

JUDGMENT OF THE COURT (Ninth Chamber)

18 September 2014 (*)

(Reference for a preliminary ruling — Article 56 TFEU — Freedom to provide services — Restrictions — Directive 96/71/EC — Procedures for the award of public service contracts — National legislation requiring tenderers and their subcontractors to undertake to pay a minimum wage to staff performing the services relating to the public contract — Subcontractor established in another Member State)

In Case C-549/13,

REQUEST for a preliminary ruling under Article 267 TFEU from the Vergabekammer bei der Bezirksregierung Arnsberg (Germany), made by decision of 22 October 2013, received at the Court on 22 October 2013, in the proceedings

Bundesdruckerei GmbH

v

Stadt Dortmund,

THE COURT (Ninth Chamber),

composed of M. Safjan, President of the Chamber, A. Prechal (Rapporteur) and K. Jürimäe, Judges,

Advocate General: P. Mengozzi,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

- Bundesdruckerei GmbH, by W. Krohn, Rechtsanwalt,
- Stadt Dortmund, by M. Arndts, acting as Agent,
- the Czech Government, by M. Smolek, J. Vláčil and T. Müller, acting as Agents,
- the Hungarian Government, by M. Fehér, K. Szíjjártó and M. Pálffy, acting as Agents,
- the Polish Government, by B. Majczyna, acting as Agent,
- the European Commission, by S. Grünheid, J. Enegren and A. Tokár, acting as Agents,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

Judgment

- 1 This request for a preliminary ruling concerns the interpretation of Article 56 TFEU and Article 3(1) of Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services (OJ 1997 L 18, p. 1).

- 2 The request has been made in proceedings between Bundesdruckerei GmbH ('Bundesdruckerei') and Stadt Dortmund (the City of Dortmund, Germany), concerning the obligation contained in tendering specifications relating to a public service contract of Stadt Dortmund to guarantee payment of a minimum wage to the employees of subcontractors of tenderers, provided for by legislation of the *Land* to which the public contracting authority belongs, even in the case where the subcontractor concerned is established in another Member State and all of the services relating to the performance of the contract concerned are to be carried out in that other Member State.

Legal context

EU law

- 3 Article 1 of Directive 96/71, entitled 'Scope', provides:

'1. This Directive shall apply to undertakings established in a Member State which, in the framework of the transnational provision of services, post workers, in accordance with paragraph 3, to the territory of a Member State.

...

3. This Directive shall apply to the extent that the undertakings referred to in paragraph 1 take one of the following transnational measures:

(a) post workers to the territory of a Member State on their account and under their direction, under a contract concluded between the undertaking making the posting and the party for whom the services are intended, operating in that Member State, provided there is an employment relationship between the undertaking making the posting and the worker during the period of posting;

or

(b) post workers to an establishment or to an undertaking owned by the group in the territory of a Member State, provided there is an employment relationship between the undertaking making the posting and the worker during the period of posting;

or

(c) being a temporary employment undertaking or placement agency, hire out a worker to a user undertaking established or operating in the territory of a Member State, provided there is an employment relationship between the temporary employment undertaking or placement agency and the worker during the period of posting.

...'

- 4 Article 3 of that directive, entitled 'Terms and conditions of employment', provides in paragraph 1:

'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 within the meaning of paragraph 8, 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;

...

For the purposes of this Directive, the concept of minimum rates of pay referred to in paragraph 1(c) is defined by the national law and/or practice of the Member State to whose territory the worker is posted.'

- 5 Article 26 of Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (OJ 2004 L 134, p. 114), entitled 'Conditions for performance of contracts', provided, before that directive was repealed by Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18 (OJ 2014 L 94, p. 65):

'Contracting authorities may lay down special conditions relating to the performance of a contract, provided that these are compatible with Community law and are indicated in the contract notice or in the specifications. The conditions governing the performance of a contract may, in particular, concern social and environmental considerations.'

German law

- 6 The Law against restrictions of competition (Gesetz gegen Wettbewerbsbeschränkungen), in its version published on 26 June 2013 (BGBl. 2013 I, pp. 1750 and 3245), last amended by Paragraph 2(78) of the Law of 7 August 2013 (BGBl. 2013 I, p. 3154) ('the GWB'), establishes, pursuant to Paragraphs 102 to 124 thereof, a body of rules governing actions relating to procedures for the award of public contracts, including those relating to actions before the Vergabekammern (Public Procurement Boards) of the *Länder* concerning the review of public contracts awarded by contracting authorities coming under the *Länder*.

