

# The social impact of procurement

## Can the EU do more?

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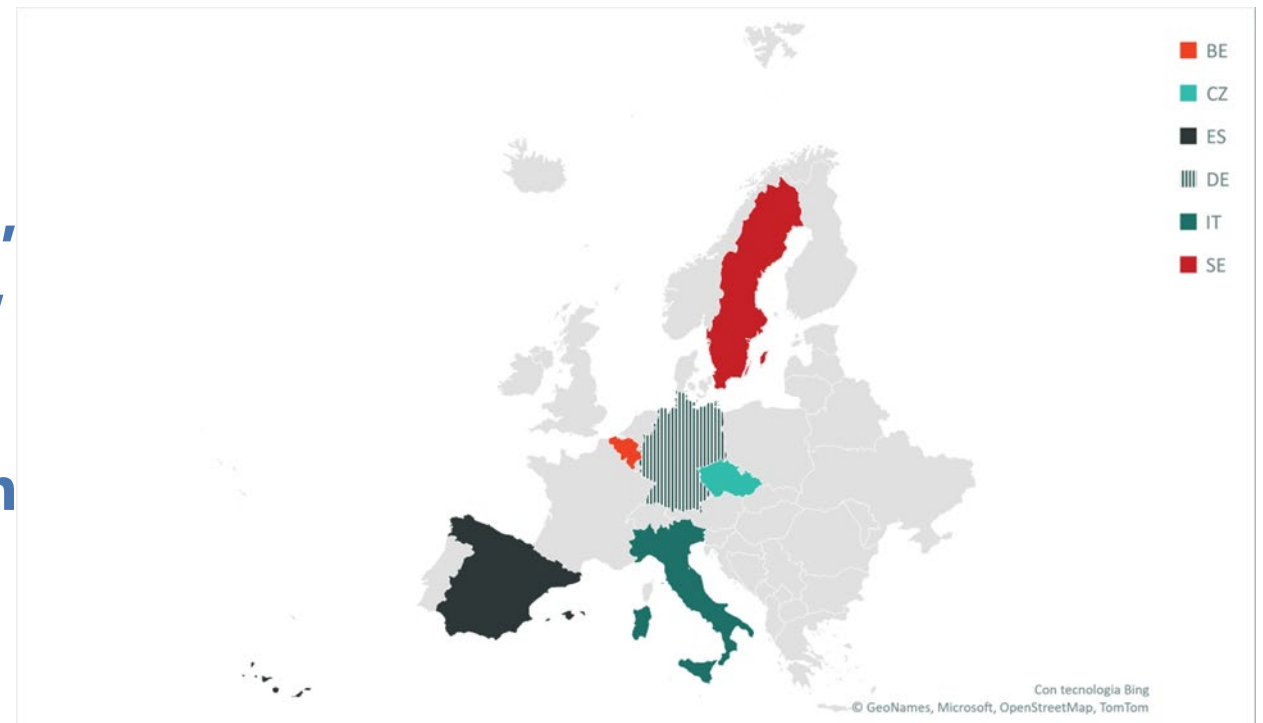
**Fondazione Giacomo Brodolini**

## Objectives of the study

- **Present the possibilities offered by Directive 2014/24/EU on public procurement for the achievement of social goals (SRPP)**
- **Analyse how the social provisions of the Directive were transposed into national laws and how they are used by contracting authorities**
- **Identify obstacles to the implementation of SRPP**
- **Make recommendations for possible future EU action**

