

Freedom to Provide Services

Henriette Boecken

Table of Contents

- A. Freedom to Provide Services, Art. 56 TFEU
- B. Case: Bundesdruckerei vs. Stadt Dortmund
- C. Opinions on the Issue
- D. Situation in Germany before the Decision of the ECJ
- E. Conclusion

A. Freedom to Provide Services, Art. 56 TFEU

Article 56

Within the framework of the provisions set out below, restrictions on freedom to provide services within the Union shall be prohibited in respect of nationals of Member States who are established in a Member State other than that of the person for whom the services are intended.

The European Parliament and the Council, acting in accordance with the ordinary legislative procedure, may extend the provisions of the Chapter to nationals of a third country who provide services and who are established within the Union.

- Residual freedom
- Right of recipients to use services from other MS without being hindered by restrictive measures imposed by their country
- it was expected that wages would rise by 0,4 % and the price of services would drop by more than 7 %
- Opponents of the provision feared that it would lead to social dumping thereby undermining the European social model

- Expansion of the EU (Portugal, Spain, Greece): tensions between the free market and the preservation of national social models grew

B. Case C-549/13

Bundesdruckerei vs. Stadt Dortmund

I. The Dispute

- Bundesdruckerei vs. Stadt Dortmund
- EU level call for tenders for a public contract relating to the digitalisation of documents by Stadt Dortmund
- Condition: tenderer has to agree to pay his employees a minimum hourly wage and to require his subcontractors also to comply with that minimum wage (TVgG-NRW)

TVgG-NRW

§ 4

(3) Public service contracts [...] may be awarded only to undertakings which [...] have agreed in writing [...] to pay their staff, for the performance of the service, a minimum hourly wage of at least 8,62 €. [...]

- Bundesdruckerei wants to contract but has a subcontractor who would perform the service exclusively in Poland
- Polish subcontractor is unable to pay the minimum wage → not provided for by Polish law or collective agreements and also not usual
- Stadt Dortmund insists on the condition of paying the minimum wage and therefore on the application of the TVgG

- Bundesdruckerei: unjustified restriction on the freedom to provide services, Art. 56 TFEU
- Action before the German Public Procurement Board (Vergabekammer)
- Stadt Dortmund: TVgG is compatible with EU law → reasonable wage, reduction of the burden on the social security system
- Vergabekammer: restriction on the freedom to provide services and indirect discrimination

II. Question to the Court of Justice for a preliminary ruling

Does Art. 56 TFEU preclude the application of legislation which requires the subcontractor of another MS to pay his workers a minimum wage?

III. Judgment – Admissibility

- Vergabekammer is classified as a „court or tribunal“ within the meaning of Art. 267 TFEU

Article 267 TFEU

The Court of Justice of the European Union shall have jurisdiction to give preliminary rulings concerning:

- (a) the interpretation of the Treaties;
- (b) the validity and interpretation of acts of the institutions, bodies, offices or agencies of the Union;

Where such a question is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court to give a ruling thereon.

Where any such question is raised in a case pending before a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law, that court or tribunal shall bring the matter before the Court.

If such a question is raised in a case pending before a court or tribunal of a Member State with regard to a person in custody, the Court of Justice of the European Union shall act with the minimum of delay.

III. Judgment – Substance

1. Applicable Law

- Directive 2004/18 is applicable: „compatible with Community Law“
- Art. 56 TFEU: Freedom to provide services

2. Violation of EU Law

- Additional economic burden
- Provision of service in the host MS may be prohibited, impeded or rendered less attractive for foreign tenderers

→ TVgG is capable of constituting a restriction within the meaning of Art. 56 TFEU

3. Possible Justification

a. Objective of protecting employees (-)

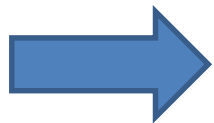
- No wage protection in the private sector
- Fixed minimum wage bears no relation to the cost of living in the other MS
- Foreign subcontractors are prevented from deriving a competitive advantage from the differences between the rates of pay

b. Objective of stability of social security systems (-)

→ No risk for the German social security system: foreign employees only might have a right for social assistance of their own MS

III. Judgment – Decision

Art. 56 TFEU precludes the application of legislation of a MS which requires subcontractors of another MS to pay their employees a minimum wage fixed by that legislation.



Unjustified Violation of Art. 56 TFEU

C. Opinions on the Issue (Rüffert – C-346/06)

- *German Government*: protection of the employees justifies the restriction
- *Belgian Government*: restriction is justified, if the employees don't have the same protection under their home country's law
- *Polish Government*: unjustified restriction → real scope is to protect German companies from competition from other MS

- *General Advocate:*
 - the disputed provisions are appropriate for protecting workers and preventing social dumping
 - genuine additional protection for workers
 - appropriate means of preventing social dumping
 - No equally effective, but less binding rules

D. Situation in Germany before the Decision of the ECJ

Decision of the German Constitutional Court
(BVerfG v. 11.7.2006 – 1 BvL 4/00) concerning a
Procurement Law of the Land Berlin:

- disputed provision of the Land is compatible with the German Constitution
- Protects companies bound to pay a minimum wage by a collective agreement

- Provision helps to avoid social dumping
- Maintenance of social standards
- Protection of social security systems

→ Decision of the ECJ in the Rüffert-Case and the Stadt Dortmund-Case is contrary to the German Constitutional Court's decision and therefore known as the "Rüffert-shock"

E. Conclusion

- Positive, when there is at least in the public sector the obligation to pay a minimum wage
- Paying a minimum wage to the Polish employees constitutes only an advantage for them
- From a social point of view MSs should not be prevented from forcing undertakings working in their territory paying a minimum wage

- uncritical recognition of “social dumping” as a public interest
- Economic freedoms seem to be unlimited, even if they are abused for social dumping
- Protection of employees against social dumping is made even more difficult