- 7 Paragraph 4 of the Law of the *Land* of North Rhine-Westphalia on compliance with collective agreements, social norms and fair competition in the award of public contracts (Gesetz über die Sicherung von Tariftreue und Sozialstandards sowie fairen Wettbewerb bei der Vergabe öffentlicher Aufträge), of 10 January 2012 ('the TVgG-NRW') provides:

'(1) Public service contracts, the performance of which comes within the scope of application of the Law on the posting of workers, ...

(2) Public contracts ... in the field of public transportation of passengers by road and rail ...

(3) Public service contracts which are not covered by Paragraph 4(1) and (2) may be awarded only to undertakings which, at the time of the submission of the tender, have agreed in writing, by means of a declaration made to the contracting authority, to pay their staff ..., for the performance of the service, a minimum hourly wage of at least EUR 8.62. The undertakings shall, in their declarations, state the nature of the commitment adopted by their undertaking in the context of the collective agreement and the minimum hourly wage which will be paid to the staff engaged for the performance of the services. The amount of the minimum hourly wage may be adapted in accordance with Paragraph 21, by means of a regulation adopted by the Ministry of Labour.'

The dispute in the main proceedings and the question referred for a preliminary ruling

- 8 In May 2013, Stadt Dortmund issued, at European-Union level, a call for tenders for a public contract relating to the digitalisation of documents and the conversion of data for the urban-planning service of that city. The value of the contract was approximately EUR 300 000.

- 9 Point 2 of the special conditions of the tendering documents, referring to compliance with the provisions of the TVgG-NRW, included a standard form to be signed by the contractor, by which he

agreed to pay his employees a minimum hourly wage of EUR 8.62 and to require his subcontractors also to comply with that minimum wage.

- 10 By letter of 24 June 2013, Bundesdruckerei informed Stadt Dortmund that, if it were awarded the contract, the services under that contract would be performed exclusively in another Member State, in this case Poland, by a subcontractor established in that State. In its letter, it stated that that subcontractor would be unable to provide an undertaking to comply with the minimum wage imposed by the provisions of the TVgG-NRW, since such a minimum wage was not provided for by collective agreements or by the law of that Member State and payment of such a minimum wage was also not usual in that State in the light of the general standard of living there.
- 11 In those circumstances, Bundesdruckerei requested Stadt Dortmund to confirm to it that the obligations provided for in point 2 of the special conditions of the tendering documents, relating to compliance with the provisions of the TVgG-NRW, did not apply to the subcontractor which it intended to engage. Bundesdruckerei added that, in its opinion, those obligations were contrary to the law governing public procurement.
- 12 By letter of 5 August 2013, Stadt Dortmund replied that it could not accede to Bundesdruckerei's request, since, as a contracting authority belonging to the *Land* of North Rhine-Westphalia, it was obliged to apply the provisions of the TVgG-NRW and, in its opinion, those provisions could not be interpreted in the manner suggested by Bundesdruckerei.
- 13 Bundesdruckerei brought an action before the Vergabekammer bei der Bezirksregierung Arnsberg (Public Procurement Board attached to the Arnsberg regional government) in order, inter alia, to oblige Stadt Dortmund to amend the tendering documents in such a way that the obligations provided for in point 2 of the special conditions would not apply to subcontractors established in another Member State and whose employees are engaged, for the performance of the public contract, exclusively in that State. In support of its action, Bundesdruckerei claims that those obligations constitute an unjustified restriction on the freedom to provide services laid down in Article 56 TFEU, since that restriction involves an additional economic burden liable to prevent or make less attractive the cross-border supply of services by the undertaking concerned.
- 14 Stadt Dortmund contends that the obligation imposed on subcontractors to pay the minimum wage provided for in Paragraph 4(3) of the TVgG-NRW is compatible with EU law. In the present case, it submits, the requirements deriving from the judgment in *Rüffert*, C-346/06, EU:C:2008:189, are met, since that obligation has a statutory basis, namely the TVgG-NRW. That obligation could therefore be laid down as a special condition relating to the performance of the contract, in accordance with Article 26 of Directive 2004/18. Moreover, that statutory obligation is justified since, as the national legislature stated in the summary of the grounds for the TVgG-NRW, it ensures that a reasonable wage is paid to the employees engaged for the performance of public works, which also reduces the burden on the social security system.
- 15 The Vergabekammer bei der Bezirksregierung Arnsberg considers, first of all, that it must be regarded as a 'court or tribunal' within the meaning of Article 267 TFEU, with the result that it is competent to submit a request to the Court of Justice for a preliminary ruling. It refers in this regard to the judgment in *Forposta (formerly Praxis) and ABC Direct Contact*, C-465/11, EU:C:2012:801.
- 16 Next, it takes the view that it does not follow from the wording of Paragraph 4(3) of the TVgG-NRW that the obligation contained in that provision is applicable to tenderers for a public contract who intend to subcontract the performance of the services under that contract to operators established exclusively in another Member State of the European Union, since that provision provides no information as to its territorial scope. It might at most be deduced from the objective of the TVgG-NRW, in so far as it seeks to guarantee payment of a reasonable wage to employees carrying out a public contract awarded in the *Land* of North Rhine-Westphalia, that Paragraph 4(3) thereof applies throughout German territory.

