

SUMMARY

<p>ECJ 18 September 2014, case C-549/13 (Bundesdruckerei GmbH - v -Stadt Dortmund), Miscellaneous, Public procurement</p>

Facts

In May 2013, the City of Dortmund (the ‘contracting authority’ in this case) issued a call for tenders for a contract relating to the digitalisation of documents. One of the conditions for tendering was that the contractor agreed to pay its employees a minimum hourly wage of € 8.62 and that it would require its subcontractors to comply with that minimum wage. This requirement was based on paragraph 4(3) of a North Rhine Westphalian law that provides that public service contracts may be awarded only to undertakings which have agreed to pay their staff the minimum wage. One of the tenderers was *Bundesdruckerei*. It informed the City of Dortmund that if it were awarded the contract, it would have the services under that contract performed in Poland and that the workers in question would be paid less than € 8.62 per hour. The City of Dortmund replied that it could not waive the minimum hourly wage requirement.

National proceedings

Bundesdruckerei brought an action before the local public procurement board (the ‘Board’) in order to oblige the City of Dortmund to amend the tendering documents. It argued that Paragraph 4(3) is an unjustified restriction on the freedom to provide services laid down in Article 56 TFEU. The City of Dortmund based its defence on Article 26 of Directive 2004/18 on the coordination of procedures for the award of public contracts, which at that time (in the 2013 version) allowed tenders for public contracts to include conditions concerning “social and environmental considerations”. The City of Dortmund relied on the ECJ’s ruling in the *Rüffert* case (C-346/06). The Board referred questions to the ECJ.

ECJ's findings

Rüffert was based on Posting Directive 96/71. Given that the work to be performed in this case was to be performed in Poland, and not by Polish workers posted to Germany, that directive does not apply. The only relevant issue is whether Paragraph 4(3) is compatible with Article 56 TFEU (§ 24-27).

The imposition of a minimum wage on subcontractors of a tenderer established in another Member State than that to which the contracting authority belongs and in which minimum rates of pay are lower, constitutes an additional economic burden that may prohibit, impede or render less attractive the provision of their services in the host Member State. Consequently, Paragraph 4(3) is capable of constituting a restriction within the meaning of Article 56 TFEU (§ 28-30).

Such a national measure may in principle be justified by the objective of ensuring that employees are paid a reasonable wage in order to avoid social dumping and to avoid penalising competing undertakings which grant a reasonable wage to their employees. However, in so far as it applies solely to public contracts, and not also to contracts in the private sector, such a measure is not appropriate for achieving that objective (see Rüffert at § 38-40). (§ 31-32).

In any event, Paragraph 4(3) is disproportionate. The minimum wage in question bears no relation to the cost of living in Poland. It cannot be justified in the light of the objective of stability of social security systems (§ 33-35).

Ruling

In a situation such as that at issue in the main proceedings, in which a tenderer intends to carry out a public contract using workers employed by a subcontractor established in a different Member State, Article 56 TFEU precludes the application of legislation of the Member State to which that contracting authority belongs requiring that subcontractor to pay its workers the minimum wage fixed by that legislation.

Creator: European Court of Justice (ECJ)

Verdict at: 2014-09-18

Case number: C-549/13