



INSIGHT

PUBLIC PROCUREMENT, SOCIAL POLICY AND MINIMUM WAGE REGULATION FOR POSTED WORKERS: TOWARDS A MORE BALANCED SOCIO-ECONOMIC INTEGRATION PROCESS?

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ABSTRACT: Income inequality increased significantly over the past decades. The liberalization and outsourcing of public services, in conjunction with increased pressure on public budgets, has played a considerable role in this development: in procuring services they previously had provided themselves, public authorities fostered price competition among private operators vying for public contracts, which in turn exacerbated the pressure on wages. In response, some public authorities conceived of strategies aimed at neutralizing the downward pressure on wages they effected. Among the measures developed in this context is the establishment of a wage floor via public procurement that contractors and their sub-contractors have to comply with. In principle, European procurement law allows public authorities to set special performance conditions that exceed general regulatory standards. This is also the case in the social area. However, attempts to implement wage floors via public procurement have been repeatedly challenged on the basis of Directive 96/71 (Posted Workers Directive) and Art. 56 TFEU, as the decisions *Rüffert* (Court of Justice, judgment of 3 April 2008, case C-346/06), *Bundesdruckerei* (Court of Justice, judgment of 18 September 2014, case C-549/13) and, most recently, *RegioPost* (Court of Justice, judgment of 17 November 2015, case C-115/04) attest. The present text analyzes the decision *RegioPost* and sketches the extent to which public procurement can be employed to pursue social policy objectives. It will be shown that *RegioPost* confirmed the right of public authorities to pursue social objectives via procurement law, which also includes the setting of a procurement wage (even if it exceeds general wage levels), provided that it conforms to the formal requirements of Directive 96/71. The decision clarifies and partly overturns the controversial judgment *Rüffert*, and – despite its perhaps somewhat technical nature – may contribute to an integration process that is more balanced in socio-economic terms.

KEYWORDS: public procurement – posted workers – freedom to provide services – social policy.

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I. INTRODUCTION: PURSUING MULTIPLE POLICY OBJECTIVES VIA PUBLIC PROCUREMENT

When public authorities procure goods, works or services, they do not necessarily want to base their decision on the lowest price alone. Other considerations may be of relevance for them as well: they may want to employ public procurement as a tool to foster innovation, wish to act as role models in social or environmental concerns, or to otherwise pursue regulatory objectives by nudging contractors, but without creating additional rules for the private sector as a whole.¹ As procurement accounts for a significant amount of the Union's overall economic activity, it constitutes a potentially powerful tool of governance.²

European law enables public authorities to pursue a broad spectrum of regulatory objectives by means of public procurement. While both the old and the new Procurement Directives, Directives 2004/18 and 2014/24,³ aim at fostering market integration and preventing discrimination between domestic and non-domestic contractors, they also recognize that procurement as an instrument of governance can serve multiple objectives. This becomes very clear in the preamble of Directive 2014/24, which emphasizes the role of public procurement in the Europe 2020 strategy, and discusses extensively how it can be mobilized for example to foster innovation, or in support of SMEs. According to Directive 2014/24, award criteria may comprise "quality, including technical merit, aesthetic and functional characteristics, accessibility, design for all users, social, environmental and innovative characteristics and trading and its conditions";⁴ while these criteria shall be "linked to the subject-matter of the public contract", these factors do not have to "form part of their material substance".⁵ Social objectives may be pursued by setting contract performance conditions. Art. 70 of Directive 2014/24 holds in that regard that "contracting authorities may lay down special conditions relating to the performance of a contract", which "may include economic, innovation-related, environmental, social or employment-related considerations". The scope of social performance conditions that can be pursued under this provision is broad, as the Directive's preamble indicates. Art. 70 of Directive 2014/24 conforms mostly to Art. 26 of Directive 2004/18, which is the subject of the *RegioPost* decision, and which we will discuss below.

