Reports of Cases

OPINION OF ADVOCATE GENERAL
PAOLO MENGOZZI
delivered on 9 September 2015 [1]

Case C-115/14

RegioPost GmbH & Co. KG
v
Stadt Landau

(Request for a preliminary ruling from the Oberlandesgericht Koblenz (Germany))

(Purely internal situation — National identity — Article 4(2) TEU — Freedom to provide services — Article 56 TFEU — Directive 96/71/EC — Article 3(1) — Directive 2004/18/EC — Article 26 — Public procurement — Postal services — National legislation requiring tenderers and their subcontractors to undertake to pay a minimum wage to the staff performing the services forming the subject-matter of the public procurement contract)

I – **Introduction**

1. In a procedure for the award of a public procurement contract, does a contracting authority of a Member State have the power, under the provisions of EU law, to require tenderers and their subcontractors to undertake to pay the statutory minimum hourly wage to the personnel who will be responsible for performing the work forming the subject-matter of that contract?

2. That, in essence, is the subject-matter of the questions referred by the Oberlandesgericht Koblenz (Higher Regional Court, Koblenz) (Germany) in the course of proceedings between RegioPost GmbH & Co. KG ('RegioPost'), a postal services provider, and the Stadt Landau in der Pfalz (Town of Landau in der Pfalz), a municipality situated in the *Land* of Rhineland-Palatinate.

3. That issue, with which the Court has previously been faced in the cases giving rise to the judgments in *Rüffert* (C-346/06, EU:C:2008:189) and *Bundesdruckerei* (C-549/13, EU:C:2014:2235), albeit in different legal and factual circumstances, calls, in essence, for an interpretation of the provisions 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 [2] and Article 56 TFEU in the context of the freedom to provide services.

4. The order for reference states that, on 23 April 2013, the Stadt Landau in der Pfalz launched an EU-wide call for tenders for a public procurement contract for postal services in that town, divided into two lots.

1 — Original language: French.

2 — OJ 2004 L 134, p. 114, corrigendum in OJ 2004 L 351, p. 4. That directive was last amended by Commission Regulation (EU) No 1251/2011 of 30 November 2011 amending Directives 2004/17/EC, 2004/18 and 2009/81/EC of the European Parliament and of the Council in respect of their application thresholds for the procedures for the awards of contracts (OJ 2011 L 319, p. 43). It was replaced 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). However, the latter directive was not applicable at the time of the facts giving rise to the dispute in the main proceedings.

5. It is common ground that, at the time of the facts of the main proceedings, there was neither a general minimum wage in Germany, the latter having been introduced, at an hourly rate of EUR 8.50 (gross), only from 1 January 2015, nor a binding, universally applicable, collective agreement covering employment conditions in the postal services sector.

6. None the less, the contract notice issued by the Stadt Landau in der Pfalz stated, in connection with the 'economic and financial standing' of the successful tenderer, that the latter must comply with the provisions of the Law of the *Land* of Rhineland-Palatinate concerning the guarantee of compliance with collective agreements and the minimum wage in the context of the award of public contracts (Landesgesetz zur Gewährleistung von Tariftreue und Mindestentgelt bei öffentlichen Auftragsvergaben (Landestariftreuegesetz) ('the LTTG') of 1 December 2010.

7. Paragraph 1 of the LTTG states that that law is intended to combat distortions of competition in the award of public contracts that result from the use of low-paid personnel, and to alleviate the burden on the social security systems. The contracting authority may thus award public contracts only to undertakings that pay their employees the minimum wage provided for in that law.

8. Paragraph 3(1) of the LTTG states that public contracts may be awarded only to undertakings that, at the time of submitting their tender, undertake in writing to pay their staff, for the performance of the services, wages of at least EUR 8.50 (gross) per hour (minimum wage) and to put into effect, for the benefit of employees, any changes to the minimum wage during the period of performance. At the time of the facts of the case in the main proceedings, the minimum hourly wage referred to in Paragraph 3 of the LTTG had been increased to EUR 8.70 (gross) by regulation of the Government of the *Land* of Rhineland-Palatinate, in accordance with the procedure laid down in Paragraph 3(2) of the LTTG. Furthermore, Paragraph 3(1) of the LTTG also states that, if the declaration relating to the minimum wage is lacking at the time when the tender is submitted and is not forthcoming even after it has been requested, the tender is to be excluded from the evaluation.

9. The specifications for the public contract in question contained a 'model declaration' as provided for in Paragraph 3 of the LTTG and asked tenderers to present, at the time of submitting their tender, their own declaration that they undertook to pay the minimum wage and declarations on behalf of their subcontractors.

10. On 16 May 2013, RegioPost complained that the minimum wage declarations referred to in Paragraph 3 of the LTTG were contrary to public procurement law. It enclosed with its tender, which was submitted within the prescribed deadline, declarations by the subcontractors which it had drawn up on their behalf, but did not submit one for itself.

11. On 25 June 2013, the Stadt Landau in der Pfalz gave RegioPost the opportunity of producing the minimum wage declarations referred to in Paragraph 3 of the LTTG retrospectively, within a period of a fortnight, while at the same time pointing out that it would exclude RegioPost's tender if RegioPost failed to comply with that request.

12. On 27 June 2013, RegioPost, which had not produced the declarations sought by the contracting authority, reiterated its complaints and stated that, if its tender were excluded, it would bring an action.

13. On 11 July 2013, the contracting authority informed RegioPost that, for want of the declarations requested, its tender could not be evaluated. At the same time, it stated that the two lots of the contract in question would be awarded to PostCon Deutschland GmbH and Deutsche Post AG respectively.

