



Briefing note

ECJ case C-346/06 Dirk Rüffert – Land Niedersachsen (DE)

Relevant EU legislation: Article 49 EU Treaty ; Public Procurement Directive; Posting Directive

The question put to the ECJ (unofficial translation)

Is it an illegal restriction of the freedom to provide services according to the EC Treaty that a contracting entity according to law is obliged, in public procurements, to only award offers from companies that in their tenders oblige themselves in writing to pay their employees wages "that are at least at the level of the wages that are foreseen on the basis of the collective agreement that applies to the place where the work is done" ?

The European importance of the case

The Dirk Rüffert case is another worrying case in the series of Laval and Viking, that are already before the ECJ, this time especially focussing on the possible different legal effect of demanding "comparable/equal wages" or "minimum wages". The referring Court suggests that article 49 of the Treaty prohibits the demand to pay wages "that are at least at the level of the wages that are foreseen on the basis of the collective agreement that applies to the place where the work is done", because these may be higher than the minimum wage that would otherwise be applicable, and more in general this kind of public procurement obligations would prevent foreign service providers from competing on the basis of lower wages.

The time schedule

The reference for a preliminary ruling was sent to the ECJ on 2006-07-18 by a German Court. Member States and EC institutions were notified by the ECJ around 2006-09-28 (the date may vary between Member States). The deadline for written observations to the ECJ is 2 months and 10 days after the day of notification, (so this may vary as well). A large number of intervening Member States supporting the view that a contracting entity may demand that the contractor – be he German or foreign - applies 'equal' wages both in the interest of protecting workers as in the interest of preventing unfair competition is important. The Commission also should support this view in its submission.

The facts in the case

The tenderer, Objekt und Bauregie GmbH & Co. KG , signed a contract when the tender was awarded, where he obliged himself to pay wages according to the locally applicable collective agreement. Objekt und Bauregie also undertook to oblige its subcontractors to pay wages according to the collective agreement applicable at the building site.

The contract was signed according to the public procurement law of Niedersachsen.

The tenderer hired a subcontractor, PKZ sp.z.o.o., from Poland, with an establishment in Germany. An inquiry by the tendering entity and Niedersachsen showed that the posted workers hired for the work by PKZ were not paid according to the locally applicable collective agreement. The 53 workers at the building site were paid 46.57 % of the applicable minimum wage, i.e. the minimum wage laid down by national law on the basis of a national collective agreement in the construction sector.

(NB: it is not clear from the case as referred to the ECJ if those workers were all unskilled workers that would fall under wage groups 1-2. This is highly relevant, as the legal and contractual situation with regard to low skilled and higher skilled workers is different, see explanation below.)

The contract was withdrawn and Niedersachsen decided to demand a fee for the contract infringement.

The tenderer opposed the decision and went to Court (Landgericht). The Court decided that the contracting entity had the right to oblige the tenderer to pay the contract infringement fee (but only 1 % of the contract value). The Court disapproved the other parts of the suit. Both parties appealed against the Court's decision. The Court of Appeal (Oberlandsgericht) decided to ask the ECJ for a preliminary ruling on 2006-07-18.

The reasoning of the referring Court

The referring Court wants to know if it should refrain from applying the public procurement law of Niedersachsen, in particular its article 8, because it is incompatible with the freedom to provide services according to article 49 EC Treaty. The ECJ is being asked to interpret the (in)compatibility of the Landesvergabegesetz with EC law.

The referring Court takes its starting point in ECJ case law on article 49 EC Treaty. It states that it is settled case-law that Article 49 requires not only the elimination of all discrimination on grounds of nationality against providers of services who are established in another Member State, but also the abolition of any restriction, even if it applies without distinction to national providers of services and to those of other Member States, which is liable to prohibit, impede or render less attractive the activities of a provider of services established in another Member State in which he lawfully provides similar services.

The referring Court states that the obligation to pay wages according to the local collective agreement has as its consequence that construction companies from other Member States (than Germany) must adapt their wages to German wages which are normally higher. The companies thereby lose the competitive advantage they would have had with lower wages. Consequently, the obligation to pay local collective agreement wages constitutes an obstacle for persons and companies from other Member States to enter the market.

Rules that restrict free movement can be justified where they meet overriding requirements relating to the public interest. Protection of workers can be an overriding requirement relating to the public interest. However, the referring Court states that it is disputed whether obligations to pay a certain wage, as in the case of the Landesvergabegesetz, can constitute an overriding requirement relating to the public interest.

The reason for that is that the law also protects German construction companies from foreign competition.

The referring Court also states that previous ECJ case law on minimum wages cannot apply to the obligation to pay wages laid down in the collective agreement applicable at the construction site, since these would considerably exceed the regulation on minimum wages in the 'Arbeitnehmer-Entsendegesetz' (AEntG – Posting of Workers Act). The Court continues saying that service providers from other member states must therefore pay higher wages than the minimum wages stated in this law.