¹ Along these lines the new Procurement Directive calls on public authorities to "spur innovation", including "eco-innovation and social innovation". Recital 47 of Directive 2014/24/EU of the European Parliament and of the Council on public procurement and repealing Directive 2004/18/EC.

² See *ivi*, recital 2.

³ The old Procurement Directive (Directive 2004/18/EC of the European Parliament and of the Council on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts) has been replaced by Directive 2014/24, and must be implemented by April 2016.

⁴ Art. 67, para. 2, lett. a), of Directive 2014/24.

⁵ *ivi*, Art. 67, para. 3.

However, not all such performance conditions are uncontroversial. In particular, conditions requiring contractors and subcontractors to respect a certain wage floor have faced legal challenges, as illustrated by the decisions *Rüffert*,⁶ *Bundesdruckerei*⁷ and, most recently, *RegioPost*.⁸ There are a number of reasons why public authorities may wish to prescribe a certain minimum wage level via procurement. If the required wage floor corresponds to the legal minimum wage or a relevant collective agreement, the reason may lie in the desire to ensure compliance, which is an issue the Procurement Directives address.⁹ However, public authorities may also want to prescribe a procurement wage that exceeds the general wage level: the nationally mandated minimum wage – if one exists – may be very low in general, or it may be too low for certain regions with high living costs. The relevant public authority may not have the competence to alter the national minimum wage or may not deem it appropriate to enforce it against all operators alike, but may nonetheless wish to pay a living wage in its area of responsibility.¹⁰ In more general terms, it can be argued that prescribing a minimum wage via public procurement relates to the desire to limit competition based on wages below a certain bottom level, or at least to prevent that public procurement exacerbates such dynamic. The insinuation that competition based on wage differences would be the main form of competition the internal market aims to foster is incorrect.¹¹ In fact, excluding a certain form of wage competition that is considered socially undesirable may stimulate competition in other aspects, such as innovation, quality or efficiency.

II. CROSS-BORDER PROVISION OF SERVICES AND THE POSTED WORKERS DIRECTIVE

The European market encompasses regions with different productivity levels and living costs. As a general principle, the terms and conditions of employment applicable at the location where a work is executed should be respected.¹² However, such principle

⁶ Court of Justice, judgment of 3 April 2008, case C-346/06, *Dirk Rüffert v. Land Niedersachsen*.

⁷ Court of Justice, judgment of 18 September 2014, case C-549/13, *Bundesdruckerei GmbH v. Stadt Dortmund*.

⁸ Court of Justice, judgment of 17 November 2015, case C-115/04, *RegioPost GmbH & Co. KG v. Stadt Landau in der Pfalz*.

⁹ Art. 18, para. 2, and preamble, para. 37, of Directive 2014/24.

¹⁰ See T. SCHULTEN, M. PAWICKI, *Tariftreuregelungen in Deutschland: Ein aktueller Überblick*, in *WSI Mitteilungen*, 2008, p. 189.

¹¹ See e.g. the comments made by the referring court cited in *RegioPost GmbH & Co. KG v. Stadt Landau in der Pfalz*, cit., para. 33.

¹² See the reference to the Convention 80/934/ECC on the law applicable to contractual obligations (Rome Convention) in Directive 96/71/EC of the European Parliament and of the Council concerning the posting of workers in the framework of the provision of services (Posted Workers Directive), preamble, recitals 7-10; see also the discussion of the older case law in the Opinion of Advocate General Wahl deliv-

leaves many concrete problems unsolved; among them is the cross-border provision of services.¹³ Directive 96/71 (Posted Workers Directive) constitutes a legislative compromise on this issue.¹⁴ According to its Art. 3, the host State has to set certain terms and conditions of employment for posted workers. These include areas such as maximum work periods, minimum rest periods and health, safety and hygiene standards at work, as well as the “minimum rates of pay”. Member States can fix terms and conditions of employment for posted workers in one of three ways. They can do so “by law, regulation or administrative provision” (variant 1). Alternatively, they can declare a collective agreement universally applicable (variant 2). For countries in which such system does not exist, Member States may base themselves on “generally applicable” collective agreements (variant 3). Because Directive 96/71 defines the conditions under which a host State can prescribe binding employment conditions for workers posted on their territory, it limits the margin of appreciation available to procuring authorities in defining social performance conditions, as we will discuss below.