14. On 23 October 2013, the Vergabekammer Rheinland-Pfalz (Public Procurement Board of the *Land* of Rhineland-Palatinate) dismissed the application for review made by RegioPost on the grounds, in particular, that the latter's tender had rightly been excluded because the declarations concerning the minimum wage legitimately requested by the contracting authority had not been produced.

15. Hearing the case on appeal, the referring court takes the view that the resolution of the case turns on whether Paragraph 3 of the LTTG is compatible with EU law.

16. More specifically, it considers that Paragraph 3 of the LTTG contains a 'special condition relating to the performance of a contract' which concerns 'social considerations' within the meaning of Article 26 of Directive 2004/18, and would be lawful only if compatible with the provisions of EU law concerning the freedom to provide services.

17. The referring court considers itself unable to determine the compatibility of that condition with EU law, even in the light of the Court's case-law, in particular the judgment in *Rüffert* (C-346/06, EU:C:2008:189).

18. As regards the compatibility of Paragraph 3 of the LTTG with the first paragraph of Article 56 TFEU, the referring court observes that the obligation incumbent on undertakings established in other Member States to adjust the wages paid to their employees to the — usually higher — level of remuneration applicable at the place of performance of the contract in Germany deprives those undertakings of a competitive advantage. Consequently, the obligation laid down in Paragraph 3 of the LTTG constitutes an obstacle prohibited, in principle, by the first paragraph of Article 56 TFEU.

19. The referring court takes the view, however, that EU law would not preclude the application of Paragraph 3 of the LTTG to those undertakings if it were to be found that the conditions governing the application of 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 [3] had been satisfied.

20. It none the less has doubts in this regard.

21. The referring court points out that, although Paragraph 3 of the LTTG is indeed a legislative provision which itself fixes the minimum rate of pay, that provision does not guarantee all the staff employed by the successful tenderers the payment of such wages. It simply prohibits contracting authorities from awarding a public contract to tenderers who do not undertake to pay the minimum wage to the workers assigned to perform that contract exclusively.

22. The referring court further states that the obligation laid down in Paragraph 3 of the LTTG applies only to public contracts and not to the performance of private contracts. However, a worker assigned to perform such a contract is no less worthy of social protection than a worker performing a public contract. The referring court points out in this regard that the application of the judgment in *Rüffert* (C-346/06, EU:C:2008:189) in a situation such as that at issue in the main proceedings is a matter of debate in Germany. It also expresses serious doubts about the proposition to the effect that the requirement that a minimum rate of pay must be applied generally to all the kinds of contract at issue is confined exclusively to the situation, which gave rise to the judgment in *Rüffert*, in which that rate is fixed by means of collective agreements and not by legislative provisions.

3 — OJ 1997 L 18, p. 1.

23. Finally, if it were to be concluded that the requirement laid down in Paragraph 3 of the LTTG is compatible with Article 56 TFEU, the referring court takes the view that it would then be necessary to consider whether the penalty provided for in Paragraph 3 of the LTTG, that is to say, the tenderer's exclusion from participation in the procurement procedure, is compatible with Article 26 of Directive 2004/18. In particular, the referring court expresses doubts about whether the condition laid down in Paragraph 3 of the LTTG may be classified as a qualitative selection criterion, any failure to meet which could justify a tenderer's exclusion. Moreover, it considers that the penalty laid down in Paragraph 3 of the LTTG is redundant, for the successful tenderer is contractually bound to pay the statutory minimum wage once the contract has been concluded and any failure to comply with that obligation attracts a penalty as laid down in Paragraph 7 of the LTTG.

24. In those circumstances, the referring court decided to stay proceedings and refer the following questions to the Court for a preliminary ruling:

'(1) Is the first paragraph of Article 56 TFEU in conjunction with Article 3(1) of Directive 96/71 to be interpreted as precluding a national provision which makes it mandatory for a contracting authority to award contracts only to undertakings which undertake and whose subcontractors undertake in writing, at the time of submitting the tender, to pay their employees who perform the contract a minimum wage fixed by the State for public contracts only but not for private ones, where there is neither a general statutory minimum wage nor a universally binding collective agreement that binds potential contractors and possible subcontractors?

(2) If the first question is answered in the negative:

Is EU law in the area of public procurement, in particular Article 26 of Directive 2004/18 to be interpreted as precluding a national provision such as the third sentence of Paragraph 3(1) of the [LTTG] which provides for the mandatory exclusion of a tender if an economic operator does not, already when submitting the tender, undertake in a separate declaration to do something which he would be contractually obliged to do if awarded the contract even without making that declaration?'

25. Written observations on those questions were submitted by the Stadt Landau in der Pfalz, Deutsche Post AG, the German, Danish, Italian, Austrian and Norwegian Governments and the European Commission. With the exception of the Italian and Austrian Governments, those parties, together with RegioPost, presented oral argument at the hearing of 29 April 2015.

II – **Analysis**

A – *The first question referred for a preliminary ruling*

26. By its first question, the referring court asks the Court whether legislation adopted by a federal entity of a Member State which requires tenderers and their subcontractors to undertake, by means of a written declaration to be enclosed with their tender, to pay the staff who will be called upon to perform the work forming the subject-matter of a public contract minimum hourly wages of EUR 8.70 (gross), as fixed by that legislation, is compatible with Article 56 TFEU and Article 3(1) of Directive 96/71.

