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# What Shapes National Responses to EU Public Procurement Policy? The Case of Health and Social Services in Norway, Germany and England

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## Abstract

This article investigates responses to EU public procurement directives in Norway, England and Germany, with a particular focus on health and social services. We used a comparative national patterns approach to analyse parliamentary debates, consultative statements, the media and interviews with stakeholders.

The literature contains prominent arguments suggesting that health and social service governance regimes are converging on the liberal model. Some authors argue that with its focus on policies which create markets, the EU is a driving force with an increasing relevance for market-based governance practices. However, the role of EU legislation is unclear as procurement regimes in relation to the governance of health and social services constitute a highly ambiguous terrain. Our study enabled us to show that the form of the debate is highly dependent on path-dependent mechanisms and the degree of openness of the national political system that provides channels for interests to be articulated. Indeed, the Norwegian case study serves as an excellent example of why marketisation has not advanced to the degree predicted in the literature: an inclusive and open political system and a strong non-profit health and service sector meant that the non-profit groups managed to turn the debate in their favour.

## Introduction

Against the backdrop of ageing societies, globalisation and growing public deficits, the sustainability of the welfare state is being debated in almost all European countries. In this context, increased efficiency is supposed to translate into welfare gains, with the market providing the most suitable tools to tackle socio-economic challenges (Crouch, 2011). Public welfare services in the health and social sector are thus increasingly organised via the market following a social investment logic, and market instruments are applied to pursue social goals. Under New Public Management reforms, the use of management techniques from the private sector have been incorporated into public administration. In this context, competitive tendering procedures were introduced under which non-profits compete with commercial providers and

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non-profit competitors (Sivesind & Trætterberg, 2017; Larsson, 2019; Feltenius, 2017).

The neo-liberal transformation in Anglo-Saxon countries in the eighties provided the blueprint for the recent – but incremental – reforms towards more privatised health and social service delivery in Scandinavia (Petersen & Hjelmar, 2014). The reforms translated into a stronger role for commercial providers in the welfare mix in Scandinavia, challenging the dominant governance model (Sivesind 2017). However, this change was accompanied by passionate public and political debate on market-based service provision in the health and social sector as it both challenged the logic of the Scandinavian welfare model as well as specific sectoral interests such as commercial versus non-profit (Petersen & Hjelmar, 2014).

EU procurement legislation provides the basis for the welfare mix in EU member states as it specifies the conditions for contracting out health and social services (Seggaard & Saglie, 2017). This has largely been neglected in the literature and it is unclear what role EU legislation plays when it comes to processes of marketisation of health and social services. We consequently address this gap in the research by scrutinising the national translation of EU procurement policy with a particular focus on the implementation of the procurement directive 2014/24/EU and the directive for concessions 2014/23/EU.<sup>1</sup>

Several researchers have attributed a bias in EU legislation towards policies, which create markets rather than those which correct markets, which could reinforce the trends towards marketisation cited above (Scharpf, 1996; Leibfried 2005; Moreno & Palier, 2005: 157).

EU procurement policy provides a particularly interesting case as it lies at the interface of social and macro-economic policies. Economic policies to create markets with a pronounced focus on harmonisation of national legislation collide here with social policies to correct markets where member states enjoy a high degree of autonomy (Rock 2010; Eyßell 2015). This leeway of autonomy is anchored in the principle of subsidiarity on which the EU system of governance is indeed based (Mossialos & Lear, 2012). As the boundaries are blurred, we expect a variety of responses to this legal stimulus.

The aim of our research is to answer how the directives for public procurement and concessions are interpreted and debated from a health and social sector perspective. We shine a light on the tensions in the social-economic policy regime in the EU, identifying whether the directives are translated through the lens of the market reinforcing the marketisation trends cited above, or whether the leeway available is used to preserve the institutional characteristics of the national health and social service governance regime. We suspect that the answer depends on the institutional configuration that constitutes the prime channels for articulating interests.

We argue that the institutional constellation, particularly in relation to strong path-dependent mechanisms in health and social services due to cohesive welfare state constituencies, and the inclusiveness of the political system contributing to the capacity that interest organisations have for advocacy, explains how the directives were translated differently and debated with a different intensity in the respective countries.

We answer our research question using a most different systems case design and through a comparative national patterns approach (NPA) (Gerring, 2010; Levi-Faur, 2004).

Three countries were selected which represent distinct welfare regimes (Esping-Andersen, 1990): Norway represents the universal social democratic regime with public service strongly dominating, and a relatively small share of non-profit providers that are assigned complex social service niches on the basis of reserved contracts. England has a liberal welfare mix with a “minimum” welfare state mainly comprising commercial providers in social service provision and a smaller number of non-profits (public authorities have a commissioning role). Germany embodies a corporatist welfare system where non-profits are deeply embedded in policy-making and are the main providers in the realm of social services (Evers & Lavielle, 2004).

Due to the (historical) fact that Scandinavian countries are very alike with regard to political institutional factors as well as welfare regime, it could be said that Norway represents Scandinavian countries overall. Therefore, employing a comparative perspective, the study also aims to shine a light on the special case of Scandinavia represented by Norway where things played out very differently compared to England and Germany. Using NPA the underlying assumption is “that political processes and outcomes are shaped by a country’s unique national and historically determined characteristics embedded in specific state traditions” (Levi-Faur, 2004:180). However, as will be discussed later, in contrast to other Scandinavian countries, Norway is obligated to implement the EU directives due to the EEA agreement but not as an EU-member.