## Geographical scope

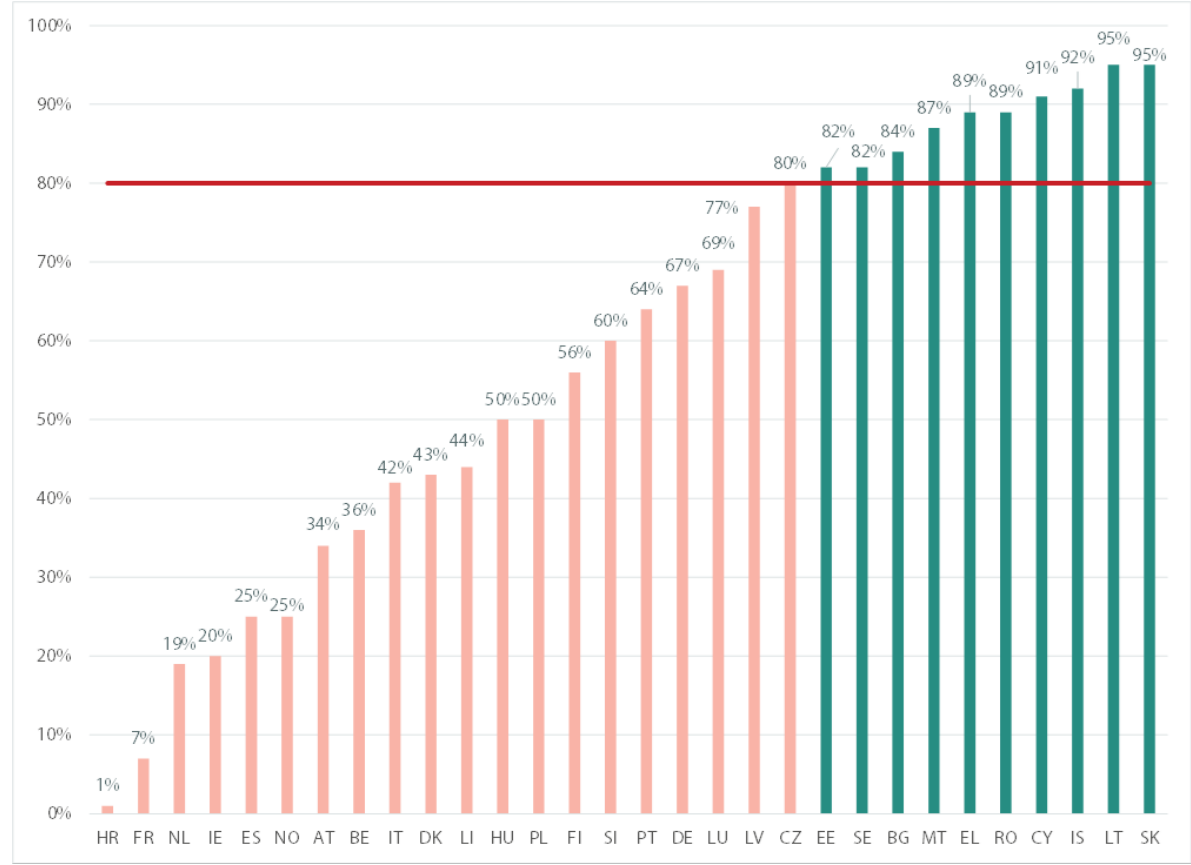
- **Analysis of transposition laws: 17 MS (BE, CZ, DE, DK, EL, ES, FR, HR, HU, IE, IT, LV, NL, PL, RO, SE and SK)**
- **Country case studies: BE, CZ, ES, IT and SE (and DE on collective bargaining & public procurement)**



# Volume and value of SRPP

- In 2021, only 5 MS awarded from 1% to 25% of their above EU threshold tenders only on the basis of price
- 7 MS from 30% to 50%
- 7 MS from 56% to 80%
- 9 MS from 82% to 95%

**This implies that quality, social (environmental & innovation) considerations are not included in award criteria**



Source: Single Market Scoreboard

## Volume and value of SRPP



**TED allows to identify tenders (above the EU thresholds) which used MEAT (most economically advantageous tender) but does not specify which qualitative criteria are used**

**The use of MEAT could only suggest a better probability that bidders respect the mandatory legislation in the social, employment and environmental fields**

## Transposition of Directive 2014/24/EU in 17 MS

Most MS analysed transposed the social provisions of the Directive in a correct way

Social provisions of Directive are not mandatory, except for the horizontal social clause: transposition was not homogeneous

Horizontal social clause was not transposed fully in line with Directive in 3 MS (CZ, LV and PL) out of 17