1. The jurisdiction of the Court

27. The Stadt Landau in der Pfalz and the German and Italian Governments submit that, in so far as all the facts of the case in the main proceedings are confined within the territory of the Federal Republic of Germany, there is no need to answer this question, since the provisions of EU law relating to the freedom to provide services are not applicable to such a situation.

28. In my view, that argument cannot succeed.

29. It is true, as the order for reference makes clear, that all the undertakings which took part in the procedure for the award of the public contract in question are established in Germany, that that contract is to be performed in German territory, and that there is in addition nothing in the documents before the Court to indicate that subcontracting undertakings established in the territory of other Member States have been called upon to participate in the performance of the contract.

30. It is also true that the Treaty provisions relating to the freedom to provide services do not apply to situations in which all the relevant facts are confined within a single Member State. [4]

31. The Court considers, none the less, that it has jurisdiction to answer questions relating in particular to the interpretation of the Treaty provisions on the fundamental freedoms in contexts in which all the facts are confined within a single Member State in three cases: where it is 'far from inconceivable' that nationals of other Member States may, in similar situations, be faced with the contested national measures adopted by the Member State at issue when exercising one of those freedoms, [5] or where the domestic law prohibits 'reverse' discrimination [6] and/or where, in order to settle a purely internal dispute, domestic law makes a *renvoi*, in principle 'directly and unconditionally', to the rules of EU law. [7]

32. In the context of the first stream of case-law which has just been mentioned, the Court made it clear, in its judgments in *Venturini and Others* (C-159/12 to C-161/12, EU:C:2013:791, paragraph 26) and *Sokoll-Seebacher* (C-367/12, EU:C:2014:68, paragraph 11), that it had jurisdiction to answer questions referred for a preliminary ruling which, despite the purely internal nature of the situations giving rise to those questions, concerned the compatibility with the freedom of establishment guaranteed by the Treaty of national legislation which was *capable of producing effects* which are not confined to a single Member State. In such circumstances, it was 'far from inconceivable' that nationals of other Member States had been or were interested in exercising the fundamental freedom in question in those cases. [8]

33. Beyond the situation specific to the case in the main proceedings, the Court thus seems to be at pains to establish whether, by virtue of its purpose or its very nature, the national measure at issue is capable of producing cross-border effects. If that is the case, the Court will agree to answer the questions referred to it.

34. That case-law can be applied to the present case.

4 — See, inter alia, the judgment in *Omalet* (C-245/09, EU:C:2010:808, paragraph 12) and the order in *Tudoran* (C-92/14, EU:C:2014:2051, paragraph 37).

5 — See, inter alia, in relation to the freedom of establishment, the judgment in *Blanco Pérez and Chao Gómez* (C-570/07 and C-571/07, EU:C:2010:300, paragraph 40) and, in the field of the freedom to provide services, the judgments in *Garkalns* (C-470/11, EU:C:2012:505, paragraph 21) and *Citroën Belux* (C-265/12, EU:C:2013:498, paragraph 33).

6 — See in particular the judgments in *Guimont* (C-448/98, EU:C:2000:663, paragraph 23); *Salzmann* (C-300/01, EU:C:2003:283, paragraph 34); *Susisalo and Others* (C-84/11, EU:C:2012:374, paragraphs 21 and 22); and *Ordine degli Ingegneri di Verona e Provincia and Others* (C-111/12, EU:C:2013:100, paragraph 34).

7 — See, inter alia, the judgments in *Dzodzi* (C-297/88 and C-197/89, EU:C:1990:360, paragraph 37); *Cicala* (C-482/10, EU:C:2011:868, paragraph 19); *Nolan* (C-583/10, EU:C:2012:638, paragraph 47); and *Romeo* (C-313/12, EU:C:2013:718, paragraph 23).

8 — Judgments in *Venturini and Others* (C-159/12 to C-161/12, EU:C:2013:791, paragraphs 25 and 26) and *Sokoll-Seebacher* (C-367/12, EU:C:2014:68, paragraphs 10 and 11).

35. The purpose of the LTTG is to require the successful tenders for the award of public contracts organised by the contracting authorities of the *Land* of Rhineland-Palatinate to pay the minimum wage fixed by that *Land* for the performance of those contracts. Paragraph 3 of the LTTG requires every tenderer and any subcontractors it may engage, irrespective of their nationality or their place of residence, to give an undertaking in writing, at the time when the tender is submitted, to pay that minimum wage if in the end awarded the contract. As such, the LTTG may therefore produce effects beyond German territory, for the requirements which that legislation lays down apply without distinction to all calls for tenders, including those on an EU-wide scale, launched by the contracting authorities of the *Land* of Rhineland-Palatinate.

36. That was, furthermore, the situation at the time of the call for tenders giving rise to the case in the main proceedings. As is clear from the documents communicated by the referring court and as confirmed at the hearing by the Stadt Landau in der Pfalz, the public contract in question was launched on an EU-wide scale and its estimated value far exceeds the threshold of EUR 200 000 provided for in Article 7(b) of Directive 2004/18 that was applicable to public service contracts at the time of the facts of the case in the main proceedings. [9]

37. It is therefore by no means inconceivable that, when it was published in the *Official Journal of the European Union*, that call for tenders was of interest to a certain number of undertakings established in Member States other than Germany, but that those undertakings did not in the end participate in the procurement procedure for reasons which could be linked to the requirements laid down in Paragraph 3 of the LTTG.

