minimum standards. Finally, BDW practices have often focused on securing minimum standards set by law or collective agreements, such as statutory minimum wages or minimum wage levels in collective agreements. While this is an important step, it is far from sufficient to ensure decent work. Future BDW practices should therefore aim for more ambitious goals.

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For the list of interviews conducted for the case studies please refer to the national reports.