## Non faithful transposition of the horizontal social clause: CZ

### Czech Republic

- The horizontal social clause is not transposed as such in national legislation.
- 2016 Code: contracting authorities (CAs) may make a reference in procedures to the entity or administrative body from which the economic operator may obtain information on the duties linked to 'the protection of employees and working conditions, environmental protection, taxes, fees or other similar pecuniary performances that are applicable at the place where the services or works are to be provided...'. In addition, the same article **spells out the obligation of economic operators to take such information into account** when drafting their tenders.
- 2021 amendment makes it mandatory for CAs to use environmental, social and innovation considerations in their tenders. No provision on how to ensure compliance.
- Obligation to exclude a participant from the procurement procedure if the participant has failed to provide proof of the payment of social security or has failed to ensure the social security for the entire duration of the award period.
- Recently focus on decent work and sustainability in cleaning services. See [example](#)

## Non faithful transposition of the horizontal social clause: LV and PL

### Latvia

- The horizontal social clause is not directly transposed.
- **Compliance** with obligations spelled out in this article **is ensured through the provisions linked to the exclusion of economic operators from public procurement procedures**. These include the event of tax avoidance and social insurance debts (over EUR 150), the employment of workers without a legal work permit or without the entitlement to legally reside in the EU, or the employment of people without a written contract.
- **No reference** is made to **environmental obligations**.

### Poland

- The horizontal social clause is not directly transposed.
- **Compliance** with (part of) the obligations **is ensured through the provisions linked to the description of the contract**, where the contracting authority defines requirements concerning employment by a contractor or subcontractor, on the basis of employment contracts, and therefore avoids unlawful application of civil-law contracts instead of employment contracts.
- The spirit of Article 18(2) of the Directive **also appears in the provisions linked to the exclusion of economic operators from public procurement procedures**. Polish law determines that economic operators shall be excluded if they breach obligations related to the payment of taxes or social security or health insurance contributions. Contracting authorities may also exclude economic operators that have committed serious professional misconduct in terms of failure to perform a contract or of improper performance.



## **Legal uncertainty in the application of the mandatory social clause for promotion of collective agreements**

- **insufficient legal clarity when there is no applicable collective agreement**
- **most of the complaints SMEs associations receive from companies are about the non-respect of the mandatory social clause by contracting authorities choosing just the cheapest offers**

## The application of the mandatory horizontal social clause

- Most EU-level stakeholders share the opinion that the **impact of the mandatory horizontal social clause has been more limited than what was expected.**
- Article 18(2) of the Directive provides that 'Member States shall take **appropriate measures** to ensure that in the performance of public contracts economic operators comply with' mandatory legislation
  - 'appropriate measures' is vague
  - lack of clarity about which authority should enforce this provision.
- ILO Convention 94 (Labour Clauses in Public Contracts Convention), which stipulates that tenders may not apply less favourable conditions of employment than those in force at the local level, is not mentioned in the Directive.
- Jurisprudence has clarified that the horizontal social clause applies even when a contracting authority awards a contract on the basis of the cheapest price. If there is a universally or otherwise applicable collective agreement in a sector, it applies and should be respected and enforced. The issue is when there is no applicable collective agreement, but a contracting authority would like to require economic operators to engage in collective bargaining and to apply collectively bargained labour standards.

## Notion of applicable collective agreement

- Trade unions argue that the definition of what is an applicable collective agreement cannot be limited to collective agreements that are declared universally applicable, but rather the question of applicability largely depends on national law and practice.
- Therefore, due regard needs to be given to the specificities of national labour market models and industrial relations systems.
- As illustrated by the 2018/957 Posting of Workers Directive, the definition of applicable collective agreements covers not only those declared universally applicable, but in the absence of, or in addition to such agreements, also those 'generally applicable to all similar undertakings in the geographical area and in the profession or industry concerned', and/or those 'concluded by the most representative employers' and labour organisations'.
- Public procurement directive does not make reference to Posting of Workers D.

## Belgium highlights

- **BE: transposition focused on fight against social dumping, social and environmental considerations and participation of SMEs**
- **Federal level two Charters containing proposed commitments for federal and regional contracting authorities on diversity and inclusion and access for SMEs to public contracts, GRPP, minimizing ethical risks in IT procurement**
- **Flanders: focus on circular procurement, respect of human rights and labour standards in supply chains**
- **Wallonia: circular to include social, environmental and ethical clauses in public works contracts**

## Italy: highlights

- **IT: 2023 Code strengthened the provisions on the social clause concerning the employment stability of workers in labour-intensive services** (obligation of the contractor taking over the service to ensure employment levels by hiring the personnel already employed by the outgoing contractor)
- **Clarification of rules on subcontracting:** The subcontractor, for the services subcontracted, must guarantee the same quality and performance standards as those provided for in the subcontracting contract and provide the workers economic and regulatory treatment not inferior to that which the main contractor would have guaranteed. Moreover, the subcontractor is obliged to apply the same national collective labour agreements as the main contractor.