Overview: How Member States can fix terms and conditions of employment for posted workers under Directive 96/71.

Variant 1	Art. 3, para. 1, first indent	“by law, regulation or administrative provision”
Variant 2	Art. 3, para. 1, second indent	by “collective agreements or arbitration awards which have been declared universally applicable”
Variant 3	Art. 3, para. 8	If such system does not exist, Member States may base themselves on “collective agreements or arbitration awards which are generally applicable to all similar undertakings in the geographical area and in the profession or industry concerned; or “collective agreements which have been concluded by the most representative employers’ and labour organizations at national level and which are applied throughout national territory”

ered on 18 September 2014, case C-396/13, *Sähköalojen ammattiliitto ry v. Elektrobudowa Spółka Akcyjna*, para. 29.

¹³ See *ivi*, para. 26.

¹⁴ See *ivi*, paras 27-30.

III. GROWING INEQUALITY AND NATIONAL PROCUREMENT LAW

For the past decades, income inequality increased, and the development of wages and of productivity has been decoupled: while productivity increased, wages stagnated.¹⁵ Consequently, the labor share in the overall societal income fell, which essentially represents a re-distribution from labor to capital. While the causes of this process are likely multiple, the liberalization and outsourcing of public services, in conjunction with increased pressure on public budgets, has played a considerable role in this development.¹⁶ In procuring services they had previously provided themselves, public authorities fostered price competition among private operators vying for public contracts, which in turn exacerbated the pressure on wage levels. In response, some public authorities conceived of strategies aimed at neutralizing the downward pressure on wages they effected.¹⁷ Among the measures developed in this context is the prescription of a wage floor via public procurement that contractors and their sub-contractors have to comply with. An example are the so-called "Tarifreugesetze" enacted by various German states, which were the subject of the decisions *Rüffert*, *Bundesdruckerei*, and *RegioPost*.¹⁸ The first generation of these laws required contractors and sub-contractors to pay wages according to the collective agreement of the place where the service is provided. However, this model was rejected by the Court in *Rüffert*, which dealt with the *LandesvergabeG* (LVergabeG) of the German region *Niedersachsen*. It required contractors and subcontractors in the building sector to pay their employees according to a collective agreement that had not been declared universally applicable.¹⁹ The Court found the measure to be in conflict with Directive 96/71 because it did not conform to any of its three variants discussed above. Moreover, it was found to conflict with Art. 56 of the Treaty on the Functioning of the European Union (TFEU), for reasons we will discuss further below. The precise scope of the decision remained unclear, however, and created considerable uncertainty, as it appeared questionable whether procurement laws could legitimately prescribe a minimum wage at all. The decision *Rüffert* contributed to an ongoing reconstruction of German law;²⁰ most

¹⁵ European Commission, *Employment in Europe*, 2007, p. 237.

¹⁶ K. JAEHRLING, *Öffentliche Auftragsvergabe - eine neue Arena der industriellen Beziehungen? Konzeptionelle Überlegungen und erste empirische Befunde*, in *Industrielle Beziehungen*, 2015, p. 326.

¹⁷ This point was made in the legislative materials accompanying the procurement laws in Nordrhein-Westfalen and Schleswig-Holstein. Quoted in T. SCHULTEN, *Warum landespezifische Mindestlohnvorgaben im Vergabegesetz trotz allgemeinem Mindestlohn eine Zukunft haben könnten*, in *Euroforum*, 2014, p. 5.

¹⁸ For an updated overview over the various *Tarifreugesetze* see www.boeckler.de.

