

RegioPost judgment: CJEU upholds minimum wage clause

[Abby Semple](#) | 20 November 2015

Case C-115/14 [RegioPost v Stadt Landau](#), Judgment of 17 November 2015

My last post looked at Advocate-General Mengozzi's opinion in Case C-115/14 *RegioPost v Stadt Landau* (now available [in English](#)), which took a markedly different approach from [Rüffert](#) to the question of whether contracting authorities may insist on the payment of a minimum wage to workers on public contracts. The CJEU has now published its judgment in *RegioPost*, which holds that:

- i) Directive 2004/18 does not preclude legislation that requires tenderers and their subcontractors to undertake, by means of a written declaration, to pay staff performing the services a predetermined minimum wage; and
- ii) A tenderer or subcontractor who refuses to provide an undertaking to pay a minimum wage required under legislation may be excluded from a procurement procedure.

For those not acquainted with *Rüffert* or the more recent [Bundesdruckerei](#) case, these findings might seem unsurprising. If a minimum wage is set out in legislation, surely public authorities are able to require their contractors to comply with the law? The judgment in *RegioPost* goes most of the way towards confirming this is the case, while leaving open some possibility for the review of minimum wage requirements against the Treaty principles of free movement and non-discrimination. The law at issue in *RegioPost* did not set a universal minimum wage, but applied only to public sector contracts. This much it shared with the collective agreement in dispute in *Rüffert* and the legislation in *Bundesdruckerei*. However unlike in those cases, none of the bidders for the contract was either based outside of Germany or proposing to use a workforce based elsewhere (see facts in my post below).

In considering the admissibility of the preliminary reference in *RegioPost*, both the Court and Advocate General found that the absence of cross-border bids did not remove the contract from the scope of EU law (paras 27-38 of opinion; paras 44-52 of judgment). The Court considered that because Article 26 of Directive 2004/18/EC allows contract performance conditions to be included in procurement procedures provided that they are compatible with Community law, review against both Article 56 of the Treaty and Directive 96/71/EC on the Posting of Workers (PWD) was appropriate. On this point, the Court differed from the Advocate General who did not consider the PWD applicable to the case (paras 51-60 of opinion). Without stating that the PWD applied based upon the facts, the Court cited a reference to the PWD in the recitals of Directive 2004/18/EC and proceeded to analyse whether the minimum wage requirement was compatible with it (paras 66-77). This may perhaps be due to the referring court's framing of its question in terms of the interpretation of Article 56 'in conjunction with' the PWD - presumably because it was concerned with the *Rüffert* jurisprudence. In so doing, the Court opened the door for future cases which explicitly involve a cross-border element to follow its approach in *RegioPost*.

The Court held that it was possible to justify a measure restricting free movement based upon the objective of protecting workers, even where the measure in question applied only to public sector contracts. It distinguished *Rüffert* on the basis that that case concerned conditions of employment set out in a collective agreement which had not been declared

universally applicable, as required by Article 3 of the Posted Workers Directive. Article 3 refers to conditions of employment laid down by 'law, regulation or administrative provision' as well as collective agreements or arbitration awards which have been declared universally applicable. The interpretation of the term 'administrative provision' may be significant in any future challenges to living wage policies, which may for example be adopted as part of organisational standing orders or other non-legislative instruments.

Interestingly, the Court did not seek to distinguish *Bundesdruckerei* on the basis that that case involved cross-border delivery of services, leaving open the question of whether minimum wage provisions can be enforced where bidders propose to use a workforce based in another Member State. It also did not engage in proportionality review of the German legislation, as the questions referred only asked if it was 'precluded' by the relevant EU law provisions. Once the Court had determined that enforcement of such legislation was possible in public contracts under the auspices of Article 26 of Directive 2004/18/EC, it turned to the question of whether a bidder could be excluded for its failure to provide a declaration that it would comply with the minimum wage. It found that given the importance ascribed to complying with mandatory conditions in tenders, including those adopted under Article 26, exclusion of a bidder was both permissible and proportionate. The fact that bidders were given an opportunity to clarify the reason for not submitting the declaration was considered relevant in this regard (para 87).

The Court notes (at para 83) that the minimum wage requirement was 'formulated in a particularly transparent manner in the contract notice and intended to emphasise, from the outset, the importance of compliance with a mandatory rule...' Without reading too much into this statement, it may be taken to endorse an explicit and up-front approach to the inclusion of minimum wage requirements, as opposed to one which only becomes clear to tenderers at the contract award stage, for example. This suggests a different approach to that which some contracting authorities have adopted in light of *Rüffert* and *Bundesdruckerei*, namely a 'soft' approach to wage issues. Given the importance of transparency as a general principle of EU law, it seems preferable for such requirements to be published and to ensure that tenderers are able to take these into account in preparing their bids. However the ongoing uncertainty regarding non-legislative living wages means that this may continue to form the subject of negotiated agreements with contractors, rather than an explicit requirement in tenders.