The next section outlines the analytic framework for our approach, followed by a description of the research design. The empirical narrative case analyses are then described and discussed from a comparative perspective. The final section summarises the article’s contribution to the body of knowledge in this particular field.

## **Analytic framework - Institutional constellation: channels for articulating interests**

We acknowledge that the implementation of the directives does not take place in a vacuum but is embedded in a larger institutional environment. Therefore, we argue that the institutional design shapes the outcome of the policy directed by the stance of different actors. Using the concept of institutional constellation formulated by Jordana & Sancho (2004) and the neo-institutional field approach (Fligstein & McAdams, 2011), we explain how different conflicts over the interpretation of the directives are mediated. Four interrelated dimensions are outlined, policy coherence, policy dominance, decision-making processes and consensus formation.

*Policy coherence* is the degree of institutional fit in relation to the scope of control. When policies are interdependent due to indirect effects from decisions in other policy fields, policy coherence will be reduced (Jordana & Sancho, 2004). Therefore, we assume that cross-cutting policies dealing with complex issues will have lower degrees of coherence. Actors at the meeting point of organisational fields are aware of institutional contradictions and alternatives to

the status quo challenging those holding a position in the field (Greenwood & Suddaby, 2005). The procurement directives regarding health and social services lies at the interface between economic and social policies. Therefore, it is assumed to be less coherent and alternative interpretations to the traditional modes of governance regarding health and social services more likely. The potential for a break in path dependency is assumed to be particularly high for our research topic, in contrast to most social policy fields which have strong path dependent forces due to solid interest group constellations (Starke, 2006; Pierson, 1996). Generally, path dependency is significant in the area of welfare policy where radical change is less likely. The resistance capacities of highly organised stakeholder groups lead to inaction and strong path dependent mechanisms result in a restructuring of existing policies rather than a paradigm shift (Starke, 2006; Pierson, 1996; Peters, Pierre & King, 2005). Differences in the perception of the scope of the directives can lead to conflict over its interpretation as different institutional actors struggle to maintain or extend their power (Majone (ed) 1996).

The national welfare context and the welfare mix are perceived as significant institutional factors in how EU policies on public procurement are interpreted. For example, a liberal paradigm will to a large extent stress free competition and equal conditions for non-profit and for-profit providers compared to a conservative corporatist paradigm that has a tradition of civic non-profit service providing. In Norway, the traditional social-democratic logic was challenged by the market logic which came out of a legal interpretation of the new procurement directive and the possibility of maintaining the Norwegian exception for non-profit service providers (Seiersted, 2014).

*Policy dominance*, is the degree to which actors control a determined policy area (Jordana & Sancho, 2004: 309). When actors with the same power resources are involved, the field becomes more contested. This applies particularly to fragmented policy fields where groups of actors differ over time resulting in a constant jockeying of power between incumbents and challengers (Fligstein & McAdams, 2011). In decentralised policy fields, a multitude of groups of actors are observed, and governance practices become more scattered. In Germany against the backdrop of strong federalism, the field of social services is particularly fragmented (Eyßell, 2015), while in the unitarian country of England governance practices are more centralised. Norway represents a middle way where municipalities are autonomous in implementing policies at the local level but the central Government sets common standards.

*Decision-making-procedures* are the space where positions are communicated, and policies are formulated. The institutional bodies that take part have different levels of participation ranging from full inclusion in decision-making to an advisory role without decision-making powers. In political systems that tend to include a variety of actors in policy making with powers of veto, a distinct consensus culture is observed (Lijphart, 2012; Tsebelsi, 2002). Norway and Germany represent consensus democracies, while England provides a textbook example of a majoritarian democracy. As a by-product of the inclusive decision-making procedures described above, *consensus formation* favours joint-decision making often based on informal negotiation processes which take place outside of the formal arena. Zero-sum-games with the “winner-takes-it-all-logic”

are rarely feasible and alien to the political culture. Instead, a balance of interests is pursued. Inclusive values lead to conflict solution through cooperative decision-making. In its extreme form, it can develop into a joint-decision trap, resulting in political deadlock. Therefore, the inability to deal with change is an inherent risk of a pronounced consensus orientation, exemplified by the corporatist governance regimes of Germany (Scharpf, 1997). *Figure 1* summarises the four analytic dimensions connecting them to our three cases, explained in more detail in the following analyses.

*Figure 1. Four key dimensions in comparing institutional constellations*

Key dimension	Norway -social democratic	Germany -corporatist	England -liberal
Policy coherence	--	-	++
Policy dominance	-	--	++
Openness of decision-making procedure	+	++	--
Consensus formation	+	++	--

Key: ++very high, + high, - low, -- very low

Source: Own illustration based on Lijphart (2012) and Jordana & Sancho (2004).

## Research design - case selection, method and data

In keeping with most different system case design and NPA (Levi-Faur, 2004), the three countries, Norway, England and Germany, were selected because they all were obligated to transfer the EU public procurement directives, but are examples of different welfare regimes and have significantly different institutional legacies and political systems (Schmidt, 2002).

To investigate the political debate and responses to the policy implementation process, consultative statements and parliamentary debates were examined in all three case countries. The relevant documents and minutes were sourced from government websites, selection was defined by the formal process, the timeframe and the actual deadline for the implementation of the EU directives into law. The official deadline for transposition of the EU directives was in the spring of 2016. In Norway, the new regulation came into force January 2017, in Germany April 2016, and in England February 2015. To study the media debate, we sampled national printed newspapers using Retriever (Norway) and LexisNexis (England and Germany) databases. The timeframe was the period from the day the national Government's proposition on a revised law on public procurement was published to one year after the revised regulation was passed in parliament. In addition, nine qualitative interviews with key stakeholders in Norway and Germany were carried out to obtain specific information about their strategies and behaviour during the process. In England, interviews were not carried out. There are several reasons for this which included, among others, that the present situation with Brexit and the number of years since its early implementation made it difficult to recruit relevant stakeholders. Perhaps more importantly, we considered that the English case was adequately described by other data sources.