¹⁹ *Dirk Rüffert v. Land Niedersachsen*, cit., para. 6.

²⁰ See M. ROHRMANN, H.W. EISERLOH, *Update Tarifreue*, in *Arbeit und Arbeitsrecht*, 2014, p. 720; D. SEIKEL, N. ABSENGER, *Die Auswirkungen der EuGH-Rechtsprechung auf das Tarifvertragssystem in Deutschland*, in *Industrielle Beziehungen*, 2015, p. 51; E.K. SARTER, D. SACK, S. FUCHS, *Public Procurement as Social Policy? An Introduction to Social Criteria in Public Procurement in Germany*, in *Working Paper Series*

notably, Germany introduced a federal minimum wage in 2015.²¹ Other reforms included the adaptation of the regional *Tariftreuegesetze*: whereas the first generation of these laws had referred to existing collective agreements, the second generation referred to collective agreements declared universally applicable via regulation on the basis of the *Arbeitnehmer-Entsendegesetz* (AEntG), and otherwise prescribed a minimum wage themselves.²² These were in turn challenged in *Bundesdruckerei* and *RegioPost*. *Bundesdruckerei* dealt with the TVgG-NRW, a *Tariftreuegesetz* of the second generation. It required contractors to pay the wage prescribed by the collective agreements declared universally applicable via regulation on the basis of the AEntG, and otherwise prescribed a minimum wage of 8.62 Euro.²³ The case dealt with a tender for the service of digitalizing documents, which the *Bundesdruckerei*, a candidate for the tender, intended to perform exclusively in Poland. The contracting authority, the city of Dortmund, nonetheless required the contractor and subcontractor to pay their employees according to the TVgG-NRW, against which *Bundesdruckerei* appealed. Different to *Rüffert*, the Court found Directive 96/71 inapplicable in *Bundesdruckerei*, as the contractor would not have posted workers to Germany. As it prescribed a minimum wage higher than the one applicable in Poland, the Court found the measure to be an unjustifiable restriction of Art. 56 TFEU.

Overview: legal instruments for setting minimum wages in Germany discussed in *RegioPost*.

Federal minimum wage	Since 2015, the <i>Mindestlohngesetz</i> (MiLoG) prescribes a minimum wage of brutto 8.5 Euro for employees not covered by a higher wage. ²⁴ At the time of the facts in <i>RegioPost</i> (2013), the MiLoG was not yet in place.
Collective agreements declared universally applicable	The AEntG extends the scope of collective agreements to posted workers via regulation. The AEntG was already applicable in 2013; a regulation for setting a mandatory minimum wage for the postal sector according to the AEntG had been in place, but had been annulled by a court. Thus, at the time of the facts of the main proceedings, no such regulation was in place. ²⁵

"Comparative Governance": *Arbeitsgebiet Vergleichende Politikwissenschaft*, Bielefeld: Universität Bielefeld, 2014, p. 8 *et seq.*, www.uni-bielefeld.de.

²¹ Mindestlohngesetz (MiLoG) of 11 August 2014 (BGBl. I S. 1348).

²² E.K. SARTER, D. SACK, S. FUCHS, *Public Procurement as Social Policy? An Introduction to Social Criteria in Public Procurement in Germany*, cit., p. 13.

²³ *Bundesdruckerei GmbH v. Stadt Dortmund*, cit., para. 7.

²⁴ Art. 1, MiLoG.

²⁵ *RegioPost GmbH & Co. KG v. Stadt Landau in der Pfalz*, cit., para. 10.

