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Minimum Wage Laws, Internal Market and Public Procurement: Team Spirit or Lonely Riders?
(Working draft)

I. Introduction

The issue of minimum wage laws has been recently the subject of lively debate between some Member States and the European Commission (the "EC" or the "Commission"). As a consequence, in May 2015, the EC launched an infringement procedure against Germany, concerning the application of the minimum wage law to the transport sector\(^1\). The EC emphasized that although it generally supports the introduction of minimum wage, which is in line with the social policy commitment of the Commission, as "guardian of the Treaties", it must also ensure that the application of the national measures is fully compatible with EU law. In the view of the EC, the German regulation restricts the freedom to provide services and the free movement of goods. The case has not yet been resolved.

An interaction between national minimum wage laws and internal market rules may also be presented in the context of public procurement rules. First of all, according to the Commission every year over 250 000 public authorities in the EU spend around 18% of GDP on the purchase of services, works and supplies\(^2\). Public procurement is therefore a concrete expression of the fundamental freedoms of the internal market, in particular the free movement of goods and services, as specified by the provisions of the Treaty on the functioning of the European Union ("Treaty" or "TFEU"). Furthermore, the issue of application of freedoms of internal market to the inclusion of social or environmental linkages in procurement has been discussed recently by the Court of Justice of the European Union (the "Court").

The paper contributes to this debate and considers, more specifically, whether there is room for minimum wage requirements in public procurement law. I start by presenting a

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short overview of European Union public procurement law (point II). I then review the case-law of the Court concerning minimum wage laws (point III). The foregoing will lead me to the main point of analysis, i.e. the interaction between national minimum wage laws and internal market rules (point IV).

II. European Union Public Procurement Law

a. Primary law

There is no "public procurement" policy stipulated in the TFEU. In fact, it mentions procurement in two places only: in the provisions concerning "Research and Technological Development and Space" and in the provisions regarding "Association of the Overseas Countries and Territories". However, there are a number of provisions in the Treaty which are relevant for the award of public contracts.

The most significant rules of the primary law are the ones concerning the freedoms of the internal market. Thus, the award of public contracts may be subject to the principles of the free movement of goods (Art. 34 of the TFEU prohibiting quantitative restrictions on imports and all measures having an equivalent effect between Member States), the freedom of establishment (Art. 49 of the TFEU prohibiting restrictions on the freedom of establishment of the nationals of a Member State in the territory of another Member State) and freedom to provide services (Art. 55 of the TFEU prohibiting restrictions on the freedom to provide services within the Union in respect of nationals of Member States who are established in a Member State other than that of the person/undertaking for whom the services are intended).

Contracting authorities from the Member States are also bound to comply with the principle of non-discrimination on the ground of nationality (Art. 18 of the TFEU). In the view of the Court, that principle along with the principle of equal treatment imply, in

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3 See Art. 179 sec. 2: "[...] the Union shall, throughout the Union, encourage undertakings, including small and medium-sized undertakings, research centres and universities in their research and technological development activities of high quality; it shall support their efforts to cooperate with one another, aiming, notably, at permitting researchers to cooperate freely across borders and at enabling undertakings to exploit the internal market potential to the full, in particular through the opening-up of national public contracts, the definition of common standards and the removal of legal and fiscal obstacles to that cooperation” (emphasis added).

4 See Art. 199 sec. 4: “For investments financed by the Union, participation in tenders and supplies shall be open on equal terms to all natural and legal persons who are nationals of a Member State or of one of the countries and territories” (emphasis added).

particular, the obligation of transparency in order to enable the contracting authority to satisfy itself that these principles have been complied with⁶.

Both freedoms of internal market and the general principles of the European Union law are particularly important in the case of procurement within the Treaty but outside the procurement directives (either because given contracts are below the financial thresholds or because they are excluded by reason of their subject matter)⁷.

b. Secondary law

Since the Treaty provisions were considered insufficient to open up public procurement, back in 1971 secondary legislation in the form of directives has been adopted. The relevant directives have been amended several times. The rules on public contract award procedures are currently contained in two directives of 2014. Directive 2014/25/EC⁸ provides the rules on procurement by entities operating in the water, energy, transport and postal services sectors. For all other public contracts, except for concession contracts, the rules may be found in Directive 2014/24/EC⁹. Concession contracts are regulated separately, i.e. by Directive 2014/23/EU¹⁰. This is the first time in history when concession contracts have their own regulation.

They apply to contracts the value of which is equal to or greater than given thresholds¹¹.