38. It is, however, primarily the connection between the case in the main proceedings and the provisions of Directive 2004/18, the applicability of which is not in doubt, which supports my conviction that the objection as to lack of jurisdiction or inadmissibility raised by the Stadt Landau in der Pfalz and the German and Italian Governments must be dismissed. [10]

39. As the referring court has rightly pointed out, Article 26 of that directive grants contracting authorities the right to 'lay down special conditions relating to the performance of a contract' which may concern 'social considerations', provided that they are indicated in the contract notice or in the specifications and 'are compatible with [EU] law'.

40. The *renvoi* so made by Article 26 of Directive 2004/18 to the provisions of EU law means that the conditions relating to the obligation to pay a minimum rate of pay laid down in Paragraph 3 of the LTTG, which are linked to the performance of the public contract, must be compatible with those provisions, including, therefore, with the freedom to provide services guaranteed by the Treaty.

41. Furthermore, as the Court has previously held, the duty to observe the principle of equal treatment lies at the very heart of the public procurement directives, which are intended in particular to promote the development of effective competition and lay down criteria for the award of contracts that are intended to ensure such competition. [11]

9 — The services covered by Directive 2004/18 include services for the transport of mail by land, pursuant to point 4 of Annex II A. The threshold of EUR 200 000 referred to in Article 7(b) of Directive 2004/18 was fixed by Article 2(1)(b) of Regulation No 1251/2011.

10 — Although those interested parties submit that the first question is inadmissible, the consequence of a finding that the situation at issue is purely internal would have to prompt the Court to declare, in principle, that it has no jurisdiction to answer the question. That situation is in fact one which, in principle, involves no factor connecting it to EU law and cannot therefore be remedied by the sending of a new request for a preliminary ruling.

11 — See the judgments in *Concordia Bus Finland* (C-513/99, EU:C:2002:495, paragraph 81) and *Fabricom* (C-21/03 and C-34/03, EU:C:2005:127, paragraph 26).

42. Because the referring court, like the contracting authority, has a duty to ensure equal treatment for tenderers participating in a call for tenders relating to a contract falling within the ambit of Directive 2004/18, the latter therefore requires the referring court, when adjudicating on purely internal situations, to adopt the same solutions as those adopted in EU law in order, in particular, to avoid any discrimination between economic operators or any distortion of competition. [12]

43. That, at all events, is why I am of the opinion that, in so far as the contract notice in the case in the main proceedings falls within the ambit of the provisions of Directive 2004/18, it is primarily the conditions governing the application of Article 26 of that directive which form the true subject-matter of the interpretation requested by the referring court in its first question. Consequently, if the first question referred by the national court is reworded in such a way as to relate to the interpretation of Article 26 of Directive 2004/18, the Court necessarily has jurisdiction to interpret that article. The applicability of the provisions of Directive 2004/18 does not depend on the existence of an actual link to the freedom of movement between the Member States; those provisions become relevant as soon as the amount of the contract at issue in the main proceedings exceeds the thresholds for the application of that directive, [13] which, in the case in the main proceedings, it does.

44. In those circumstances, I take the view that the Court has jurisdiction to answer the first question referred for a preliminary ruling by the national court. As I have said, in my opinion, its jurisdiction to do so is clear if that question is reworded in such a way as to seek an interpretation of the effect of the conditions laid down in Article 26 of Directive 2004/18.

2. Substance

45. In the light of the foregoing observations concerning the rewording of the question referred by the national court, I consider that that court seeks, in essence, to ascertain whether Article 26 of Directive 2004/18 is to be interpreted as meaning that it precludes the legislation of a regional entity of a Member State that requires tenderers and their subcontractors to undertake, by means of a written declaration to be enclosed with their tender, to pay the staff who will be called upon to perform the work forming the subject-matter of a public procurement contract a minimum hourly wage of EUR 8.70 (gross), as fixed by that legislation.

46. Article 26 of Directive 2004/18 authorises contracting authorities to make the performance of the public contract subject to ‘special conditions’ which may concern ‘social considerations’, provided that those conditions are indicated in the contract notice or in the specifications and are ‘compatible with [EU] law’.

47. In this instance, the requirement for the successful tenderer to comply with the provisions of the LTTG, in particular Paragraph 3 thereof, was clearly indicated both in the contract notice and in the specifications in the case in the main proceedings. Moreover, there is no doubt, in my opinion, that the ‘social considerations’ referred to in Article 26 of Directive 2004/18 include the obligation for a successful tenderer and any subcontractors it engages, when performing a public contract, to pay a minimum rate of pay fixed by law for the benefit of the workers assigned to that task.

12 — See, by analogy, with regard to the obligation, arising from the application of national legislation, to extend the solutions adopted by EU law to purely internal situations, the judgments in *Modehuis A. Zwijnenburg* (C-352/08, EU:C:2010:282, paragraph 33) and *Isbir* (C-522/12, EU:C:2013:711, paragraph 28).

13 — See, by analogy, with regard to Council Directive 93/37/EEC of 14 June 1993 concerning the coordination of procedures for the award of public works contracts (OJ 1993 L 199, p. 54), which was repealed by Directive 2004/18, the judgment in *Michaniki* (C-213/07, EU:C:2008:731, paragraphs 29 and 30).

48. Recital 34 in the preamble to that directive confirms that '[t]he laws, regulations …, at … national … level, which are in force *in the areas of employment conditions* … apply during performance of a public contract, providing that such rules, and their application, *comply with [EU] law*'.[14] Compliance with a minimum rate of pay is eminently capable of falling within the category of employment conditions.[15]

49. In accordance with Article 26 of Directive 2004/18, read in the light of recital 34 of that directive, the possibility of requiring observance of such a minimum rate of pay must none the less be compatible with EU law.