(NB: here again the Court does not clarify if the workers concerned would be falling under wage groups 1-2, i.e. therefore covered by the AEntsg, in which case the remark of the Court does not make any sense, or under wage groups 2a-6)

The referring Court quotes different opinions in Germany (the so called majority and minority views), where the majority view advocates that the inclusion of procurement criteria which demand wage levels exceeding the minimum wage stated by the above mentioned law should be considered an obstacle to the free movement of services. The appropriate wage level constituting protection for workers should be the minimum wage. The obligation to pay wages according to locally applicable collective agreements would discriminate foreign workers since their employers cannot make use of their lower price advantages in the competition. The referring Court tends to support the majority opinion.

The relevant national law

The **public procurement law of Niedersachsen** (Landesvergabegesetz) provides the following procedure for tenders over 10 000 Euros: The tendering entity can only, in public procurements in the construction sector (and the sector of public transportation of passengers), conclude agreements with companies that commit themselves to pay equal (same) wages to the wages in collective agreements applicable at the construction site where the work is conducted. The tenderer must in a written contract commit himself, and his subcontractors, to pay wages according to the local collective agreements. A tenderer, or its subcontractor, that does not follow the contract regarding wages can lose the contract and become obliged to pay a fee for the contract infringement (1-10% of the contract value) according to article 8 Landesvergabegesetz. The preamble to the public procurement law of Niedersachsen also states that the purpose of the law is to prevent distorted competition by the use of cheap labour, in particular in the construction sector, and to minimize charges on the systems of social security.

The **Law on the Posting of workers** (Arbeitnehmerentsendegesetz) is the transposition of the Posting Directive in German Law. With regard to the minimum wages to be applied in the construction sector, it refers to the 5.Verordnung of the Ministry of Labour that declares universally binding the minimum-wage levels as regulated in the 'Tarifvertrag Mindestlohn' for the construction sector, regulating wage levels 1 and 2 in the Construction sector (i.e. the lowest wages in the construction sector, for unskilled and low skilled work).

Clarification on the applicable collective agreements in the German construction sector

There exists a generally binding nationwide collective agreement for the construction sector, which lays down descriptive rules on wages groups, but does not regulate the exact wages. Wages are regulated in specific wage-agreements (Entgeltverträge). There are two collective wage agreements applying to construction workers, laying down the wages to be paid ('Tarifvertrag Mindestlohn' and 'Tarifvertrag zur Regelung der Löhne und Ausbildungsvergütungen im Baugewerbe im Gebiet der Bundesrepublik Deutschland mit Ausnahme der fünf neuen Länder und des Landes Berlin'). The first one, dealing with minimum wages, is applicable nationwide to all workers in the construction sector based on a decree (so called 5.Verordnung of the Ministry of labour), which itself is based on the "Arbeitnehmerentsendegesetz" (the law transposing the posting Directive in Germany). The second nationwide collective agreement regulates wage levels 2a to 6 (i.e. for skilled workers and higher) for the whole of Germany, except for Berlin and Eastern Germany. This collective agreement is itself not declared generally binding. In this case, both collective agreements (i.e. on wage levels 1-2 and on wage-levels 2a-6) are made binding to **all** contractors executing public works, be they from national or foreign origin, in the Land Niedersachsen through the law on public procurement. This means that no distinction is made with regard to wages, if a worker is working for a German or a foreign company.

Some legal comments

The OLG Celle's preliminary ruling is another case where service providers/subcontractors try to use article 49 EC Treaty in order to gain access to lower wages through internal market regulation. The connection to the Laval case (C-341/05) and the Viking case (C-438/05) is evident. Article 49 is used as an instrument to attack national legislation which restricts unfair wage competition. The ambiguity in EC law on which the referring Court founds its preliminary ruling reference is not evident. EC law seems to be rather clear in this case. It seems as if the referring Court has forgotten to check the *leges specialis* (in this case 2) before going to the general legal framework (article 49).

As an *obiter dictum* it can be said that after the OLG Celle's decision to bring its matter to the ECJ the German Constitutional Court has held that the Berlin Public Procurement Act which is similar to the one of Niedersachsen is fully compatible with the German Constitution (BVerfG of 11 July 2006, 1 BvL 4/00).

Public Procurement Directive

Firstly, the Public Procurement Directive (2004/18/EC) which was adopted recently provides in Article 26 that:

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

Article 27 (on "obligations relating to taxes, environmental protection, employment protection provisions and working conditions") provides that:

1. A contracting authority may state in the contract documents, or be obliged by a Member State so to state, the body or bodies from which a candidate or tenderer may obtain the appropriate information on the obligations relating [...], to the employment protection provisions and to the working conditions which are in force in the Member State, region or locality in which the works are to be carried out or services are to be provided and which shall be applicable to the works carried out on site or to the services provided during the performance of the contract.