- 17 Finally, the Vergabekammer bei der Bezirksregierung Arnsberg takes the view that an extension of that minimum wage to employees performing public contracts outside German territory would constitute a restriction on the freedom to provide services and indirect discrimination with respect to tenderers who supply their services in other Member States with very different cost structures.
- 18 In the opinion of the Vergabekammer, that restriction cannot be justified by the overriding reason in the public interest which is represented by the protection of workers. In the light of the significant disparities between the cost of living in the different Member States of the European Union, the imposition of that minimum wage for those workers is not, in its view, such as to permit attainment of the legitimate objective of guaranteeing reasonable remuneration in the context of the performance of public contracts of contracting authorities in the *Land* of North Rhine-Westphalia and is also not necessary for that purpose. The hourly rate corresponding to that minimum wage is, for many Member States, clearly above that which is required in order to guarantee reasonable remuneration in the light of the cost of living in those countries. Furthermore, in the case of public contracts performed entirely outside German territory, it cannot be ruled out that the public interest in the protection of workers may already be taken into account by the legislation of the Member State in which the service is supplied.
- 19 In those circumstances, the Vergabekammer bei der Bezirksregierung Arnsberg decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

‘Do Article 56 TFEU and Article 3(1) of Directive 96/71/EC preclude national legislation and/or a procurement condition of a public contracting authority according to which a tenderer who wants to obtain a, or the, advertised public contract must (1) undertake to pay the staff appointed to carry out the contract a standard or minimum wage fixed in the legislation, and (2) impose the same obligation on an appointed or prospective subcontractor and submit a corresponding undertaking of the subcontractor to the contracting authority, where (a) the legislation provides for such an obligation only for the procurement of public contracts but not also for the award of private contracts, and (b) the subcontractor is established in another EU Member State and the employees of the subcontractor carry out the services covered by the contract exclusively in the subcontractor’s home country?’

The question referred for a preliminary ruling

Admissibility

- 20 At the outset, it is necessary to examine whether the Vergabekammer bei der Bezirksregierung Arnsberg is a ‘court or tribunal’ within the meaning of Article 267 TFEU and, therefore, whether the request for a preliminary ruling is admissible.
- 21 According to settled case-law of the Court of Justice, in order to determine whether a body making a reference is a ‘court or tribunal’ within the meaning of Article 267 TFEU, which is a question governed by EU law alone, the Court takes account of a number of factors, such as whether the body is established by law, whether it is permanent, whether its jurisdiction is compulsory, whether its procedure is *inter partes*, whether it applies rules of law and whether it is independent (judgments in *HI*, C-92/00, EU:C:2002:379, paragraph 25, and in *Forposta (formerly Praxis) and ABC Direct Contact*, EU:C:2012:801, paragraph 17).
- 22 In this regard, it is clear from Paragraphs 104 and 105 of the *GWB*, provisions which govern review proceedings concerning procedures for the award of public contracts before the Vergabekammern, that those bodies, which are granted exclusive jurisdiction to hear and determine at first instance disputes between economic operators and contracting authorities, satisfy, when called upon to exercise that power, the criteria referred to in paragraph 21 of the present judgment (see, by analogy, with regard to public procurement review bodies, the judgments in *HI*, EU:C:2002:379, paragraphs 26 and 27, and in *Forposta (formerly Praxis) and ABC Direct Contact*, EU:C:2012:801, paragraph 18).
- 23 It follows that the Vergabekammer bei der Bezirksregierung Arnsberg must be classified as a ‘court or tribunal’ within the meaning of Article 267 TFEU, with the result that its request for a preliminary ruling is admissible.