50. It is therefore necessary to establish whether a requirement in respect of a minimum rate of pay for the purposes of the performance of a public procurement contract, such as that at issue in the case in the main proceedings, is compatible with the relevant provisions of EU law.

51. In that regard, the referring court and the interested parties take the view that such an examination must be undertaken primarily, if not exclusively, in the light of Article 3(1) of Directive 96/71, in so far as that provision governs the terms and conditions of employment which Member States may require of undertakings that temporarily post workers for the purpose of providing services.

52. I am unpersuaded by that approach.

53. The reason for this is that it is common ground that the case in the main proceedings does not fall within the ambit of any of the measures involving the posting of workers referred to in Article 1(3) of Directive 96/71. In particular, for the purposes of performing the public contract for which it tendered, RegioPost, which is established in Germany, did not intend either to rely on an establishment or undertaking within its group which would have posted workers to German territory, or even to use the services of a temporary employment undertaking or placement agency which hires out workers from another Member State in order to have such workers posted to Germany.

54. From the point of view of the application of Directive 96/71, the situation giving to rise the present case is not substantially different from that which gave rise to the judgment in *Bundesdruckerei* (C-549/13, EU:C:2014:2235), in which the Court held that it could not examine the compatibility between the provisions of that directive and the legislation of a German *Land* requiring undertakings which had successfully tendered for a public contract to observe a minimum rate of pay fixed by that same legislation, on the ground that the situation at issue in the main proceedings was not covered by one of the three transnational measures referred to in Article 1(3) of Directive 96/71.[16]

55. It was apparent from the request for a preliminary ruling in that case that the undertaking Bundesdruckerei intended to perform the public contract in question (which concerned the digitalisation of documents and the conversion of data for the benefit of a German municipality) not by posting workers to German territory but by entrusting the contract to workers employed by one of its subsidiaries established in the territory of another Member State, namely Poland.[17]

56. In other words, according to the Court's reasoning, even though the situation in question was transnational, it did not involve the temporary posting of workers to German territory for the purpose of providing the services at issue.

14 — Emphasis added.

15 — By way of illustration, the first subparagraph of Article 3(1) of Directive 96/71, which lists the 'terms and conditions of employment' which the Member States are entitled to require of undertakings posting workers to their territory for the purpose of providing services, refers, inter alia, to 'minimum rates of pay'.

16 — Judgment in *Bundesdruckerei* (C-549/13, EU:C:2014:2235, paragraph 27).

17 — Idem (paragraphs 25 and 26).

57. It is also important to note that, in excluding the application of Directive 96/71, the Court drew attention, not to the situation as it stood when the contracting authority issued its contract notice at EU level, at which time the posting of workers to German territory was still a possibility, but to the specific situation in which Bundesdruckerei found itself and which had given rise to the reference for a preliminary ruling.

58. The Court thus inferred from those circumstances that the interpretation of Article 56 TFEU alone was relevant in *Bundesdruckerei* (C-549/13, EU:C:2014:2235, paragraph 29).

59. In my opinion, that is the approach that must be adopted in the present case too.

60. Consequently, in a situation such as that in the case in the main proceedings, I take the view that the *renvoi* made to EU law by Article 26 of Directive 2004/18 relates exclusively to Article 56 TFEU.

61. In order to ascertain whether a rule of national law such as Paragraph 3 of the LTTG is compatible with Article 56 TFEU, it is necessary, in essence, to determine whether the minimum rate of pay provided for in the legislation of the *Land* of Rhineland-Palatinate constitutes a restriction of the freedom to provide services, that could be justified by the objectives of combating distortions of competition or protecting workers, as both the Stadt Landau in der Pfalz and the German Government have submitted.

62. First of all, in the light of the case-law of the Court, there is no doubt that, in requiring suppliers which have successfully tendered for public contracts and any subcontractors they may engage to observe a minimum hourly rate of pay of EUR 8.70 (gross), legislation such as that of the *Land* of Rhineland-Palatinate may impose on service providers established in Member States other than Germany in which the minimum rates of pay are lower an additional economic burden that may prohibit, impede or render less attractive the provision of their services in Germany. Consequently, such a national measure is capable of constituting a restriction within the meaning of Article 56 TFEU. [18]

63. Next, it must be ascertained whether such a national measure may be justified, inter alia, in the light of the objective of protecting workers.

64. In that connection, both RegioPost and the Commission submit, with reference in particular to paragraphs 29 and 39 of the judgment in *Rüffert* (C-346/06, EU:C:2008:189), that this is not the case, since the protection afforded by Paragraph 3(1) of the LTTG does not extend to workers assigned to perform private contracts.

65. I do not share that view.

66. In *Rüffert*, the Court was asked about the compatibility with Article 3(1) of Directive 96/71 and with Article 56 TFEU of the legislation of a German *Land* requiring suppliers which had successfully tendered for public construction contracts and local public transport contracts to observe, when performing those contracts, the rate of pay provided for under a collective agreement referred to by the *Land* legislation in question.

18 — See the judgment in *Rüffert* (C-346/06, EU:C:2008:189, paragraph 37). See also the judgment in *Bundesdruckerei* (C-549/13, EU:C:2014:2235, paragraph 30).

67. In the light of the interpretation of Directive 96/71, which, according to the Court's reasoning in the judgment in *Rüffert* (C-346/06, EU:C:2008:189), is also relevant to the interpretation of Article 56 TFEU, the question thus arose as to whether the collective agreement at issue in that case had been declared universally applicable within the meaning of Article 3(1) of that directive. The Court held that that was not the case and that, consequently, the procedures for fixing the minimum rate of pay provided for by Directive 96/71 had not been observed.