What does this mean in terms of competition and the likelihood of costs being passed on to contracting authorities? What about the provisions on abnormally low tenders – could a tender be deemed abnormally low if it did not comply with a living wage requirement? The 2014 directives make clear that contracting authorities may take social considerations into account in various ways when awarding contracts, including through award criteria (following from the Court's judgment in Case C-368/10 [Dutch Coffee](#)). However the ability to exclude a tenderer or subcontractor based on non-compliance with social obligations is limited to those which are i) applicable and ii) set out in EU law, national law, collective agreements or the international conventions listed in Annex X of Directive 2014/24/EU (under Articles 18.2, 56.1 and 57.4(a) of that Directive). Article 70, which replaces Article 26, is still phrased in more general terms to allow contracting authorities to lay down special conditions for the performance of contracts, including social and employment-related considerations. This must be read in light of recital 98 of the Directive:

"... requirements concerning the basic working conditions regulated in Directive 96/71/EC, such as minimum rates of pay, should remain at the level set by national legislation or by collective agreements applied in accordance with Union law in the context of that Directive."

Given the Court's approach in *RegioPost*, a question arises as to whether the reference to basic working conditions 'regulated' by the PWD means any minimum wage requirement, or is only relevant when the PWD actually applies. If the former, then the recital suggests that it is only national legislation or (universally applicable) collective agreements which can form the basis for minimum wage requirements in contract performance clauses, rather than administrative provisions or arbitral awards. This may, however, be an excessively literal reading of the recital.

Living wages in public contracts: A chance to reconsider *Rüffert*

[Abby Semple](#) | 15 October 2015

Case C-115/14 [RegioPost v Stadt Landau](#), Opinion of Advocate General Mengozzi

I have always found the [Rüffert](#) judgment problematic. In it the CJEU held that a German public authority could not enforce the wage rates set under a collective agreement in a contract to build a prison. The case turned upon the interpretation of the Posted Workers Directive (Directive 96/71/EC) and the enforcement of minimum working conditions which were not universally applicable, because they only related to public sector contracts. The CJEU held that such conditions constituted a restriction on the freedom to provide services under the Treaty, which could not be justified by the objective of protecting workers. The case is notable for its almost complete lack of engagement with the Court's prior jurisprudence on social clauses in public procurement, including the [Beentjes](#) and [Nord Pas de Calais](#) cases. Its effect has been to cast doubt upon the widespread practice of public authorities requiring that contractors pay fair or living wages to their employees.

More recently, the [Bundesdruckerei](#) case seemed to confirm the CJEU's approach of treating minimum wage requirements in public contracts as a restriction on trade - while acknowledging a greater scope to justify this restriction based on social factors. In outsourcing a data services contract, the City of Dortmund included a requirement for all tenderers and their subcontractors to pay at least the hourly rates set by a regional law. The applicant objected on the basis that it proposed to perform the contract using workers based in Poland. The CJEU held that imposition of a minimum wage on subcontractors based in another Member State could in principle be justified based upon the objectives of protecting employees and preventing social dumping (para 31). However it held that in the circumstances, given that the minimum wage in question applied only to public sector contracts (i.e. it was not universally applicable) and bore no relation to the cost of living in Poland, it was disproportionate. The operative part of the judgment refers only to cases where a tenderer intends to carry out a contract by having recourse 'exclusively' to workers in another Member State. The Court also considered whether the measure might be justified based upon the need to ensure the stability of social security systems, but found it could not be based on the facts of the case (para 35.)

One question emerging from *Bundesdruckerei* was the extent to which the restriction on a public authority specifying minimum wages would apply to a contract performed entirely domestically. This factual situation is now being considered by the CJEU in the case

of *RegioPost GmbH v Stadt Landau* (C-115/14). Advocate General Mengozzi published his opinion in the case on 9 September 2015, finding that EU law did not prevent contracting authorities from setting conditions relating to the payment of minimum wages within public contracts. His opinion turns upon the discretion granted to contracting authorities to set special conditions for the performance of contracts under Article 26 of Directive 2004/18/EC (replaced by Article 70 of Directive 2014/24/EU). He distinguished the *Rüffert* case on the basis that it concerned a contract awarded prior to Directive 2004/18/EC coming into effect. He also distinguished *Bundesdruckerei* on the basis that, in the case at hand, all of the services would be performed in Germany. At the same time, he acknowledged the potential for the tender to attract bidders or subcontractors based in other Member States – which meant that EU law was engaged (and the question referred should not be considered outside of the CJEU’s remit.)