Procurement wage via regional procurement laws	Various German regions prescribe wage floors in their procurement laws, such as the LTTG that is the subject of the decision <i>RegioPost</i> .
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IV. THE DECISION *REGIOPOST*

In the German *Bundesland Rheinland-Pfalz*, the *Landestariftreuegesetz* (LTTG) lays down the minimum wage that a contractor has to pay its employees in performing public contracts. Its Art. 4 requires contractors to pay according to the relevant collective agreements that were declared universally applicable per regulation on the basis of the federal *Arbeitnehmer-Entsendegesetz* (AEntG). For contractors to which Art. 4 is not applicable, Art. 3 prescribes a minimum wage of 8.5 Euro (now 8.9 Euro). As the relevant regulation for the postal sector under AEntG had been annulled by a court at the time of the facts of the case, contractors and subcontractors were bound by the wage floor defined by Art. 3 LTTG. The municipality of *Landau in der Pfalz* had issued a call for tender for the provision of postal services. In accordance with the LTTG, the city required tenderers to submit declarations for themselves and their subcontractors that the minimum wage would be paid. The application of one tenderer, *RegioPost*, which did not comply with this requirement, was excluded from the tender. Against this decision *RegioPost* lodged a complaint. In the judgment, the Court of Justice had essentially to deal with the question whether contractors and their subcontractors can be required to pay a certain minimum wage to their employees. By requiring tenderers and their subcontractors to pay a minimum wage of 8.5 Euro, the procuring authority defines a performance condition according to Art. 26 of Directive 2004/18. Such conditions must conform to the procedural condition of transparency, as Art. 26 requires these conditions to be “indicated in the contract notice or in the specifications”. The Court found this condition to be fulfilled, as the minimum wage is laid down by law. Moreover, as performance conditions must be compatible with Union law, the Court subsequently scrutinized the measure’s conformity with Directive 96/71 as well as Art. 56 TFEU.

IV.1. THE NATIONAL MEASURE IN THE LIGHT OF DIRECTIVE 96/71

Directive 96/71 provides, as just discussed, three possibilities to prescribe minimum rates of pay. According to the Court, the LTTG conforms to the first variant, as it lays down a minimum rate of pay by law. The Court thereby clarifies that public authorities may lay down a minimum procurement wage if they conform to the formal requirements of Directive 96/71. In this regard, the Court makes two points of interest, which we will discuss in turn. First, the Court holds that “at the time of the facts in the main proceedings, the AEntG did not impose, nor did other national legislation impose, a

lower wage for the postal services sector".²⁶ This statement, which relates to the question how the concept of "minimum rates of pay" should be interpreted, is ambiguous. It may invite misunderstandings, as it could be assumed that Directive 96/71 would allow Member States to only lay down one single minimum wage for all posted workers or for each sector, or even that the minimum rate of pay applicable to posted workers would have to conform to the lowest wage prescribed in a Member State. This, however, would be an incorrect interpretation of Directive 96/71 for the following reasons. Art. 3, para. 1, lett. c), of Directive 96/71 allows the host Member States to set "the minimum rates of pay": the use of the plural²⁷ already indicates that Directive 96/71 does not limit the host Member States to set one general minimum wage.²⁸ Instead, Directive 96/71 allows Member States to apply multiple minimum rates of pay; as the Court speaks about a lower wage "for the postal services sector," it implies at least the possibility of minimum rates of pay differentiated on the basis of the various economic sectors. However, there is no indication that the minimum rates of pay could not also be differentiated for the different professions, qualifications or regions. This point has recently been explicitly recognized by the Court in the decision *Sähköalojen Ammattiliitto* (2015).²⁹ Beyond that, the functional orientation of Directive 96/71 certainly does not support an overly restrictive reading of the concept. Art. 3 conceptualizes the host Member State as the guardian of the posted workers, and Art. 3, para. 7, of Directive 96/71 emphasizes that the provision "shall not prevent application of terms and conditions of employment which are more favourable to workers".³⁰ Finally, the Preamble emphasizes that the "promotion of the transnational provision of services requires a climate of fair competition and measures guaranteeing respect for the rights of workers", and certainly does not mention anywhere that the objective of Directive 96/71

²⁶ *RegioPost GmbH & Co. KG v. Stadt Landau in der Pfalz*, cit., para. 62.