68. Going somewhat beyond that issue [19] and examining the universal and binding effect of a collective agreement such as that at issue in that case, the Court held, in paragraph 29 of the judgment in *Rüffert* (C-346/06, EU:C:2008:189), that such an effect could not be held to exist where, in particular, the 'legislation' of the *Land* in question, which referred to observance of the rate of pay provided for in that agreement, 'applie[d] only to public contracts and not to private contracts'.

69. In paragraph 39 of the judgment in *Rüffert* (C-346/06, EU:C:2008:189), which forms part of the Court's 'confirmatory' reasoning relating to Article 56 TFEU, the Court reiterated word for word the assessment cited above, contained in paragraph 29 of the judgment.

70. None the less, the implications of the assessment contained in paragraphs 29 and 39 of the judgment in *Rüffert* must now be reconsidered in the light of Article 26 of Directive 2004/18, an entirely new provision in EU public procurement law which was not applicable at the time of the facts giving rise to that judgment. [20]

71. As I have already stated, Article 26 of Directive 2004/18 authorises Member States to require suppliers which have successfully tendered for public contracts to comply with *special* conditions, including employment conditions, when performing those contracts. If that authorisation is to continue to be of practical effect, the Member States must, in my view, be empowered to adopt laws, regulations or administrative provisions which, in the specific context of public contracts, lay down employment conditions, including a minimum rate of pay, for the benefit of the workers who provide services in performance of those contracts.

72. It is clear that, in exercising that power, the Member States and the contracting authorities must ensure that the principles of transparency and non-discrimination, as provided for in Article 26 of Directive 2004/18 in reference to EU law, are observed.

73. However, the exercise of that power cannot, in my view, be made subject to the requirement that the employment conditions in question, such as in this instance the minimum rate of pay, must also apply to workers performing private contracts. If that were the case, those conditions would cease to be 'special conditions' within the meaning of Article 26 of Directive 2004/18. Furthermore, a requirement to extend employment conditions to the performance of private contracts in this way would ultimately have the effect of compelling the Member States to introduce a universal minimum rate of pay applicable in some or all parts of their respective territories, which they are currently in no way obliged to do under EU law. [21]

19 — The Court looked at whether the collective agreement in question satisfied the material conditions laid down in Article 3(8) of Directive 96/71, which provision, as the Court itself confirmed in paragraph 27 of the judgment in *Rüffert* (C-346/06, EU:C:2008:189), applies only to Member States which have no system for declaring collective agreements to be of universal application (as was the case with the Kingdom of Sweden in *Laval un Partneri*, C-341/05, EU:C:2007:809). However, since the Federal Republic of Germany did have such a system, there was no need to examine whether the conditions under Article 3(8) of Directive 96/71 were met.

20 — While the period prescribed for transposing Directive 2004/18 expired on 31 January 2006, the events giving rise to *Rüffert* took place during the course of 2003 and 2004.

21 — On the absence of any such obligation under Directive 96/71 in particular, see the judgment in *Commission* v *Germany* (C-341/02, EU:C:2005:220, paragraph 26) and my Opinion in *Laval un Partneri* (C-341/05, EU:C:2007:291, point 196).

74. In fact, in a context such as that at issue in the case in the main proceedings, such an extension, the reason for which would be concern to ensure the consistency of the *Land* legislation, even seems to me to be potentially prejudicial to the powers of the *Länder*.

75. As several interested parties have emphasised, while the *Länder* have the power under German law to lay down rules governing minimum rates of pay when issuing calls for tenders for public contracts, they have no such powers when it comes to fixing minimum rates of pay for workers as a whole.

76. The outcome of upholding the proposition advanced by RegioPost and the Commission would be that, in a case such as that in the main proceedings, a *Land* would be unable to apply its legislation transposing the authorisation granted by Directive 2004/18 because the scope of such legislation would have to extend beyond the specific public procurement sector in respect of which the *Land* has exercised its powers.

77. As a result, the *Land* would have no option but to refrain from applying that legislation until such time as the Federal State decided to introduce a universally applicable minimum rate of pay.

78. At Federal State level, that approach, which, if the line of argument put forward by RegioPost and the Commission is carried through to its logical conclusion, would have to be adopted in order to comply with the requirement to extend to private contracts the treatment previously reserved for public contracts, would effectively transform the option made available to Member States to introduce a minimum wage in their respective territories into an actual obligation, which, as I have already said, is by no means provided for by EU law as it currently stands.

79. At *Land* level, the introduction of a minimum rate of pay by the Federal State would render superfluous the legislative provisions adopted by the *Land* for the specific purpose of ensuring that successful tenderers fulfilled the obligation to pay a minimum wage to workers performing a public contract in its territory.

80. In such circumstances, the *Land*'s powers in this sphere would be significantly reduced, if not non-existent.

81. It might be argued, it is true, that, in the situation envisaged in the foregoing points of this Opinion, the *Länder* would still be authorised to adopt a (minimum) rate of pay higher than that fixed at Federal level in order, in particular, to take into account local costs of living. However, there would still be the question of whether such a rate would retain the status of a minimum rate of pay and, in particular, whether it would not itself have to be extended to workers assigned to the performance of private contracts. Ultimately, the *Länder* would quite simply have to waive their powers in the public procurement sector and apply the minimum rate of pay adopted at Federal level in that sector.

82. It should be recalled that, under Article 4(2) TEU, the Union is required to respect the national identity of the Member States, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government.