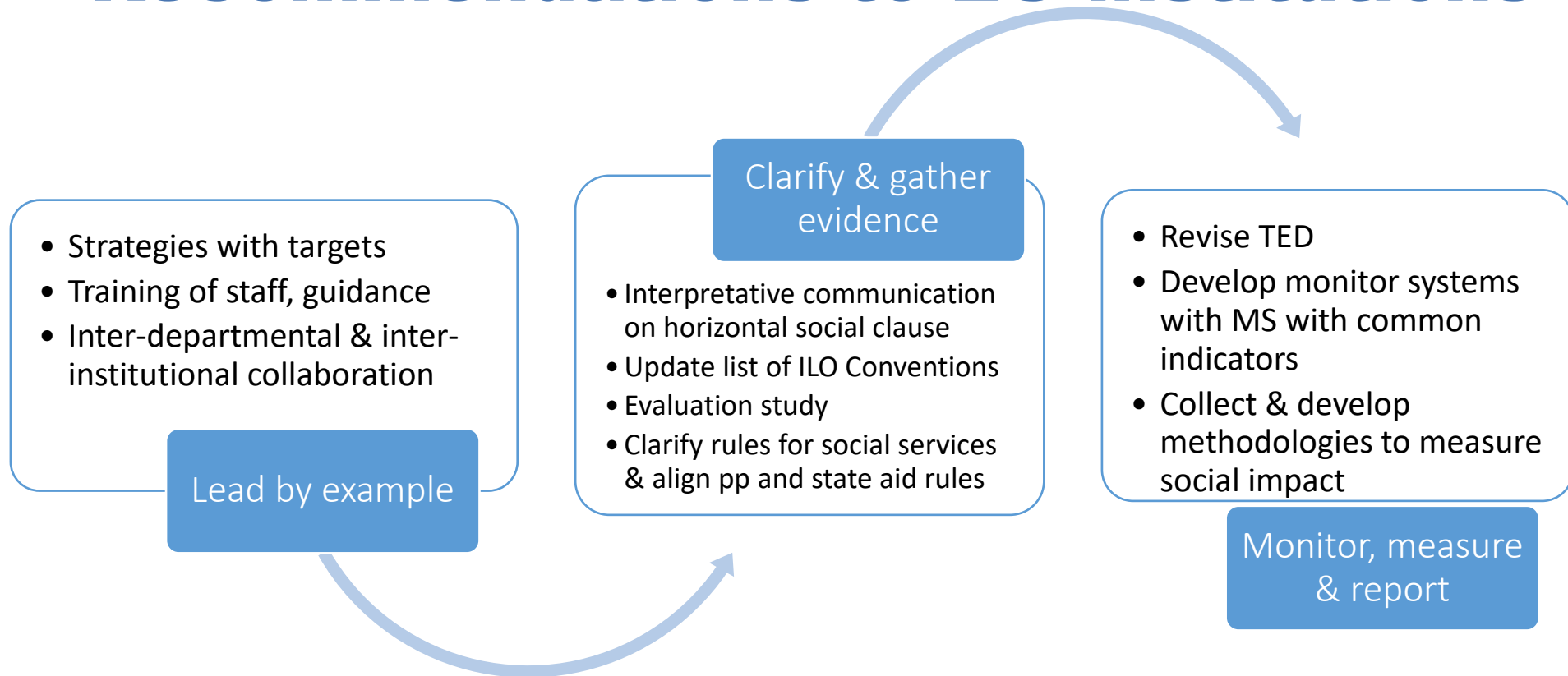
## Sweden: Key insights

- **Key features of SRPP all fully transposed into national law**
- **Art. 18.2: a) Definition of provisions in field of labour law only; b) No system to declare collective agreements universally applicable => Compliance with terms and conditions of PWD**
- **Art. 67: BPQR/MEAT [=> different criteria] one of three options**
- **Art. 69: Obligation to reject abnormally low tenders**
- **Chapter 17 Sections 2 & 4 S: Obligations on subcontractors**
- **Tools beyond legislation: 1) National Strategy; 2) Guidance (NAPP, etc.); 3) Capacity building; 4) Coordination Structures**