The facts of *RegioPost* are as follows: the City of Landau published an OJEU level tender in 2013 for the provision of postal services. As part of their tender, bidders were required to submit a declaration on their own behalf and on behalf of any proposed subcontractors, guaranteeing to pay employees involved in delivery of the service at least €8.70 per hour. This was in accordance with a requirement for public contracts set out in regional legislation (similar to the law which was at issue in *Bundesdruckerei*). At the time that the contract was tendered, no national minimum wage legislation applied in Germany - from 1 January 2015, a minimum wage of €8.50 per hour came into effect. RegioPost submitted the declaration in respect of its subcontractors, but not on its own behalf. In response to a request for clarification, RegioPost indicated that it believed the requirement to submit the declaration was contrary to public procurement law. The City of Landau then excluded RegioPost from the competition, and it challenged this decision.

AG Mengozzi’s opinion focuses both on the ability of regional or national authorities to set minimum wages and the compatibility of such requirements with the Treaty provisions on free movement and Article 26 of Directive 2004/18/EC. In his view, Article 26 clearly envisions the use of social clauses such as those relating to minimum wages [para 47]. He states:

‘Member States must be empowered, in my view, to adopt legislative, regulatory or administrative measures setting working conditions, including minimum rates of pay, in the specific context of public contracts, for the benefit of workers who provide services for the delivery of those contracts.’ [Para 71 of opinion; author’s translation from French]

He does not consider the Posted Workers Directive relevant to the case, and argues that the fact that the wage agreement in question only applies to public sector contracts should not mean that it is deprived of its effect in the context of a procurement procedure. Mengozzi draws an analogy with the ability of contracting authorities to apply environmental conditions regardless of whether these apply in the private sector generally, as established in the [Concordia Bus](#) case. He also considers the requirement applied by the City of Landau to be proportionate, inasmuch as it referred specifically to the workers to be employed on the contract at hand and not to all employees of the tenderers [para 87].

Mengozzi’s opinion will be welcomed by those who support the use of living wages in public contracts, as it creates a line of argumentation which the CJEU may adopt to distance itself from *Rüffert*. Although he does not mention the 2014 directives, Mengozzi’s reasoning appears to be more in line with the expanded ability to apply social considerations under the new directives, including the explicit ability to reject tenders which do not comply with

applicable social or labour laws or collective agreements under Article 56.1 of Directive 2014/24/EU. I agree with the criticism (put forward by Albert Sánchez Graells in his timely blog [here](#)) that just because an authority has a competence to do something - in this case, to apply minimum wages in respect of workers on public contracts only – it does not necessarily have a commensurate ability to do that thing in the context of an EU regulated procurement.

However I disagree fundamentally with the idea that measures adopted in public contracts should be subject to the same standard of review against the free movement principles as legislative or other administrative measures. As Albert points out, public procurement is not properly seen as a regulatory tool – but the conclusion I draw from that (and which cases such as [Dutch Coffee](#) and [Concordia](#) support) is that contracting authorities should have a wide discretion to specify the terms on which they wish to buy something, provided they comply with the procedural guarantees set out in the directives. The directives give effect to the relevant Treaty principles in the context of public procurement, and they explicitly authorise public authorities to apply social criteria and contract performance clauses. The caveat ‘provided these comply with EU law’ should not deprive these more specific provisions of their value, which has been hard won in the process of adopting the directives.

The Advocate General's approach in *RegioPost* does leave open several questions about when minimum wage requirements will be compatible with EU law, and these are of immediate interest to public authorities who are considering, or already do include, such requirements in their contracts.

Question 1 - Does it matter if the minimum wage is set out in universally-applicable legislation, a collective agreement, or adopted on a voluntary basis?

The source of a minimum wage obligation may be relevant in determining whether it can be included in public contracts. Mengozzi refers to ‘legislative, regulatory or administrative measures’ – which is the same wording used in the Posted Workers Directive. Article 18.2 of Directive 2014/24/EU and the various provisions which cross-reference it empower contracting authorities to exclude tenderers, reject tenders or require the replacement of subcontractors where, *inter alia*, they do not comply with applicable social or labour law obligations set down in national or EU laws or collective agreements, or with a limited list of ILO conventions. If a tender is considered abnormally low due to non-compliance with such obligations, rejection is mandatory. Presumably 'national laws' would encompass regional laws such as the ones at issue in *Bundesdruckerei* and *RegioPost* - so the focus will be on whether they are 'applicable' to a particular tenderer or subcontractor. However Article 18.2 does not refer to purely voluntary arrangements such as the [living wage in the UK](#) or [fair trade](#) commitments.