The following comparative narratives of the responses to the directives and what prompted specific ways of responding to the transposition of the directives in these particular countries are based on both quantitative and qualitative content analysis. We used quantitative content analysis to provide an overall picture identifying the extent to which the responses to the national transfer refer to the health and social services sector. The quantitative content analysis also functioned as a basis for identifying statements for the qualitative content analysis: the items that explicitly referred to the health and social services sector and commented on the production of public welfare services. By carefully reading these documents, we were able to identify and cast light on arguments related to how to interpret the EU directives when contracting out public health and social services. Approximately 340 documents were analysed across the three countries.<sup>2</sup>

### Three country cases – three different interpretations

#### Norway: interest articulation and openness ensure a return to the path

In the last decade the non-profit welfare providers in Norway have experienced more competitive pressure due to “increasing use of market-emulating tools of governance, such as open tenders, short-term contracts and increasing competition between the sectors” (Sivesind, 2017: 58). Despite clear market liberal trends and a strong public sector, non-profit providers have been given preferential treatment legally through regulation ensuring reserved contracts and a collaboration agreement for publicly funded health and social services (Ministry of Trade, Industry and Fisheries 2015). Based on legal arguments (Seiersted 2014), the government bill on public procurement ‘ignored’ the former regulation of preferential treatment for non-profit service providers and the collaboration agreement, in favour of a pure liberal market approach. Therefore, the policy field was at a crossroads and coherence was very low.

Norway has a long tradition of openness in decision-making procedures, including interest organisations in political processes through consultation, informal communication channels and active lobbying, and while the intention is consensus, the influence of affected interest groups can result in political debate (Binderkrantz, Christiansen & Pedersen, 2015). Political debate was indeed a key factor in the Norwegian process of interpretation and the openness in both formal and informal decision-making procedures was a decisive reason for the final, non-profit friendly transposition that contradicted the original bill formulated by the right-wing minority Government. This provoked an intense political dispute grounded in an ideational conflict along political left-right lines both amongst and between politicians and interest groups.

Overall, both pro-liberal market ideas and market correcting arguments were represented in the media and to some extent in the parliamentary debate (Stortinget 2016), while in the consultative statements pro-liberal market ideas were almost absent in relation to health and social services (Regjeringen 2015).<sup>3</sup> This is not surprising, since the political hearing documents were based on economic liberalism with an emphasis on open competition and equal treatment; those promoting such ideas did not have the same reason to stress their worries

as those concerned about special conditions for non-profit providers. By active lobbying and “marketing” of arguments in the media, representatives of the non-profit providers (in particular the Non-profit Network, the Enterprise Federation of Norway (Virke), and the Association of NGOs in Norway) and their political allies, Members of Parliament from the central and left wing parties (the opposition), stimulated the political debate. In particular, there was close informal contact between key MPs from the opposition parties and Virke and the Non-profit Network respectively with regard to knowledge exchange and coordinating communication strategies with the aim of defining the agenda and controlling the political debate (interview data). Headlines of op-eds written by these groups illustrate the intensity and focus for example : “Non-profit versus for-profit” (Klassekampen, 20.02.2016), “Non-profit supply is requested, but...” (Vårt Land, 4.2.2016), “Non-profit welfare must be ensured” (Nationen, 7.4.2016), “NHO is wrong about competitive tendering (Klassekampen, 5.9.2016). The last item was then answered by the pro-liberal NHO with this headline: “The tunnel vision of Virke on procurement” (Klassekampen, 9.9.2016).

As an ideational political conflict, the focus was moved from a technical and legal question of what is (not) possible to a normative question of what ought to be the fundamental values of society. In particular, the non-profit interest groups succeeded in telling their story with a description of reality communicated directly though formal and informal lobbying and indirectly through the media to policy makers and the central administration. The message was that non-profit health and social service organisations are something more than just service providers; they are of great intrinsic value and represent the good values of society – altruism, goodness, and genuineness:

I want to talk about the important and valuable tasks of non-profit health and social service providers. The non-profit sector represents a culture in our society, a long history based on solidarity and responsibility for fellow human beings. Non-profit actors existed before the welfare state. We may state that the non-profit sector represents the best of our society (MP, the Labour Party).

This view was placed in contrast to for-profit welfare providers where it was claimed price is a measure of quality and maximising profits is the goal. The strategy of the non-profit interest groups was partly to move the debate on the technical and legal details of the regulation to a debate on societal values to a question of “what kind of society do we want?” (Nationen, 25.1.2016). They were also able to provide policy makers and the central administration with legal knowledge about the leeway for national adjustments by referring to other countries:

The Norwegian understanding of “in-house” does not seem to include the Danish model of inclusion of “self-governing institutions” [...]. In the opinion of Non-profit Network this is one of the collaboration forms that public entities and non-profit organisations can use when it is appropriate. (the Non-profit Network).