As emphasized by the Court, public procurement directives provide a framework within Member States implement their own national procurement policies¹². The framework

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¹⁰ OJ 2014 L 94/1.
¹¹ For discussion see in particular P. Telles, The Good, the Bad, and the Ugly: The EU’s Internal Market, Public Procurement Thresholds and Cross-border Interest, "Public Contract Law Journal" 2013, no. 1, pp. 6 and. In his opinion, in order to achieve the internal market objectives would be to lower the thresholds and thereby apply all EU law to most contracts tendered.
nature of public procurement directives means that Member States may set forth stricter and more detailed regulations in national law than is required in the directives.

Arrowsmith aptly points out that the framework character of directives – in relation to award procedures – is articulated in Directive 2014/24/EC itself. Article 26 par. 1 thereof states that "when awarding public contracts, contracting authorities shall apply the national procedures adjusted to be in conformity with this Directive". Consequently, it is submitted that public procurement directives require the entities to which they apply to award their contracts in accordance with certain, minimum procedural rules set out in the directives. These require, among other things, that contracting authorities must:

i. advertise contracts EU-wide through the Commission;

ii. hold competition between interested firms (entities may dispense with an advertisement and competition only in exceptional and specified cases, such as extreme urgency);

iii. exclude firms from the competition only for certain justified reasons – either those that are specified in the directives, mainly concerned with the firm's lack of financial or technical capacity, or other justified reasons recognized by the Court (such as to prevent conflicts of interest in the procurement process);

iv. respect minimum time-limits for important phases of the procedure, to ensure that all firms have time to participate;

v. award the contract based on the results of the competition, on the basis of criteria specified in the directives and notified in advance;

vi. provide information on decisions to interested parties, including tenderers.

The public procurement directives have traditionally focused on contract award and left contract implementation to domestic law. However, it has been gradually changing with a final expression in the directives of 2014 with a set of provisions concerning contract performance. One of such provisions is Article 70 of directive 2014/24/EU specifying conditions for performance of contracts and stipulating that "contracting authorities may lay down special conditions relating to the performance of a contract, provided that they are linked to the subject-matter of the contract within the meaning of Article 67(3) and indicated in the call for competition or in the procurement documents. Those conditions may include

13 See more S. Arrowsmith, The Law of Public and Utilities Procurement..., p. 175.
economic, innovation-related, environmental, social or employment-related considerations." This provision will be of particular interest later on.

c. Soft law

Finally, a number of soft law instruments have been adopted by the EC in recent years. The most remarkable soft-law instrument was adopted in 2006 when the EC decided to issue a Commission interpretative communication on the Community law applicable to contract awards not or not fully subject to the provisions of the Public Procurement Directive ("Communication"). In the view of the EC, there are three basic standards for the award of contracts relevant to the internal market: the obligation to ensure adequate advertising, the impartiality of the procedures and judicial protection. This was a controversial approach, just to say that only a few weeks after the Communication was issued the Republic of Germany tried to annul the Communication before the Court\textsuperscript{16}. After 4 years the Court declared the action inadmissible. Nonetheless, the judgment contains a detailed consideration of the Communication and is read as agreement with the EC’s standpoint\textsuperscript{17}. Much uncertainty has remained even after the judgment was rendered.

III. Minimum wage laws in the case-law of the Court of Justice

The issue of national minimum wage laws in the context of public procurement appeared for the first time before the Court in the Rüffert case. It concerned German legislation which required that public contracts for building works worth more than EUR 10,000 be awarded only to undertakings which agreed to pay staff working on such contracts a minimum wage as prescribed by a collective agreement on "building and public contracts". Even if the law was applied in a non-discriminatory manner, the Court held that Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers ("Posted Workers Directive") in the framework of the provision of services, interpreted in the light of Article 56 of the Treaty on the functioning of the European Union (then Article 49 Treaty establishing the European Community), "precludes an authority of a Member State from adopting a measure of a legislative nature requiring the contracting authority to designate as contractors for public works contracts only those undertakings which, when submitting their tenders, agree in writing to pay their


employees, in return for performance of the services concerned, at least the remuneration prescribed by the collective agreement the minimum wage in force at the place where those services are performed\(^\text{18}\).

Shortly after the judgment was made Arrowsmith and Kunzlik noted that although the case was concerned specifically with the preclusory effects of the Posted Workers Directive, the reasoning and statements of the Court in reaching this conclusion might have wider implications\(^\text{19}\). Similar opinion was also made by McCrudden. They all could not be closer to the truth. The judgment in Rüffert seems to indicate that rules on free movement of services and the Posted Workers Directive in principle preclude the government from imposing in public contracts conditions beyond those that apply more in the state concerned, when these are conditions of the type covered by the Posted Workers Directive\(^\text{20}\). The Court held that the national measure at issue could not be justified since it was not "necessary"\(^\text{21}\). In particular, in the view of the Court, neither the objective of ensuring protection for independence in the organisation of working life by trade unions, nor the objective of ensuring the financial balance of the social security systems were sufficient arguments to justify the restriction on the free movement of services\(^\text{22}\).