²⁷ See e.g. the German and the Polish language version ("Mindestlohnsätze", "minimalne stawki płacy").

²⁸ Advocate General Mengozzi lays out extensively that Directive 96/71 cannot be understood to require the Member States to implement a federal minimum wage. Opinion of Advocate General Mengozzi delivered on 9 September 2015, *RegioPost GmbH & Co. KG v. Stadt Landau in der Pfalz*, cit., para. 73.

²⁹ *Sähköalojen ammattiliitto ry v. Elektrobudowa Spółka Akcyjna*, cit., paras 43-44; on this point see also G. NASSIBI, F. RÖDL, T. SCHULTEN, *Perspektiven vergabespezifischer Mindestlöhne nach dem Regio-Post-Urteil des EuGH*, in *WSI Mitteilungen*, 2016 (upcoming).

³⁰ The Court's interpretation of Art. 3, para. 7, in *Dirk Rüffert v. Land Niedersachsen*, cit., paras 32-34, and in Court of Justice, judgment of 18 December 2007, case C-341/05, *Laval un Partneri Ltd v. Svenska Byggnadsarbetareförbundet, Svenska Byggnadsarbetareförbundets avdelning 1, Byggettan and Svenska Elektrikerförbundet*, paras 79-80, is incorrect, given its clear wording in the context of the Directive's overall objective, as laid out in its Preamble. The correct interpretation of Art. 3 of Directive 96/71 is that Member States *shall* lay down minimum standards for posted workers (para. 1) and *can* lay down protective measures that go beyond this (para. 7). These rules are, however, subject to the proportionality requirement under Art. 56 TFEU. It can be assumed that standards laid down according to Directive 96/71 will conform with Art. 56 TFEU, unless there are indications that this is not the case.

would be to foster price competition on the basis of cross border wage differences.³¹ While the Court emphasized in decisions like *Rüffert* and *Laval* that Member States cannot require the “observance of terms and conditions of employment which go beyond the mandatory rules for minimum protection”,³² such argument defines a procedural requirement, i.e., the adherence to the formal requirements laid down by Directive 96/71, and cannot possibly be read in substantive terms, as we will discuss below.³³ Consequently, Directive 96/71 must be understood as allowing Member States to apply differentiated minimum rates of pay, if they conform to its formal requirements.

Second, *RegioPost* clarifies and overturns *Rüffert* in one important aspect. It concerns what could be called the selective applicability of procurement law, i.e., the fact that procurement law, by its nature, does not apply to the general work force but only to employees working on public contracts. In *Rüffert*, this point had been brought up twice, once in regard to Directive 96/71, and once in regard to the proportionality test under Art. 56 TFEU, which we will discuss in the next section. In *RegioPost* the Court and especially Advocate General

Advocate General Mengozzi clarified that this point is of relevance with regard to a very limited aspect of Directive 96/71 alone, namely the interpretation of its Art. 3, para. 8. As already discussed, Art. 3, para. 8, of Directive 96/71 allows Member States that do not have a system of declaring collective agreements universally applicable to prescribe minimum rates of pay to posted workers via a collective agreement if it is “generally applicable to all similar undertakings in the geographical area and in the profession or industry concerned”. As procurement laws are not generally applicable in such sense, they are not covered by this provision. It is only in this regard that the selective applicability of procurement laws must be considered relevant. By contrast, a procurement law – as already discussed – may well conform to the first variant of setting minimum wages provided for by Directive 96/71.

IV.2. THE NATIONAL MEASURE IN THE LIGHT OF ART. 56 TFEU

The Court held in *RegioPost*, as it had already done in *Rüffert*, that the imposition of a minimum wage on contractors and subcontractors via procurement law constituted a restriction of the freedom to provide services if they are established in another Member State where lower minimum rates of pay apply.³⁴ Different to *Rüffert*, however, the

³¹ See in particular recitals 5, 9-10, 12-14, 17 of Directive 96/71.