Mengozzi's opinion points to a somewhat wider scope for rejection of tenders which do not comply with minimum wage requirements, including where these are contained in legislation which is not universally applicable. There is no guarantee that the CJEU will follow his opinion in this regard, and even if it does the status of voluntary arrangements such as the living wage would still be in question. Interestingly however, the CJEU has already endorsed the use of the wage premium which forms part of fair trade certification as an award criterion and/or contract performance clause in the [Dutch Coffee](#) case [para 91]. It seems both regrettable and inconsistent if the use of similar arrangements in the domestic/European context cannot be justified based on the need to protect workers and social security systems..

Question 2 – Can minimum wage requirements be applied to non-domestic undertakings, including subcontractors?

This is a difficult question which Mengozzi's opinion somewhat elides. It seems unlikely that the CJEU will pull back from its judgment in *Bundesdruckerei* that the enforcement of a minimum wage for workers in other Member States was disproportionate and could not be justified based on the need to protect social security systems. If it follows the AG's opinion in *RegioPost*, it will most likely restrict this to cases where the performance of the contract will take place purely in the location where the minimum wage applies. That would mean that such conditions should only apply inasmuch as a tenderer proposes to deliver a contract in that location. This may lead to objections that local/domestic tenderers are being penalised and risk losing out to competitors in lower-cost locations. However it should be borne in mind that only a small percentage of public contracts EU are currently awarded to undertakings outside of the country of award ([less than 2% at last check](#)) – and that contracting authorities can and do choose to take factors other than cost into account. The effects of lower-wage jurisdictions being able to undercut local or domestic tenderers subject to the higher wage requirements should not be exaggerated.

Regarding subcontractors, Article 71 of Directive 2014/24/EU makes clear that contracting authorities may require compliance with applicable labour and social laws and collective agreements on the part of subcontractors, and require tenderers to replace any subcontractors who do not so comply. This depends on having visibility of the supply chain, and in some cases contractors may argue that they do not have control over the conditions applied by their subcontractors. However the 2014 directives also provide an expanded ability to evaluate at selection stage the supply-chain management measures which a tenderer has in place (Article 60.1 and Annex XII, Part II (d) of Directive 2014/24/EU). Member States are also free to enforce more rigorous systems for the supervision and joint liability of subcontractors in their implementation of the directives under the terms set out in Article 71.

Question 3 - Does it matter at which stage of the procurement process a minimum wage requirement is included?

Again Mengozzi's opinion leaves some questions unanswered in this regard, although he rejects the use of a minimum wage declaration as a selection criterion under the heading 'financial and economic capacity' (para 96). As the CJEU's prior case law makes clear, the directives specify the types of evidence which can be requested from bidders at selection stage. The idea is that barriers should not be put in place to participation, and that there should be some degree of uniformity in terms of selection processes. Broadly speaking, exclusion and selection criteria relate to an undertaking's past or present status at the time of expressing an interest in the contract. They should not relate to the undertaking's proposals for how it will perform the contract – which are properly assessed under award criteria, or in terms of compliance with specifications and contract conditions. In addition to the clear separation between these considerations in the directives, there are good reasons in terms of competition not to evaluate wage commitments on a retrospective basis. It should be possible for a company which has not previously applied a living wage to commit to applying it if it wins the contract. This is especially true where the company has not previously operated in the area where the relevant wage applies.

The Scottish Government has recently published [statutory guidance](#) which recommends that tenderers' working practices be taken into account as part of quality evaluation, i.e. under

contract award criteria. There is much to recommend the Scottish Government's approach in that it takes into account a range of considerations related to fair work practices, including recruitment, terms of engagement, skills utilisation and job support, and worker representation. While these considerations may be of equal importance to rates of pay in some cases, many authorities will still wish to know if they can require payment of a living wage as a contract condition, either in addition to or instead of evaluation under award criteria. The Scottish guidance says no, based on letters from former Commissioner Michel Barnier in [2012](#) and [2014](#). *RegioPost* may yet give reason to revisit this position.

Conclusion

Putting aside the legal arguments for a moment, at the political level these cases go to the very heart of the debate about whether the EU internal market is a social market. *Bundesdruckerei* posed the question most plainly: should a German contracting authority be able to impose its higher wage expectations on a contractor performing services in Poland? Understandably the CJEU held this undermined the competitive advantage of the Polish undertaking and could not be justified by reference to the need to protect workers or ensure the integrity of social security systems, as the wage rates in question were based upon living costs in Germany, not Poland. *RegioPost* gives the CJEU another opportunity to bring its approach to living wages into greater sync with the approach to fair trade criteria in *Dutch Coffee*, by striking a balance between competition and respect for workers within the EU.

Note: At time of writing, the transcript of AG Mengozzi's opinion was not yet available in English.