Substance

- 24 With regard to the scope of the question referred for a preliminary ruling, it must be noted that, unlike in the situation which was at issue in other cases, such as that which gave rise to the judgment in *Rüffert*, EU:C:2008:189, Directive 96/71 is not applicable to the main proceedings.
- 25 It is common ground that the tenderer which brought the action in the main proceedings does not intend to perform the public contract by posting, in German territory, employees of its subcontractor, which is a wholly-owned subsidiary established in Poland.
- 26 On the contrary, according to the actual wording of the question referred for a preliminary ruling, that question concerns a situation in which ‘the subcontractor is established in another EU Member State and the employees of the subcontractor carry out the services covered by the contract exclusively in the subcontractor’s home country’.
- 27 Such a situation is not covered by one of the three transnational measures referred to in Article 1(3) of Directive 96/71, with the result that that directive is not applicable to the dispute in the main proceedings.
- 28 In addition, although, as the European Commission maintains, the public contract at issue in the main proceedings appears, in the light of its objective and the amount of the contract, to come within the scope of application of Directive 2004/18, and assuming that the requirements relating to the minimum wage laid down in Paragraph 4(3) of the TVgG-NRW can be classified as ‘special conditions relating to the performance of a contract’, in particular ‘social ... considerations’, which are ‘indicated in the contract notice or in the specifications’, within the meaning of Article 26 of that directive, the fact remains that, in accordance with that latter provision, such requirements may be imposed only to the extent to which they are ‘compatible with Community law’.
- 29 It follows that, by its question, the Vergabekammer bei der Bezirksregierung Arnsberg is asking, in essence, whether, in a situation such as that at issue in the main proceedings, in which a tenderer intends to carry out a public contract by having recourse exclusively to workers employed by a subcontractor established in a Member State other than that to which the contracting authority belongs, Article 56 TFEU precludes the application of legislation of the Member State to which that contracting authority belongs which requires that subcontractor to pay those workers a minimum wage fixed by that legislation.
- 30 In this regard, it is apparent from the Court’s case-law that the imposition, under national legislation, of a minimum wage on subcontractors of a tenderer which are established in a Member State other 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, a measure such as that at issue in the main proceedings is capable of constituting a restriction within the meaning of Article 56 TFEU (see, to that effect, the judgment in *Rüffert*, EU:C:2008:189, paragraph 37).
- 31 Such a national measure may in principle be justified by the objective of protecting employees expressly referred to by the legislature of the *Land* of North Rhine-Westphalia in the draft legislation which culminated in the adoption of the TVgG-NRW, namely that of ensuring that employees are paid a reasonable wage in order to avoid both ‘social dumping’ and the penalisation of competing undertakings which grant a reasonable wage to their employees.
- 32 However, the Court has already held that, in so far as it applies solely to public contracts, such a national measure is not appropriate for achieving that objective if there is no information to suggest that employees working in the private sector are not in need of the same wage protection as those working in the context of public contracts (see, to that effect, the judgment in *Rüffert*, EU:C:2008:189, paragraphs 38 to 40).
- 33 In any event, the national legislation at issue in the main proceedings, in so far as its scope extends to cover a situation such as that in the dispute in the main proceedings, in which employees carry out a

public contract in a Member State other than that to which the contracting authority belongs and in which the minimum wage rates are lower, appears disproportionate.

- 34 By imposing, in such a situation, a fixed minimum wage corresponding to that required in order to ensure reasonable remuneration for employees in the Member State of the contracting authority in the light of the cost of living in that Member State, but which bears no relation to the cost of living in the Member State in which the services relating to the public contract at issue are performed and for that reason prevents subcontractors established in that Member State from deriving a competitive advantage from the differences between the respective rates of pay, that national legislation goes beyond what is necessary to ensure that the objective of employee protection is attained.
- 35 The wage protection measure at issue in the main proceedings also cannot be justified in the light of the objective of stability of social security systems. It has not been claimed, and also does not appear tenable to assert, that the application of that measure to the Polish employees concerned is necessary in order to avoid a risk of seriously undermining the balance of the German social security system (see, by analogy, the judgment in *Rüffert*, EU:C:2008:189, paragraph 42). If those employees did not receive a reasonable wage and were consequently forced to have recourse to social security in order to ensure a minimum level of purchasing power, it would be to Polish social assistance that they would have a right. Such a consequence would clearly not affect the German social security system.
- 36 In the light of all of the foregoing, the answer to the question referred is that, in a situation such as that at issue in the main proceedings, in which a tenderer intends to carry out a public contract by having recourse exclusively to workers employed by a subcontractor established in a Member State other than that to which the contracting authority belongs, Article 56 TFEU precludes the application of legislation of the Member State to which that contracting authority belongs which requires that subcontractor to pay those workers a minimum wage fixed by that legislation.

Costs

- 37 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Ninth Chamber) hereby rules:

In a situation such as that at issue in the main proceedings, in which a tenderer intends to carry out a public contract by having recourse exclusively to workers employed by a subcontractor established in a Member State other than that to which the contracting authority belongs, Article 56 TFEU precludes the application of legislation of the Member State to which that contracting authority belongs which requires that subcontractor to pay those workers a minimum wage fixed by that legislation.

[Signatures]

* Language of the case: German.