The non-profit interest groups won the argument by defining both the problem (the non-profit sector is in trouble and fundamental values are challenged) and the solution (ensure good conditions for non-profit providers by law). In the end, no national policymaker disagreed with the idea that non-profit welfare providers are of great value for society and for the welfare mix in particular. Such a unified consensus was evident in the committee report (Næringskomiteen 2016) and the final parliamentary debate where no speaker discussed public procurement of health and social services without mentioning the added value of the non-profit sector (Stortinget 2016). What is even more remarkable is that all speakers regardless of political persuasion praised the non-profit sector for their contribution to society through value based and non-commercial service providing. In addition, the conservative Minister of Trade and Industry, who originally launched the bill that promoted a purely market liberal law, expressed a loyalty to the non-profit sector based on experiences from the past and recognition of its contribution to Norwegian welfare. The *consensus* on this point of view was wide, only very few actors promoted a principle belief in the free market:

We have solid trust in the non-profit actors. We think they have a strong power of competition, and we want to provide equal terms to all actors, and we want the resources of society to be used in an optimal way [...] That is to say, we have a strong belief in non-profit organisations, and we think they have competitiveness (MP, the Conservative Party).

There was agreement that the national scope of action within the European Economic Area (EEA) Agreement and the EU directive should be used to promote good conditions for non-profit service providers:

A unified committee concludes that the national space of action within the EEA Agreement must be used and that separate regulations for health and social services must be provided. That is important for looking after the non-profit sector (MP and Leader of the committee, the Labour Party).

However, the process showed a high degree of disagreement regarding the scope of national leeway. Two points of view were present, the first was that EU directives on public procurement are a technical legal hindrance to pro-active political regulation in favour of non-profit providers. The Government made it clear several times that Norway as an EEA member is committed to revising the public procurement regulation in a way that does not deviate from the EU directives that could limit the scope of national autonomy for preferential treatment of non-profit service providers:

I want to say that my experience is that all of us indeed wanted to maintain the possibility to make reserved contracts for non-profit actors within the health and social sector. Moreover, it is also my opinion that we could have had another situation today if the former government had done a good job, but the former government came too late to the train in EU. I regret that. (Minister of Trade and Industry, the Conservative Party)

From the Government's point of view, the process of implementation was considered a technical and legal matter and as a question of what is possible, rather than what do we want. The Government linked the strict economic approach to the harmonisation intention of European economic policies and used to explain (or excuse) the purely liberal approach. However, this Europeanisation argument was countered with another European anchored statement, that the EU allows for the preferential treatment of non-profit health and social service providers. Advocates for non-profit interests – represented mainly by umbrella organisations and opposition political parties - proclaimed in a consultative statement that “[i]t is possible within the frame of the new directives to continue (with some limitations) the collaboration agreement on health and social services between public authorities and the non-profit sector” (the Non-profit Network 2015). It was argued that public authorities have the opportunity to reserve contracts on health and social services for non-profit organisations if it contributes to the overall goals for the sector for the common good and economic efficiency. Also, in the statement, it was argued for separate regulation of procurement of health and social services, as well as for in-house collaboration and partnership collaboration between public authorities and non-profit organisations, which would also qualify for exemption from the regulations, according to legal advice. Therefore, there were two kinds of Europeanisation arguments involved in the Norwegian debate related to creating and correcting the market respectively.

In the end sceptics were convinced that the EU regulations permitted national adjustments in accordance with national culture and traditions. This was achieved through reference to practices in other EU countries, recent research, legal reports and statements, and to the EU directives themselves as well as common European social policy and practice. The victory of the non-profit interest groups was clear when the responsible minister in the parliamentary debate pronounced:

...the Government will consider the scope of action for reservation contracts on health and social services to nonprofit actors, and the possibility for different forms of collaborations with nonprofit actors, such as vertical collaboration, within the scope of the EEA law. The Government will also use its opportunities to influence the legal development in this field at the EU level.

In summary, in a context of low policy coherence the transposition of the public procurement directives triggered a liberal response from the Norwegian government. The non-profit sector and their political allies frustrated this approach and through the openness of the decision-making procedures they stimulated a political debate, emphasising the widespread consensus of the inherent ‘goodness’ of the sector and the leeway the directives afforded. This led to rejection of a purely liberal market policy interpretation and endorsement of preferential treatment for the non-profit sector as before.

**England: stickiness to the liberal path ensures the status quo**

Until the 1980s social services were funded and delivered by local authorities. There was then a move to encourage a proportionate increase in private and voluntary services, and the purchase of services from these sectors was seen as

the best model going forward (Griffiths, 1988). Local authority provision, quantitatively dominant for so long, has waned over the past two decades across all social service areas, the for-profit sector is now dominant followed by the non-profit sector. The commissioning role of local authorities has increased and strategic shaping of local social care markets has become a major responsibility. Therefore, in contrast to the situation in Norway and Germany the long-standing trend of a mixed economy of welfare in England, means a purely liberal interpretation of the EU directives on public procurement would be expected and very high policy coherence.

England traditionally had a strong, centralised government (Schmidt, 2002). Over the past twenty years the state has been rolled back to create a low-key state and rolled out to extend its influence by outsourcing and incorporating others in public governance (Rhodes, 2017). Government is often required to consult with stakeholders but not necessarily to act on the responses. There are also some constraints placed on the political campaigning and lobbying of the non-profit sector, for example through the Lobbying Act (2014). Therefore, due to government processes an absence of political conflict would usually be the case in England, and would score highly on the policy dominance dimension

Ideological path dependency was a key factor in interpretation of the directives in England. The centre right Conservative-led coalition government was committed to a strategy of reforming English public procurement processes to stimulate economic growth. The coalition response to the directives was to incorporate this into their narrative of being strong on the economy, and that the new rules supported priorities of deficit reduction. The changes were promoted as making public procurement faster, less costly and enabling better outcomes for government and industry. The government stated early implementation of the directives was to make available the potential economic benefits as soon as possible:

Procurement can better support...strategic objectives by facilitating the efficient use of public money, stimulating private sector growth and enabling a flexible approach and choice for contracting authorities on how they manage their procurement policies to promote wider objectives. (Cabinet Office, 2011).