³² *Dirk Rüffert v. Land Niedersachsen*, cit., para. 33; *Laval un Partneri Ltd v. Svenska Byggnadsarbetareförbundet et al.*, cit., para. 80.

³³ Advocate General Wahl is correct when he argues that “Member States retain substantial discretion in determining the material content of the rules referred to in Art. 3, para. 1 of Directive 96/71”. This discretion is subject to the proportionality requirement of Art. 56 TFEU, as we will discuss below. Opinion of Advocate General Wahl, cit., para. 66.

³⁴ *RegioPost GmbH & Co. KG v. Stadt Landau in der Pfalz*, cit., para. 69.

Court found the measure at stake in *RegioPost* justifiable in the light of the regulatory objective of protecting workers. The Court's reasoning includes the same points it had already made in relation to Directive 96/71. But as Directive 96/71 and Art. 56 TFEU are different instruments, it is important to scrutinize these points anew in relation to the latter. Distinguishing between the two is important in particular in regard to the selective applicability argument. As discussed above, the Court in *Rüffert* had made the limited point that the selective applicability of procurement measures to public contracts alone conflicts with the requirement of Art. 3, para. 8, of Directive 96/71 – which establishes one of the three variants of setting a minimum wage – that the collective agreement in question would have to be “generally applicable”. However, the Court had then brought up the same argument again in the context of a proportionality analysis under Art. 56 TFEU: it was suggested, and repeated a few years later in *Bundesdruckerei*, that measures applying to employees in public contracts alone could not be justified on grounds of worker protection unless such differential treatment between employees working on private and on public contracts was justified.³⁵ By contrast, the Court rejected this line of reasoning in *RegioPost*, and thereby overturned *Rüffert* in an important aspect. A key argument brought forward by Advocate General Mengozzi, and accepted by the Court, concerns Art. 26 of Directive 2004/18, which – as we already discussed – grants the possibility to set special performance conditions, and explicitly mentions social and environmental considerations in that regard. This competence implies the setting of requirements that exceed the general regulatory standards.³⁶ If procurement conditions, which by their nature apply to public contracts alone would be unjustifiable, Art. 26 would lose its meaning. The Court thereby recognizes that public procurement can legitimately serve objectives of social policy, despite the fact that it does not establish rules that apply to everyone alike.

The second point the Court picked up again in the context of the proportionality analysis under Art. 56 TFEU relates to the interpretation of the concept of “*minimum rates of pay*”. The Court argued that the LTTG “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”.³⁷ The statement is ambiguous also with regard to Art. 56 TFEU. It might be assumed that Member States, additionally to the formal restrictions Directive 96/71 defines for setting minimum rates of pay, would also be subject to the requirement that

³⁵ *Bundesdruckerei GmbH v. Stadt Dortmund*, cit., para. 32.

³⁶ According to the Advocate General Mengozzi, the Court has already recognized this in relation to special environmental considerations. Opinion of Advocate General Mengozzi, cit., para. 86; see also G. NASSIBI, F. RÖDL, T. SCHULTEN, *Perspektiven vergabespezifischer Mindestlöhne nach dem Regio-Post-Urteil des EuGH*, cit., discussing further case law supporting this point in regard to both environmental and social considerations.

³⁷ *RegioPost GmbH & Co. KG v. Stadt Landau in der Pfalz*, cit., para. 76.