Another interesting case was the Bundesdruckerei judgment\(^\text{23}\) in which the Court held that when a tenderer intends to carry out a public contract by having recourse exclusively to workers employed by a subcontractor from another Member State than the contracting authority, EU law precludes the application by that contracting authority of national legislation which requires that subcontractor to pay those workers a fixed minimum wage. It should be noted that unlike in the situation which was at issue in Rüffert, this time Posted Workers Directive was not applicable to the main proceedings.

The case concerned proceedings between Bundesdruckerei GmbH, a company governed by German law, and the City of Dortmund, concerning the obligation contained in the tendering specifications relating to a public services contract of the City to guarantee payment of a minimum wage to the employees of the subcontractors of tenderers, as provided

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\(^{18}\) Case C-346/06, Rüffert, ECLI:EU:C:2008:189.


\(^{20}\) Ibidem, p. 5.

\(^{21}\) Para. 40.

\(^{22}\) Para. 41 and 42.

\(^{23}\) Case 549/13, Bundesdruckerei, ECLI:EU:C:2014:2235.
for by the legislation of the land to which the public contracting authority belongs, even in 
the case where the subcontractor concerned was established in Poland, i.e. another Member 
State, and all of the services relating to the performance of the contract concerned were to be 
carried out in Poland. In those circumstances, the German court examining the case decided 
to refer a question to the Court whether, among other things, Article 56 of the Treaty 
precludes such national legislation.

The Court pointed out that such a national measure might be justified by the objective 
of protecting employees, avoiding "social dumping" and the penalisation of competing 
undertakings that grant a reasonable wage to their employees as long as it was "appropriate" 
for achieving that objective\textsuperscript{24}. However, in the view of the Court, this was not so in the case 
in question. By imposing a fixed minimum wage corresponding to that required in order to 
ensure reasonable remuneration for employees in Germany in the light of the cost of living in 
that Member State, but which bears no relation to the cost of living in Poland in which the 
services relating to the public contract at issue were performed and for that reason prevented 
subcontractors established in Poland from deriving a competitive advantage from the 
differences between the respective rates of pay, that national legislation went beyond what 
was "necessary" to ensure that the objective of employee protection is attained\textsuperscript{25}. Thus a fixed 
minimum wage requirement was not proportionate.

Finally, in the most recent \textit{RegioPost} case\textsuperscript{26} the Court held that Article 26 of Directive 
coordination of procedures for the award of public works contracts, public supply contracts 
and public service contracts, which is Article 70 of Directive 2014/24/EU now\textsuperscript{27}, must be 
interpreted as not precluding legislation 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 
wave laid down in that legislation.

\textsuperscript{24} [31].

\textsuperscript{25} [34].

\textsuperscript{26} Case C-115/14, \textit{RegioPost}, ECLI:EU:C:2015:760.

\textsuperscript{27} The only difference is that Article 70 of Directive 2014/24/EU, which replaced Article 26 of Directive 
2004/18/EC, does not contain as expressly stated requirement regarding "compatibility with EU law", as Article 
26 had. However, it should be noted that the general obligation to comply with EU law does not need to be 
written in a directive since it derives generally from the supremacy of EU primacy law over secondary one. 
Consequently, both Article 26 of Directive 2004/18/EC (explicitly) and Article 70 of Directive 2014/24/EU 
(implicitly) require that any special conditions for the execution of public contracts comply with general EU law.
The case concerned proceedings between RegioPost GmbH & Co. KG, a company governed by German law, and German municipality of Landau in the Palatinate concerning the obligation, imposed on tenderers and their subcontractors in the context of the award of a public contract for postal services in that municipality, to undertake to pay a minimum wage to staff performing the services covered by that public contract.

As abovementioned, the Court based its conclusion on the interpretation of Article 26 of Directive 2004/18/EC. However, in the view of the Court, it was confirmed, furthermore, by a reading of that provision in the light of Article 56 of the TFEU. In the justification the Court referred to both the Rüffert case\(^{28}\) and the Bundesdruckerei judgment\(^{29}\).