83. It is true that Member States with a federal structure, such as the Federal Republic of Germany, may not rely on the internal allocation of competences between the authorities at regional and local level and the Federal authorities with a view to evading compliance with their obligations under EU law.[22] In order to ensure compliance with those obligations, those various authorities are bound to coordinate the exercise of their respective competences.[23]

22 — See, inter alia, the judgment in *Carmen Media Group* (C-46/08, EU:C:2010:505, paragraph 69 and the case-law cited).

23 — See the judgments in *Carmen Media Group* (C-46/08, EU:C:2010:505, paragraph 70) and *Digibet and Albers* (C-156/13, EU:C:2014:1756, paragraph 35).

84. That requirement presupposes, however, that the powers of those authorities can actually be exercised. To my mind, it is clear from Article 4(2) TEU that EU law cannot prevent a regional or local entity from actually exercising the powers vested in it within the Member State concerned. As the preceding submissions serve to demonstrate, however, that would be the ultimate consequence of RegioPost's and the Commission's argument that, in order to be compatible with Article 56 TFEU, the rule laid down in Paragraph 3 of the LTTG for the benefit of workers performing a public contract would have to be extended to workers assigned to the performance of private contracts.

85. It therefore seems to me to be perfectly consistent with the powers exercised by the *Land* of Rhineland-Palatinate that the scope of Paragraph 3 of the LTTG should be confined to workers performing public contracts.

86. As I see it, that approach is also consistent with the Court's case-law in the context of the special environmental considerations, applicable without distinction, which contracting authorities may require to be taken into account. Thus, that case-law recognises in particular that such considerations may be taken into account in the examination of criteria governing the award of public contracts for the provision of urban transport services and be compatible with the principle of non-discrimination, without need for those considerations to be further extended to urban transport undertakings where these perform private contracts.[24] It is important to make the point that Article 26 of Directive 2004/18 refers to environmental considerations in the same way as to the social considerations examined in the present case. To my mind, the analogy which the German Government draws between those two types of considerations makes readily apparent the need to allow the Member States to adopt measures specific to the economic sector of public procurement.

87. Furthermore, a national measure such as Paragraph 3 of the LTTG seems to me to be entirely proportionate. It requires successful tenderers and any subcontractors they may engage to pay the minimum wage fixed by the *Land* of Rhineland-Palatinate only for the benefit of those of their workers who are assigned to the performance of public contracts, not for the benefit of all their employees.

88. Consequently, it is my view that Paragraph 3 of the LTTG may be justified by the objective of protecting workers and, therefore, that Article 56 TFEU does not preclude the application of a provision of that kind in a situation such as that in the case in the main proceedings, there being no need for the scope of that provision to be extended to private contracts.

89. In the light of all those considerations, I propose that the first question referred for a preliminary ruling by the national court be answered as follows: Article 26 of Directive 2004/18 is to be interpreted as not precluding the legislation of a regional entity of a Member State which requires tenderers and their subcontractors to undertake, by means of a written declaration to be enclosed with their tender, to pay the staff who will be called upon to perform the work forming the subject-matter of a public procurement contract a minimum hourly wage of EUR 8.70 (gross), fixed by that legislation.

24 — See the judgment in *Concordia Bus Finland* (C-513/99, EU:C:2002:495, paragraphs 83 to 86).

B – *The second question referred for a preliminary ruling*

90. By its second question referred for a preliminary ruling, the national court wishes to ascertain, in essence, whether Article 26 of Directive 2004/18 must nevertheless be interpreted as precluding a provision adopted by a regional entity of a Member State, such as Paragraph 3(1) of the LTTG, which provides that a tender must compulsorily be excluded if the tenderer fails, when submitting its tender, to give an undertaking, in a separate declaration, in respect of the minimum rate of pay laid down by that provision, and which it would be contractually bound to pay in any case if it were awarded the contract.

91. That question calls for an examination, first, of the means by which the Member States are authorised to verify that the conditions laid down in Article 26 of Directive 2004/18 have been satisfied, and secondly, supposing that those conditions are not met, of the issue of whether a penalty, such as exclusion from participating in the public procurement procedure, is appropriate.

92. With the exception of RegioPost, all the parties which have submitted observations on this question contend that the Member States are authorised to review compliance with the conditions laid down in Article 26 of Directive 2004/18, in particular by means of a system whereby the tenderer makes a declaration of its undertaking at the time when it submits its tender, and that, if such a declaration is not produced, the contracting authority is authorised to exclude the tenderer from the procurement procedure.

93. I concur with the position adopted by the latter parties.

94. As regards the first point, it is, to my mind, clear that if, as I consider, the Member States are authorised under EU law to adopt laws or regulations aimed at imposing on successful tenderers special employment conditions such as payment of a minimum rate of pay in the performance of public contracts, that authorisation necessarily implies that the Member States may adopt measures enabling the contracting authority to ensure that the tenderers and their subcontractors are prepared to fulfil those conditions in the event that the contract is awarded to them.

95. In the present case, the measure at issue takes the form of a written declaration of commitment which the tenderer must provide both for itself and, if appropriate, for its subcontractors.

96. Contrary to what appears to have been stated in the contract notice in the case in the main proceedings, that declaration does not appear to be a document relating to the minimum level of economic and financial standing that may be required of the tenderer under Article 47 of Directive 2004/18, which may be demonstrated by one or more of the references listed in that article or by any document deemed appropriate by the contracting authority, in particular the economic operator's balance-sheet or a statement of its overall or sector-specific turnover.