The government had a strong commitment to neoliberal values, which clearly underpinned the agenda for the wider transformation of public services and the welfare state, including health and social services. The narrative about the directives situated them as part of an unquestioned, pro-market approach. Government made little mention of the non-profit sector specifically except for conditions for mutuals, but talked about industry and business, health and social services were considered mainly in terms of the light touch regime proposed for these sectors.

The responses to the consultation about how the directives should be implemented also tended to the liberal model, placing flexibility above all else and on the whole supporting the national government approach (Cabinet Office, 2014). All stakeholders supported market principles, and the non-profit consultees expressed support for creating a diverse market and division of contracts to allow smaller organisations to compete, as this was essential for the health of future markets in public service provision. However, non-profit

consultees also took the view that social value, quality and price should always be a factor.

There was a “stickiness” or coherence to the path as the approach to the directives was a continuation of policies started in the late 1980s. It reflects the pro-market approach to the delivery of social services and health services in England over recent years. Given the extent of private sector involvement in social services in England, the voice of business was not overly represented but perhaps this as in Norway was because the regulations were market oriented anyway. The directives can be located within policy changes in England that have reinforced long-term trends and introduced a shift towards an ideal-type neoliberal model (Grimshaw & Rubery, 2012).

Various documents stated that England was influential in drafting the directives, and that they represented an “excellent outcome” from England’s “extensive” negotiations in Brussels (HM Government, 2011). The Government claimed it had negotiated successfully in Brussels to enable better value outcomes for business. This was part of a longer-term adaptation of English government to ensure effective input into EU policy making that began decades ago (Bulmer & Birch, 2009). The directives were seen by the coalition government as an opportunity structure for resolving domestic policy issues, not just as a means of creating similar conditions across borders. For example, the directives would allow small businesses better access to public sector contracts and this was a recommendation already made by the Prime Minister’s Enterprise Advisor.

The lack of political conflict allowed for the early implementation of the directives. Any potential contestation was managed by adhering to the broad principles, but highlighting there was room for some manoeuvre and discretion. For example, there was collective agreement that the proposal for a national oversight body with a judicial function infringed the principle of subsidiarity, and amounted to unwarranted interference in the domestic legal order of England where administrative and judicial powers had traditionally been exercised separately (Hansard, 2012). This was eventually removed from the draft regulations.

The directives were accepted across the political spectrum, there was broad consensus and no political movement to challenge it. Therefore, consensus in decision-making was low from the perspective of including external actors. The cross-party European Scrutiny Committee supported the government’s view (European Scrutiny Committee, 2012), and there was only one short parliamentary debate that also ended with backing for the government position of supporting many elements of the directives. There were only one or two dissenting voices from the Labour Party (opposition) who were concerned about EU involvement in and privatisation of public services. However, most of the discussion focused on transport, utilities, defence, manufacturing and the hope that the directives would support UK business. There was only one specific mention of health and social services related to the inappropriateness of EU involvement in this area, but there was no mention of non-profit or other sector providers (Hansard, 2012).

The style of government in England meant that the agenda was closely controlled with only a marginal role for social partners, trade unions and so on.

Therefore, low on openness and consensus as dimensions of decision-making. The first stage of consultation to inform policy choices where the regulations allowed some discretion was limited to a group of stakeholders identified by the government. In the second stage, a formal public consultation, specific questions were asked based on certain aspects of the directives, the government was therefore guiding the topics and areas covered by the consultation. The consultation responses highlighted widespread support for the proposed approach taken to the regulations and the light touch regime proposed for health and social services, particularly from the non-profit sector. The only issue raised was the lost opportunity to introduce MEAT (Most Economically Advantageous Tender) as a mandatory basis for contracts. For example, the National Council for Voluntary Services (NCVO) stated in their response:

NCVO welcomes ....a new “light touch” regime for health, social and other services....The new regime offers an opportunity for a ‘fresh start’ and if implemented correctly could help alleviate unnecessary procedures for all parties...The new financial threshold of €750k...is strongly welcomed (NCVO, 2014)

There was little public interest generated in the directives and there was not much (if any) debate about the directives in the public sphere and particularly through the media. This may reflect that there was overall consensus amongst the stakeholders involved in implementation or directly affected at a purchaser/provider level by the directives, so there was no need to engage with the media to help influence the debate. In addition, due to the threshold levels there would also be large numbers of non-profit providers of social services (and providers from other sectors) not affected and so not engaged in trying to influence policy.

In conclusion, to a large extent interpretation did not greatly affect the existing state of affairs and the directives did not require any overall ideological or policy paradigm change. Arrangements already in place were extended or more actively supported to implement the directives, change was incremental rather than comprehensive.

### Germany: robustness of the corporatist regime ensures the status quo

Following a corporatist mode of governance and a conservative welfare perspective, social partners play a crucial role in the self-administration of the social security system in Germany. Additionally, welfare associations are directly involved in policy-making (Strünck, 2010). Social services form part of the social law regime, a triangular relationship between state, social service providers and citizen in need, considered irreconcilable with procurement law (§ 5 SGB XII; § 4 SGB VIII; § 78 KJHG). Social service providers are free to establish a service, and services demanded by citizens vested with social rights who can then choose a service. Public bodies grant the entitlement to citizens to take up a service. Representing a user choice model, the preconditions for procurement for most social services are not applicable (Nielandt, 2005).