IV. **Where and how should we go (team spirit or lonely riders)?**

Although in all those three cases conclusions are different – as different as provisions to which the Court refer to, there is one contact point therein. Namely, in each case a public contract regulation was assessed in the light of the internal market rules. We should not be surprised by that fact. In accordance with the settled case-law of the Court, where a national measure falls within a field that has been exhaustively harmonised at EU level, that measure must be assessed in the light of the provisions of that harmonising measure and not in the light of the primary law of the European Union\(^{30}\). If, however, it does not lay down such exhaustive rules in given respect, a national measure may be assessed in the light of the primary law of the European Union. The latter was the case here.

Consequently, the three-step methodology, consisting in the analysis of: first, restriction, then justification and, finally, proportionality, should have been applied to assess whether national regulations were in line with EU law. This methodology is considered to be one of the most predictable and formulaic features of the free movement case-law\(^{31}\). Interestingly, it seems that it has been used in Rüffert and Bundesdruckerei but not in the RegioPost judgment.

In RegioPost there was no analysis of the proportionality. The construction of the judgment was itself not very clear.

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\(^{28}\) See para. 71 and 74.

\(^{29}\) See para. 69 and 70.


The first question of the national court referred to Article 56 of the Treaty, read in conjunction with the Posted Workers Directive. The Court, however, decided to transform it into the question concerning Article 26 of directive 2004/18/EC (now Article 70 of Directive 2014/24/EU). Answering this question it carried out the analysis in light of the Posted Workers Directive and finally concluded that Article 26 read in conjunction with the Posted Workers Directive permits to impose a minimum wage requirement. The most important part is to come.

In para. 67 the Court said "that interpretation of Article 26 of Directive 2004/18 is confirmed, furthermore, by a reading of that provision in the light of Article 56 TFEU". A question may appear: what kind of argument do we have here, i.e. a supportive or decisive one? Notwithstanding the above, it should be noted that in para. 69 the Court held that: "[…] a measure such as that at issue in the main proceedings is capable of constituting a restriction within the meaning of Article 56 TFEU". In para. 70 it recalled that "such a national measure may, in principle, be justified by the objective of protecting workers" and then we reach to the issue. In paras. 71 to 76 it distinguished the case from Rüffert and refers to requirements set forth by the Posted Workers Directive. Surprisingly, this appeared to be sufficient for the Court to hold that national measures were compatible with EU law. Interestingly, in Rüffert the Court presented different logic. It started his review from the PWD, as well, then switched to the Treaty and carried out full three step analysis. In RegioPost it stopped at the second step – justification by the objective of public interest. The problems is that even if the Court wanted to distinguish RegioPost from Rüffert it should not have stopped here but should carry out a proportionality test (as it did in Rüffert). Otherwise, it looks like the Court examines whether the Posted Workers Directive may provide a safe haven for the national law. It could have been done 8 years ago, when the Rüffert case was adjudicated, but not now. This was against Article 26 of Directive 2004/18 (which was not applicable in Rüffert case), read in conjunction with Article 56 of the Treaty and, as far as the new directives are concerned, it would be against Article 70 of Directive 2014/24 read in conjunction with Article 56 of the Treaty. It would also be against other provisions of Directive 2014/24, most notably Article 18 and the principle of proportionality which set forth therein.

Is there room for introducing minimum wage requirements in public procurement law? It seems that the answer should be definitely positive. However, special conditions of performance of contracts, such as a minimum wage, cannot constitute restrictions within the meaning of e.g. Article 56 of the Treaty. If they do, they have to be justified by the objective of public interest which cannot go beyond what is necessary that the objective at hand is
attained. In other words, the three-step methodology: restriction, justification, proportionality should be used. Analysis of the Court's case-law clearly shows that it is relatively easy to establish before the Court an existence of restriction (infringement of free movement of services) and the Court rarely opposes to the public interest being invoked by Member State\textsuperscript{32}, the proportionality marks the point at which the case is won or lost.

V. Conclusions

Barnard points out that the Court's case-law shows how the intensity of the Court's review varies according to the sensitivity of the subject matter. Where national rules do not raise politically difficult issues, the Court's scrutiny tends to be quite intrusive. There is no doubt that a minimum wage laws issue is a politically sensitive issue, which is present in the huge majority of the Member States. Will it mean that scrutiny of the Commission and/or the Court is relaxed, as far as the said issue is concerned? In my opinion, this would in practice effect in brushing things under the carpet and would not solve out this problem.

\textsuperscript{32} Although in the Ruffert case it recalled that the risk of seriously undermining the financial balance of the social security system cannot be ruled out as a potential overriding reason in the general interest (see, inter alia, Case C-372/04 Watts [2006] ECR I-4325, paragraph 103).