97. It is above all else a declaration of an undertaking to observe the law, that is to say, more specifically, the employment conditions required by the legislation of the *Land* of Rhineland-Palatinate, when performing the work forming the subject-matter of the public contract.

98. It could, it is true, be argued, as the Commission did at the hearing before the Court, that proof that the tenderer or its subcontractors are able to pay the minimum wage fixed by the legislation of the *Land* of Rhineland-Palatinate to the employees assigned to perform the public procurement contract requires a certain financial capacity.

99. Even if the Court were to take the view that the declaration of an undertaking to pay a minimum wage has to do with the tenderer's financial standing, the requirement to submit such a declaration would not be prohibited by Article 47 of Directive 2004/18. The Court has already made it clear that the list of criteria for assessing the minimum level of economic and financial standing required is not

exhaustive. [25]

100. At all events, such a declaration of an undertaking to pay the minimum wage fixed by the legislation of the *Land* of Rhineland-Palatinate is not in itself capable of placing on the tenderer an additional burden so intolerable as to render the procurement procedure more onerous than it would be without the requirement to produce that declaration. In asking for that declaration, the contracting authority seeks only to verify that the tenderer undertakes to comply with the condition for the performance of the contract laid down in Paragraph 3 of the LTTG. As the Commission submits, moreover, such a declaration is a proven means of verifying that tenderers and their subcontractors satisfy the conditions governing the performance of public contracts. Requiring the submission of such a declaration also lends transparency to the special conditions set out in the contract notice and/or specifications by alerting tenderers to the importance which the contracting authority attaches to those conditions.

101. As regards the second point, that is to say, exclusion from the procurement procedure if the tenderer refuses to give such a declaration of commitment, I would endorse the Commission's argument that such a refusal supports the assumption that the tenderer does not intend to submit to the condition laid down in Paragraph 3 of the LTTG.

102. Pursuing a procurement procedure with such an economic operator and, if appropriate, awarding the contract to that operator, only to have to impose contractual penalties on it later on account of its failure to observe the condition laid down in Paragraph 3 of the LTTG, would be paradoxical and incompatible with the rational use of public finances.

103. It is important to point out, moreover, that recital 34 of Directive 2004/18 provides in particular that, in the event of non-compliance with the obligations connected with observance of the laws and regulations in force in the sphere, in particular, of conditions of employment, the Member States may classify such non-compliance as grave misconduct or an offence concerning the professional conduct of the economic operator concerned that is liable to lead to the exclusion of that operator from the public procurement procedure.

104. While, in my view, the refusal to submit a declaration of commitment to pay the minimum wage cannot, as such, be regarded as grave misconduct, the idea underlying recital 34 of Directive 2004/18 is indeed that it is recognised that the Member States are entitled to exclude an economic operator who has no intention of complying with the employment conditions applicable in the place of performance of the public contract. In my opinion, the Member States cannot be required to employ such a measure only in situations in which their authorities find that there has been an infringement of the obligations linked to compliance with those employment conditions by the supplier which has tendered for the public procurement contract.

105. Excluding the tenderer from the procurement procedure on the ground that it refuses to submit a declaration of commitment as referred to in Paragraph 3 of the LTTG is therefore, in my opinion, an appropriate means of ensuring that the contracting authority is not prompted to select a candidate which has no intention of satisfying the requirements laid down by that contracting authority with respect to payment of the minimum wage.

106. Finally, as is clear from the facts of the case in the main proceedings, it is important to make the point that the exclusion of a tenderer which has failed to enclose a declaration of commitment to pay the minimum wage when submitting its tender is not automatic. Under Paragraph 3 of the LTTG, the contracting authority is not authorised to exclude such a tender until it has made a further request for

25 — See the judgment in *Édukövízig and Hochtief Construction* (C-218/11, EU:C:2012:643, paragraph 28).

the production of the declaration of commitment within a certain period of time. This serves as a remedial measure in cases of forgetfulness or error on the part of the tenderer at the time of submitting the tender. Such an obligation for the contracting authority appears to be a wholly proportionate measure.

107. In the light of those considerations, I propose that the second question referred for a preliminary ruling be answered as follows: Article 26 of Directive 2004/18 is to be interpreted as not precluding the legislation of a regional entity of a Member State which provides for the mandatory exclusion of a tender where a supplier tendering for a public contract fails to give an undertaking, on its own and its subcontractors' behalf, in a separate declaration made at the time of submitting its tender or after having received a further request to that effect from the contracting authority, that it would pay the minimum wage fixed by that legislation if it were to be awarded the task of performing the work forming the subject-matter of the public procurement contract in question.

III – **Conclusion**

108. In the light of all the foregoing considerations, I propose that the questions referred by the Oberlandesgericht Koblenz be answered as follows:

(1) 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 is to be interpreted as not precluding the legislation of a regional entity of a Member State which requires tenderers and their subcontractors to undertake, by means of a written declaration to be enclosed with their tender, to pay the staff who will be called upon to perform the work forming the subject-matter of a public procurement contract a minimum hourly wage of EUR 8.70 (gross), fixed by that legislation.

(2) Article 26 of Directive 2004/18 is to be interpreted as not precluding the legislation of a regional entity of a Member State which provides for the mandatory exclusion of a tender where a supplier tendering for a public contract fails to give an undertaking, on its own and its subcontractors' behalf, in a separate declaration made at the time of submitting its tender or after having received a further request to that effect from the contracting authority, that it would pay the minimum wage fixed by that legislation, if it were to be awarded the task of performing the work forming the subject-matter of the public procurement contract in question.