Against the backdrop of pronounced autonomy of German municipalities and the fragmented nature of social law, the governance practices of social services are diverse ranging from traditional corporatist governance regimes to

voucher-based user choice models (Eyßell, 2015). The non-statutory welfare sector remains an important pillar of social services infrastructure, and suggestions by the main economic advisory body of the executive (the monopoly commission) to liberalise the governance model and in particular to cut back the privileges of non-profit welfare providers (Monopolkommission 2014:269), have been strongly rejected by the Federal and State Governments. Instead they called for a perpetuation of the close collaboration between public authorities and non-profit providers (Deutscher Bundestag 2015:8; Bundesrat 2015:4). Despite the fragmentation of the field, the triangular relationship and the strong role of the non-profit providers within this welfare model seems to have support across the political spectrum. Taking into account the overall consensus regarding the corporatist model but also the fragmentation of social services, there is a moderate low score on the cohesion dimension.

Due to the cooperative federalism in Germany the political arena consists of many institutional barriers, which can lead to political paralysis. The numerous veto points of the political system can produce a political deadlock or “joint decision trap”. These frequently lead to compromises with restrictions on the government. Only in the case of a narrow or ambiguous majority do political actors opt for confrontation and engage in a zero-sum game (Burkhart & Manow, 2006; Immergut & Orłowski, 2013; Lehbruch 2000). Therefore, Germany scores particularly low on the dimension of policy dominance, but particularly high on the dimensions of the openness of decision-making procedures and consensus formation.

Given the pronounced openness of decision-making procedures, the grand coalition of the social-democratic SPD and the conservative party CDU, deployed a consensual strategy to transpose the EU directives. The federal government achieved the integration of the conflicting interests of stakeholder groups that resulted in broad consensus and a consolidation of the corporatist characteristics of the procurement regime. Due to incremental and technical changes to the governance regime, the potential for conflict was low and consequently, the debate gained little public attention.

The new procurement regulations simplified the structure of procurement legislation. Leeway for public authorities was extended, in particular the interests of local authorities as “prime buyers” of social services were taken into account. A stated goal was to make the procurement law “more favourable for local governments” (Ausschuss für Wirtschaft und Energie, 2015: 16). The new social and ecological criteria were optional and designed to strengthen the strategic capacity of contracting authorities. Additionally, possibilities to negotiate the terms of delivery with the contractor were increased. Particularly the social services negotiation procedures between providers and public authorities were enhanced which strengthened the corporatist characteristics allowing for close collaborative ties between contracting authorities and providers:

In the discussion, it was important for us that social services have to comply with high quality standards. (...) This is specifically regulated by § 65 allowing public authorities to apply different procurement procedures, which lead to a closer collaboration

between contracting authorities and providers (BT- Plenarprotokoll 18/158-25.02.2016).

Social services largely continue to be out of the scope of the procurement law (Ausschuss für Wirtschaft und Energie, Protokoll-Nr.18/68. 6). The factions of the grand coalition stated that service provision carried out within the legal framework of the triangular relationship regulated by social assistance law does not fall into the domain of EU procurement legislation. However, a blanket exemption for all social services organised according to the triangular relationship regulated by social law cannot be assumed and depends on the individual case (BT Drucksache 18/7086-16.12.2015: 13). In this context, the coalition government also stated in a parliamentary inquiry that individual entitlements to social services are based on users' choices and therefore not subject to the procurement legislation (BT-Drucksache 18/6492 - 28.10.2015). Mainly labour market services were subject to the regulations and here the application of quality criteria in the awarding process was strengthened.

Generally, the transposition of the EU directives was not perceived as a 'hot topic' in the political arena. This was reflected in the low attendance of German parliamentarians at the plenary debate (BT-Plenarprotokoll 18/146 - 17.12.2015: 1425). Also, the debate in the Bundesrat was brief with very few short statements on technical issues and even less specifically related to social services.

The responsive strategy of the government resulted in an overall acknowledgement of the legal changes by the different parties involved in the legislative process. The German coalition government successfully buffered potential conflicts by thoroughly integrating the interests of divergent stakeholder groups. Secretary of State Uwe Beckmeyer (SPD) highlighted the positive feedback of different stakeholders despite many fault lines in the political arena:

By and large this legal initiative is positively assessed, which is even more impressive considering that all stakeholders involved in this process had partly voiced very divergent positions. (BT- Plenarprotokoll 18/146- 17.12.2015: 14424)

In addition, the Federal Government pointed out the positive feedback from the German States (BR-Plenarprotokoll 936 – 25.09.2015: 332).

Positions of the parliamentary factions were relatively close, and the coalition government succeeded in avoiding controversies. In accordance with its general approach to extend the leeway for contracting authorities, the coalition government was in favour of an optional provision of strategic criteria, while the opposition called for both a mandatory provision of strategic criteria and a strong control and sanction regime. The Government highlighted the 'middle course' between a pure focus on competition and the application of strategic criteria (BR-Plenarprotokoll 940 – 18.12.2015: 515).

The opposition factions, BÜNDNIS 90 / DIE GRÜNEN and DIE LINKE, called for stronger regulation and the integration of mandatory social and ecological criteria into German procurement law in order to use procurement law as an instrument for pursuing socio-political goals. They were critical that little

substantial change was brought about by the legal changes. The faction DIE LINKE leveled the critique:

I can't at all agree that this is a great breakthrough. That is very little, what you do (BT-Plenarprotokoll 18/131-16.10.2015: 12809).