## Germany: Legislation (States; federal?) on compliance with collective agreements

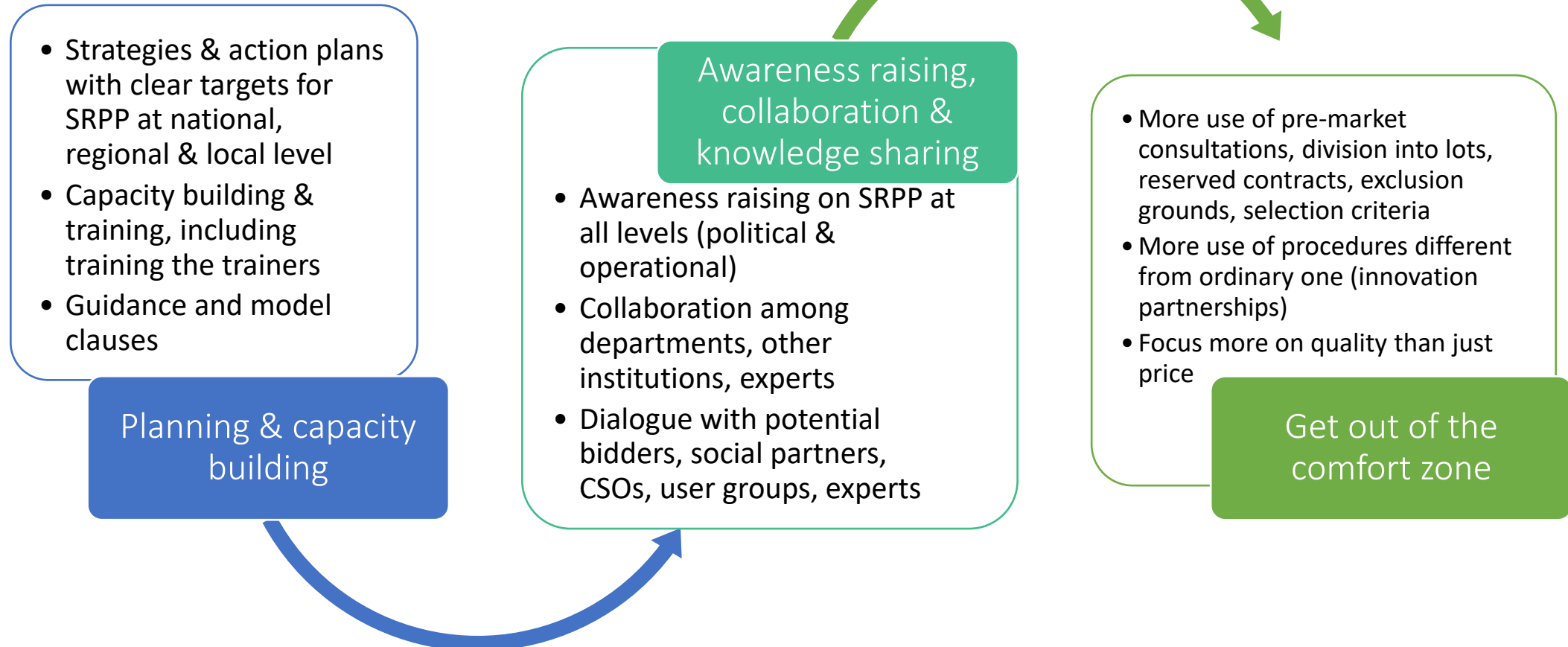
- **Need to reorganise approach after ECJ rulings (Rüffert, etc.)**
- **Objective: Waterproof obligation for contractors to pay remuneration set out in prevailing collective agreements**
- **5 of 16 States (*Länder*) have enacted regional procurement legislation stipulating wages > minimum wage, 7 prepare it**
- **4 States have “full programme” for social clauses => 4 items**
- **Type 1 “Berlin” (05/2020-): 1) Direct reference to applicable collective agreements; 2) Register with updated tariff info; 3) Support structures; 4) Gender equality clauses confirmed**
- **Type 2 “Saarland”: 1) Reference to either a) sector-specific or b) representative collective agreements (2021); 2) Use of sector-specific ordinances (07/2022-)**
- **Proposal for federal law expected (*Bundestariftreuegesetz*)**

