SUMMARY

ECJ 17 November 2015, case C-115/14. (Regio Post), Social Dumping

Summary

This case concerns a German province (“State”) that issued a call for tenders to provide postal services. Such a tender may include the condition that the contractor and its subcontractors pay their workers the provincial minimum wage. The ECJ distinguishes the case from that in its 2008 judgment in Rüffert.

Facts

In 2013, the town of Landau in the State of Rhineland-Palatinate issued an EU-wide call for tenders in respect of postal services. The call for tenders included the provision that the successful tenderer shall submit a declaration that it and its subcontractors shall comply with the State’s law on minimum wage (paragraph 3 of the “LTTG”) and the federal law on working conditions concerning cross-border services (the “AEntG”). One of the tenderers was RegioPost, a German company. It refused to submit a declaration that it would comply with the State’s minimum wage law, claiming that this was contrary to public procurement law. As a result, it was excluded from the tender process and the contract was awarded to competitors.

National proceedings

RegioPost filed a complaint with the State’s Public Procurement Board. It ruled against RegioPost, which appealed to the Oberlandesgericht Koblenz. That court referred two questions to the ECJ. The questions concerned the interpretation of Article 26 of Directive 2004/18 on the coordination of procedures for the award of public contracts, which reads: “Contracting authorities may lay down special conditions relating to the performance of a contract, provided that these are compatible with Community law [.....] The conditions governing the performance of a contract may, in particular, concern social and environmental considerations”. The issue was whether the condition regarding the payment of minimum

wages was “compatible with Community law” within the meaning of this Article 26 and, in particular, with Article 56 TFEU on the freedom to provide services and Article 3(1) of Posting Directive 96/71, which provides: “Member States shall ensure that, whatever the law applicable to the employment relationship, the undertakings referred to in Article 1(1) guarantee workers posted to their territory the terms and conditions of employment covering the following matters which, in the Member State where the work is carried out, are laid down:

by law, regulation or administrative provision, and/or
by collective agreements or arbitration awards which have been declared universally applicable [.....], insofar as they concern the activities referred to in the Annex:...(c) the minimum rates of pay, including overtime rates; this point does not apply to supplementary occupational retirement pension schemes;...

ECJ’s findings

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The ECJ rejects the defence of inadmissibility on the ground that as both RegioPost and the other tenderers are German, the case lacks a cross-border element (§ 44-52).

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A national provision which requires all tenderers and subcontractors to undertake to the contracting authority to pay staff called upon to perform the public contract concerned a minimum wage established by law, must be regarded as a ‘special condition relating to the performance of a contract’ concerning ‘social considerations’, within the meaning of Article 26 of that directive (§ 54).

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In examining whether the national measure at issue is compatible with EU law, it is necessary to determine whether, in cross-border situations in which workers from one Member State provide services in another Member State for the purpose of performing a public contract, the minimum conditions laid down in Directive 96/71 are observed in the host member State in respect of posted workers. In this case, the referring court raises the question of the effects of

the national measure at issue on undertakings established outside Germany that may have been interested in participating in the procedure for the award of the public contract in question and envisaged posting their workers to that territory, on the ground that those undertakings may have decided not to participate because of the obligation placed on them in respect of the minimum wage imposed by the LTTG. Therefore, it is necessary to examine that national measure in the light of Article 3(1) of Directive 96/71 (§ 60-61).

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A provision such as Paragraph 3 of the LTTG must be regarded as a 'law', for the purposes of the first indent of the first subparagraph of Article 3(1) of Directive 96/71, laying down a 'minimum rate of pay', within the meaning of point (c) of the first subparagraph of Article 3(1) thereof (§ 62).

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Contrary to the legislation at issue in Rüffert, paragraph 3 of the LTTG itself lays down the minimum rate of pay (§ 62).

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The legality of the measure in question cannot be called into question on the basis that it applies to public contracts and not to private contracts. The limitation of the scope of the national measure to public contracts is the simple consequence of the fact that there are rules of EU law specific to that field, in this case, those laid down in Directive 2004/18 (§ 63-65).

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It follows that Article 26 of Directive 2004/18, read in conjunction with Directive 96/71, permits the host Member State to lay down, in the context of the award of a public contract, a mandatory rule for minimum protection referred to in point (c) of the first subparagraph of Article 3(1) of that directive, such as that at issue in the main proceedings, which requires undertakings established in other Member States to comply with an obligation in respect of a minimum rate of pay for the benefit of their workers posted to the territory of the host Member State in order to perform that public contract. Such a rule is part of the level of protection which must be guaranteed to those workers (see Laval un Partneri, C-341/05, paragraphs 74, 80 and 81) (§ 66).

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According to the case-law of the Court, the imposition, under national legislation, of a minimum wage on tenderers and their subcontractors, if any, established in a Member State other than that of the contracting authority 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, a measure such as that at issue in the main proceedings is capable of constituting a restriction within the meaning of Article 56 TFEU. Such a national measure may, in principle, be justified by the objective of protecting workers (see to that effect, judgment in Bundesdruckerei, C-549/13, paragraph 30 and 31) (§ 69-70).

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However, as the referring court has observed, the question arises whether it follows from paragraphs 38 to 40 of the judgment in Rüffert that such a justification cannot be accepted on the grounds that the minimum wage imposed by Paragraph 3(1) of the LTTG applies to public contracts only, and not to private contracts. That question calls for a negative answer (§ 71-72).

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In Rüffert, the Court based its conclusion on certain characteristics specific to that measure, which clearly distinguish that measure from the national measure at issue in the main proceedings. Thus, in the judgment in Rüffert, the Court based its conclusion on the finding that what was at issue in that case was a collective agreement applying solely to the construction sector, which did not cover private contracts and had not been declared universally applicable. Furthermore, the Court observed that the rate of pay set by that collective agreement exceeded the minimum rate of pay applicable to that sector under the AEntG. The minimum rate of pay imposed by the measure at issue in the main proceedings is laid down in a legislative provision, which, as a mandatory rule for minimum protection, in principle applies generally to the award of any public contract in the Land of Rhineland-Palatinate, irrespective of the sector concerned. Furthermore, that legislative provision confers a minimum social protection since, at the time of the facts in the main proceedings, the AEntG did not impose, nor did other national legislation impose, a lower minimum wage for the postal services sector (§ 73-76).

Ruling (judgment)

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Article 26 of Directive 2004/18/EC [.....] must be interpreted as not precluding legislation of a regional entity of a Member State, such as that at issue in the main proceedings, which requires tenderers and their subcontractors to undertake, by means of a written declaration to be enclosed with their tender, to pay staff who are called upon to perform the services covered by the public contract in question a minimum wage laid down in that legislation.

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Article 26 of Directive 2004/18 [....] must be interpreted as not precluding legislation of a regional entity of a Member State, such as that at issue in the main proceedings, which provides for the exclusion from participation in a procedure for the award of a public contract of tenderers and their subcontractors who refuse to undertake, by means of a written declaration to be enclosed with their tender, to pay staff who are called upon to perform the services covered by the public contract in question a minimum wage laid down in that legislation.

Creator: European Court of Justice (ECJ)
Verdict at: 2015-11-17
Case number: C-115/14