Similar to the aforementioned critique, the faction BÜNDNIS 90 / DIE GRÜNEN criticised the little progress made:

In light of the possibilities, the EU explicitly offered, I have to note: Your law is insufficient and fragmentary. It is unambitious and you have missed the opportunity to count on ecological, social and fair procurement criteria (BT-Plenarprotokoll 18/146- 17.12.2015: 14424).

But noteworthy, even the faction DIE LINKE, which represents the far left, abstained from the vote on the covering decree VergModVO acknowledging the achievements that were made (BT-Plenarprotokoll 18/158- 25.02.2016: 15560).

The non-profit social service providers, represented by the Free Welfare Association "Paritätische", stressed the importance of the triangular relationship enshrined in German social law. They emphasised their viewpoint in the hearings that "in the first place labour market services are subject to procurement" (Ausschuss für Wirtschaft und Energie. Protokoll-Nr. 18/68 - 17.02.2016: 20). As the lobbying efforts of the Free Welfare to keep social service provision for the most part out of the procurement regime were successful, there was no need to use the media as an instrument to influence the debate:

I had not the impression, that the Federal Government (...) had a big motivation to change (the governance regime, author's note). Insofar the reform does not affect the German situation, not only welfare, at all or very little. And they (the government, author's note) had good discourses with us and also with others. They have listened to the interests and for the most part have incorporated the interests, so that there was no need to involve media (Interview December, 2017: 6).

The statements of the Federal Government reflect the overarching strategy of the German government against the backdrop of the complex institutional setting of multiple veto players, aimed at integrating the divergent interests of stakeholders in order to avoid a political blockade. In addition, in contrast to the Norwegian case, no alternative to the prevalent governance regime received support.

Overall, the German case provides a textbook example of how policymaking works in the context of a cooperative federal state that has to balance divergent majorities. It illustrates the robustness of the corporatist regime in Germany that follows a depth-dependent adjustment approach even if it is challenged by external pressures to change.

## Comparative discussion – institutional context matters

On the one hand, the transposition of the public procurement regulations provided an opportunity to recalibrate the governance system of health and social service provision in favour of liberal market solutions. On the other hand,



the EU directives also provided enough leeway due to a large number of exemptions and limited scope of application for national policy makers to stick with established contracting practices that go beyond a mere market logic. Our analysis shows that political institutional factors at a national level played a decisive part in the interpretation of the same EU policies.

In contrast with Norway, the absence of intra-national political debate related to the role of health and social service provision is notable in both the English and German cases. We argue that *consensus formation* related to the robustness of the corporatist regime in Germany and *policy coherence* as ideological stickiness to the liberal path in England are decisive factors in explaining the different interpretations. We also argue that these aspects contribute to explaining why supra-national policies for public procurement in the context of health and social services are interpreted in line with established norms, values as well as traditions of a particular country.

In Germany, the statutory leeway of the directive was neither exploited towards more liberalisation (e.g. through extending the scope of procurement law to the social services) nor towards more regulation (e.g. through applying more restrictive regulations on the potential providers with respect to social, labour or ecological issues). The German federal government followed a pre-emptive strategy to avoid a political blockade. Considering the very high *inclusiveness of the decision-making procedures* and the *low score on policy dominance*, we expected Germany to adopt a consensus-oriented strategy by thoroughly considering stakeholder interests from the beginning and using the scope of action the directive provided. The leeway of the German government can be challenged and possibly restricted by many veto players, each possesses the ability to engage in a political blockade if its position in the field reduced and therefore the government incorporated the preferences of the divergent stakeholder groups. The responsive strategy of the government resulted in an overall acknowledgement of the legal changes by the different parties involved in the legislative process. Thus as stakeholder interests were thoroughly integrated, there was no need for political resistance. The consensus strategy of the Federal Government fortified the institutional characteristics of German corporatist governance particularly in the social domain and procurement regime.

Unlike the Norwegian and German cases, England had *high policy coherence* as pro-market solutions in social services provision had already been implemented for some time. We expected to see a liberal market interpretation of the directive and this proved to be the case. The discourse of government was paradigm reinforcing rather than paradigm threatening. As expected, the system of government limited the possibilities of resistance, the agenda was closely controlled by government and interest groups played only a marginal role in the consultation processes due to *low openness of the decision-making procedures*. However, particularly in the area of social services provision the desire to lobby politically on this directive is likely to have been low, given that a light touch regime was being proposed and a streamlining of processes (as well as a financial threshold that would bring many non-profit sector contracts with local government out of scope of legislation). It could also be argued that the political

system in England is too closed to bring forward ideological debate, and that in some cases this may result in the restriction of interest organisations.