# Recommendations to EU institutions

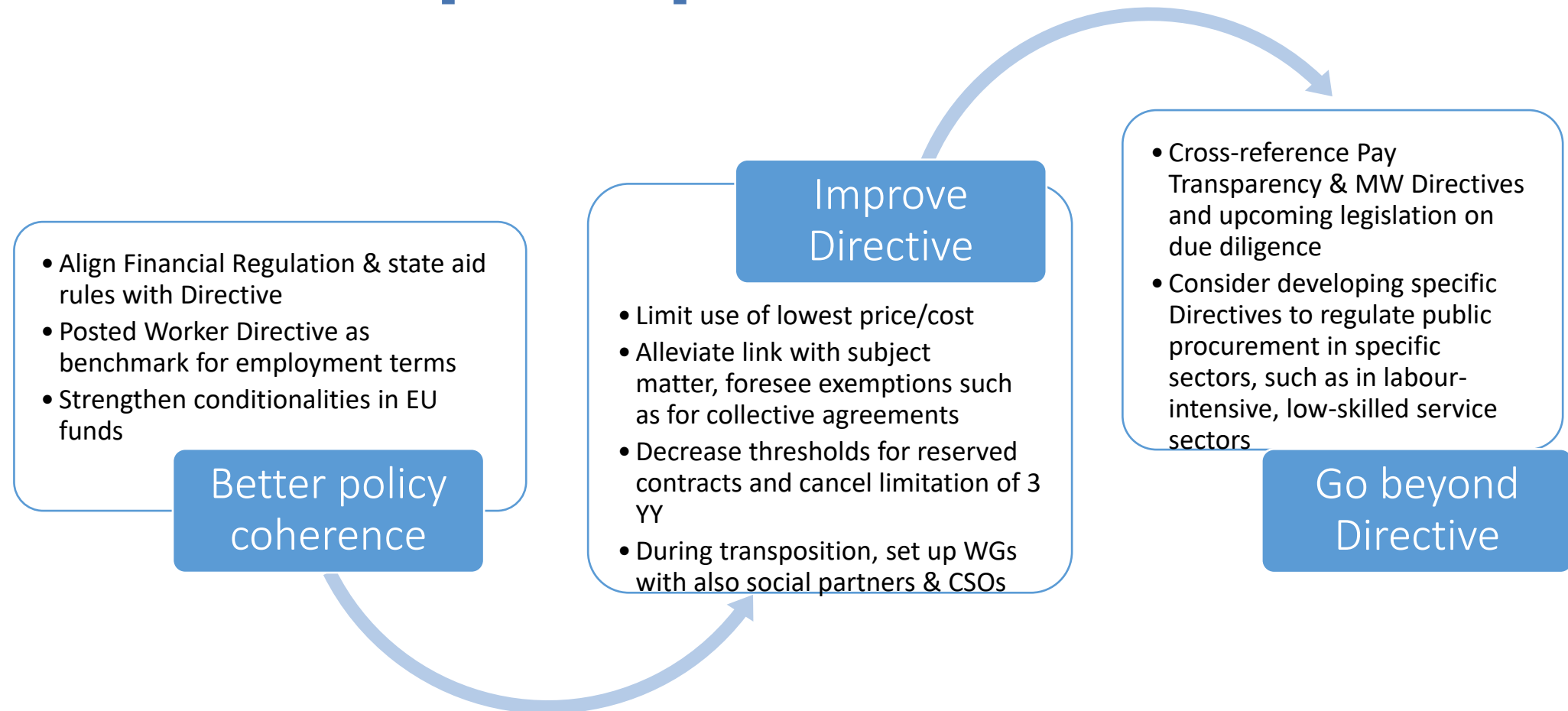




# Recommendations to MS & contracting authorities



# Recommendations for future reform of public procurement



# Thank you for your attention

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