they could not prescribe a minimum wage that exceeds the “minimum social protection” in some substantive sense. We already discussed above that Directive 96/71 cannot be read in such way, and this is also of relevance for the interpretation of Art. 56 TFEU in that context. Directive 96/71 essentially constitutes a legislative compromise on the regulation of wages in the context of the cross-border provision of services, which holds that the minimum rates of pay applicable at the location where the service is executed can be prescribed.³⁸ This does not imply that a national measure that sets minimum rates in some form could not be scrutinized on the basis of Art. 56 TFEU at all, or could not be held to be disproportionate. However, the minimum rates of pay fixed in accordance with Directive 96/71 should generally be assumed to be in conformity with Art. 56 TFEU as well, unless there are indications that this is not the case. Moreover, such reading would lead to inconsistent results: in the *RegioPost* scenario, even an excessively high procurement wage would be considered justifiable as it was the lowest minimum wage on the books at that time. This, however, would quite obviously be in conflict with the claim that it confers not more than a “minimum social protection”. And third, as already discussed, the Court’s statement in *RegioPost* itself – which speaks of “a lower minimum wage for the postal services sector” – implies to the very least that differentiated, sector-specific minimum wages are considered possible. Given the Court’s clear finding in *Sähköalojen Ammattiliitto* that minimum rates structured on the basis of wage groups differentiated on the basis of “various criteria including the workers’ qualifications, training and experience and/or the nature of the work performed by them” conform with Directive 96/71, the Court’s statement in *RegioPost* must be read along the same lines.³⁹ Advocate General Wahl is certainly correct when he argues that in the case of “competing minima” (e.g. one set by legislation, the other by collective agreement of universal applicability) the “conflict would need to be decided in favour of the lowest of those ‘minima’”.⁴⁰ However, such situation will often be avoided in practice. For example, federal minimum law such as the MiLoG usually apply only to the extent that no other, more beneficial law is applicable, so that no situation of “competing minima” occurs.⁴¹ Consequently, it must be assumed that, despite the Court’s ambiguous formulation, Art. 56 TFEU allows Member States to prescribe differentiated minimum rates of pay, and does not require the imposition of one a rate of pay that is “minimum” in the absolute sense.

³⁸ See in this regard recitals 9-10 and 12-14 of Directive 96/71.

³⁹ *Sähköalojen ammattiliitto ry v. Elektrobudowa Spółka Akcyjna*, cit., paras 43-44.

⁴⁰ Opinion of Advocate General Wahl, cit., para. 87.

⁴¹ Art. 1, para. 3, MiLoG.

V. CONCLUSION

In *RegioPost*, the Court revisited the decisions in *Rüffert* and *Bundesdruckerei*, and clarified or overturned them in important aspects. The preceding analysis allows us to sum up the key points of judgment as follows: first, public authorities may set procurement wages that exceed the general regulatory standard as performance conditions under Art. 26 of Directive 2004/18. Even though its Art. 70 is formulated slightly differently, this will clearly also be possible under Directive 2014/24. Second, insofar as posted workers are factually or potentially concerned, the procurement wage has to conform to the requirements of Directive 96/71. A procurement law such as the LTTG that sets a numerical minimum wage conforms to that requirement. Third, Directive 96/71 allows Member States to set differentiated minimum wages for posted workers, e.g. based on different regions, tasks or qualifications. Fourth, a minimum wage applied to posted workers constitutes, as the Court argues, a restriction of Art. 56 TFEU that must be justified, e.g. on the grounds of worker protection. However, it has been argued in this text that Directive 96/71 constitutes a legislative compromise, which presumes that the wage level applicable in the place where the service is executed can be applied to posted workers. Consequently, a national measure that conforms to the requirements of Directive 96/71 must generally be assumed to conform with Art. 56 TFEU as well, unless there are indications to the contrary. In such case, the procuring authority will have to provide rational support for why they procure for a specific wage, e.g., if they wish to set a procurement wage that exceeds the general standards; as discussed in the beginning, possible arguments could be found in the objective to pay a living wage.

All in all the decision *RegioPost* shows that public procurement can be employed as an instrument of social policy and in that sense has become a factor that is relevant for the process of European integration. In particular, the legality of establishing wage floors for public procurement aimed at neutralizing the downward pressure on wages that public authorities that public authorities exert through their procurement activity has been confirmed. By clarifying and partly overturning the controversial judgment *Rüffert*, *RegioPost* may contribute to an integration process that is more balanced in socio-economic terms.