However, this is not the whole story, in contrast with Norway and as full-members of the EU, England and Germany both had important access points in the early stages of the policy making process at the EU level which provided influence, knowledge, as well as a feeling of ownership and loyalty to the policy itself. In this way they were also able to be certain that the EU regulations on public procurement did not challenge established practice for health and social service provision. In Norway, the right-wing government – perhaps because of inadequate legal competence – used the EU as a scapegoat to promote a neoliberal agenda and passed the blame to the EU legislators. However, the resistance of the non-profit interest groups proved to be strong. In a context of *low policy coherence*, but *consensus formation* and *openness in decision-making procedures*, they were able to make their voice heard and exert pressure directly through parliamentary and administrative strategies as well as indirectly through media strategies and an alliance with political parties ideologically aligned with their interests. Thus, pivotal actors in the debate were drawn to their side and the direction of the debate turned from a focus on market-based solutions to a stronger consideration of established governance arrangements and an acknowledgment of the ‘civil society plus’ in the health and social services. In fact, the debate illustrated that *private service provider* is not a unified concept, but includes both for-profit and non-profit actors who have very different interests and ideological ideas about welfare production. The distinction between these two types of private providers is often overlooked in both debates and research on the public procurement of health and social services (Larsson, 2019:14). The context for the “success” of the Norwegian non-profit interests was a minority government and an *open political system* that included interest groups in policy-making. In addition to the inclusive design of the political system, the resistance capacity of the non-profit interest groups depended on their ability to obtain and provide the political actors with valid legal arguments and the availability of communication channels. Indeed, this finding points to a limitation of the institutional constellation framework used in this article. In addition to the context factors covered by this approach, we argue that other decisive determining factors for how the debate played out in Norway – as well as in England and Germany – are related to the distinctive character of the political actors and in particular the power resources of affected interest organisations (Korpi 2006). We argue that factors such as legal expertise, economic resources, organisational capacities, and communication and media strategies, in addition to the extent of collaboration between the actors may also be important to take into consideration. However, what makes this complicated but relevant as an issue for further studies is that the distinctive characters of the actors and the contextual institutional constellation factors may interact with each other. Consequently, an actor-oriented perspective combined with a context-specific approach may be useful in comparative studies of policy-making processes.

## Concluding remarks

We started our analysis with the strong claim made in the literature that health and social service governance regimes are converging towards a neo-liberal model. In the literature, the EU is attributed an important role in attuning the welfare regime in the direction of increased market orientation. We found that the answer is more nuanced and highly dependent on the institutional constellation at the national level that assists interest groups and in particular civil society interest groups to different degrees. Moreover, our comparative analysis and the three case narratives show that the same EU policy with points of contact with economic, health and social areas may be interpreted differently across borders and that the national debate partly reflects the overall national welfare context. Interpretation depends on the openness of the political system that determines access and the voice of stakeholders with different interests to be heard. In this way, the study also confirms that the EU is not fully a channel for changing “the rules of the game” outside the control of national states, as Paul Pierson otherwise predicted in the mid-1990s (1996: 177-78). Institutional constellation at a national level in terms of ideological stickiness, institutional robustness, and the openness of the political system itself are important and should be taken into account when understanding national interpretation and transposition of supra-national policies – both theoretically and in practice. We argue that the political institutional constellations in terms of the degree of policy coherence, policy dominance, openness, and consensus formation mediate the conflicting interests of stakeholder groups and are decisive to explain how a policy stimulus, here the EU directive 2014/24/EU and 2014/23/EU, is translated into national contexts. Inclusive institutional constellations seem to work as a bulwark or buffer against marketisation pressures where non-profit organisations are vested with power via hearings, seats in parliament or other participatory legal instruments. Norway represents a crucial case with a non-profit sector vested with vast power resources. In addition, the Norwegian case provides a textbook example of the resistance capacity of the organised non-profit interests against liberalisation attempts and proved to be a particularly resilient model. We claim that the institutional constellation, particularly in relation to the policy coherence in the field of health and social services, cohesive welfare state constituencies and the inclusiveness of the political system contributing to the lobbying capacity of interest organisations, are decisive factors that explain how the directives are debated and translated differently into the national contexts. A strongly organised non-profit sector can work as a panacea that seems to make developed welfare states more immune to marketisation pressures. The value of this study was to make these developments visible. We have shown, under what contextual conditions non-profit interest organisations are able to turn around the debate in order to protect the social governance model based on exclusive rights for non-profit actors. Moreover, the study also points out that not just the political institutional context, but distinctive characters of political actors and the affected interest organisations in particular – their legal, organisational, communicative, and economic capacities – may be decisive factors for the debate and the policy-making process. Consequently, we argue for a stronger actor-oriented perspective combined with a context-specific approach.

One question remains regarding Norway as representing the Scandinavian model and the possibility of generalisation: does EU membership make a difference with regard to debates on EU policy implementation? We cannot exclude the possibility that formal affiliation to the EU matters. However, within the scope of this research project, we focused on the policy making process. Future research comparing Scandinavian countries with low participation in the formulation of policy, such as a non-EU member, to those countries with a higher degree of participation (full EU members), could clarify whether different degrees of participation in formulating EU policies translate into a different sense of ownership, understanding and implementation of the respective policy. Nevertheless, we know that marketisation of welfare services is indeed a hot political topic in Denmark and Sweden, too (Petersen & Hjelmar, 2014). There are similarities in the political institutional and welfare context and the distinctive character of interest organisations are very alike due to a common Nordic model for political interest inclusion (Christensen, 2017) We find it likely that such national and organisational similarities are more important than formal EUaffiliation.

Finally, we underline that the Norwegian case also illustrates that a dual distinction between public and private providers is too simple if the intention is to understand the dynamics of public procurement policy and marketisation of public welfare. *Private service provider* is not a unified concept, but includes both for-profit and non-profit actors who indeed have very different interests and ideological ideas. Empirically, the different views, values and interests of the two types of private providers might influence the services provided as well as the basis for collaboration with the public sector (Trägårdh 2019). Consequently, one direction for further studies could be to take a closer look at the divisions within the private sector and investigate how to overcome or at least handle these in relation to the public procurement of welfare services.

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## Notes

<sup>1</sup> Full titles: "Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC Text with EEA relevance" and "Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts Text with EEA relevance".

<sup>2</sup> Due to the large amount of data material, the analytic narratives compress overall interpretations of the three cases and, as a practical consequence, include a relative few, but illustrative quotations and references.

<sup>3</sup> See Stortinget (2016) and Regjeringen (2015) for details of the parliamentary debate and all the consultative statements, respectively.