2. A contracting authority which supplies the information referred to in paragraph 1 shall request the tenderers or candidates in the contract award procedure to indicate that they have taken account, when drawing up their tender, of the obligations relating to employment protection provisions and the working conditions which are in force in the place where the works are to be carried out or the service is to be provided.

Further, recital 34 provides the following:

The laws, regulations and collective agreements, at both national and Community level, which are in force in the areas of employment conditions and safety at work apply during performance of a public contract, providing that such rules, and their application, comply with Community law. In cross-border situations, where workers from one Member State provide services in another Member State for the purpose of performing a public contract, 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(11) lays down the minimum conditions which must be observed by the host country in respect of such posted workers. If national law contains provisions to this effect, non-compliance with those obligations may be considered to be grave misconduct or an offence concerning the professional conduct of the economic operator concerned, liable to lead to the exclusion of that economic operator from the procedure for the award of a public contract.

Article 53 in Directive 2004/18/EC states that the criteria on which the contracting authorities shall base the award of public contracts can be:

[...] the tender most economically advantageous from the point of view of the contracting authority, various criteria linked to the subject-matter of the public contract in question [...]

Recital 1 in Directive 2004/18/EC states that:

This Directive is based on Court of Justice case-law, in particular case-law on award criteria, which clarifies the possibilities for the contracting authorities to meet the needs of the public concerned, including in the environmental and/or social area, provided that such criteria are linked to the subject-matter of the contract, do not confer an unrestricted freedom of choice on the contracting authority, are expressly mentioned and comply with the fundamental principles mentioned in recital 2.

It might be worthwhile to remind here that in particular recital 34 is the result of the partial acceptance by the European Commission in the amended proposal of this Directive of two amendments proposed by the European Parliament. The text of the amended proposal ((COM(2002) 236 final submitted by Committee on 6 May 2002, OJ C 203 E of 27.8.2002, p. 210) states the following:

"Amendment 11 and 51 relate to compliance with social protection provisions.

Amendment 11 introduces a new recital serving as a reminder of the applicability of the Directive on the posting of workers (96/71/EC), which sets out the minimum labour protection conditions which must be observed when services are provided by such posted workers.

Amendment 51 obliges tenderers to comply with social legislation, including collective as well as individual rights, judicial decisions and collective decisions which are deemed to be generally binding. These obligations must not prejudice the application of more favourable employment protection rules and working conditions." (amended proposal, p. 219)

The Commission then argues that *"it is indisputable that companies tendering for public contracts must comply with the social legislation applicable in the country of establishment and, where appropriate, at the place where a service is rendered (cf. Commission Communication of 15 October 2001 on the social aspects of public contracts). (...)"* As a result, the Commission incorporated these two amendments in a new recital which corresponds with the wording of the current recital 34.

Interesting is the reference to the ***Interpretative communication of the Commission on the Community law applicable to public procurement and the possibilities for integrating social considerations into public procurement*** (COM (2001) - 0566 final OJ C 333 , 28/11/2001 P. 0027 - 0041. (This communication was therefore adopted before the 2004 Directive on Public Procurement).

The Communication looks more in particular to how "social considerations", although not yet explicitly figuring in the then applicable procurement directives, can nevertheless be used and integrated in public procurement tendering procedures and this in each phase of the tendering. Social considerations are prescribed as follows: The expression "social considerations" used in this Communication covers a very wide range of issues and fields. It can mean measures to ensure compliance with fundamental rights, with the principle of equality of treatment and non-discrimination (for example, between men and women), with national legislation on social affairs, and with Community directives applicable in the social field. The expression "social considerations" also covers the concepts of preferential clauses (for example, for the reintegration of disadvantaged persons or of unemployed persons, and positive actions or positive discrimination in particular with a view to combating unemployment and social exclusion). In the accompanying footnote 12, explicit reference is made – amongst others – to the Posting Directive.

(In Annex can be found some quotes of interesting text parts of the Communication).

It should thus be without any doubt that Directive 2004/18/EC does not constitute any obstacle for a contracting authority to include "social considerations" in the tendering process and to impose the obligation on a contractor and his sub-contractors to adhere to applicable social regulations, such as to pay wages laid down in a collective agreement applicable to the works carried out and to the services provided during the performance of the contract.

Posting of Workers Directive

It is noteworthy that the referring Court does not even refer to, or mention, the Posting of Workers Directive, 96/71/EC, whereas this Directive seems to be of crucial importance.

Recital 5 of the Directive clearly states that: "*(5) Whereas any such promotion of the transnational provision of services requires a climate of fair competition and measures guaranteeing respect for the rights of workers*"

Article 3 obliges Member States to ensure that service providers posting workers in to their territory will at least pay the minimum rates of pay, as laid down by law or (in case of construction work) by universally applicable collective agreement. According to the Directive, the concept of minimum rates of pay is defined by the national law or practice of the host state. (see Annex 2 for precise text of the Directive)

Article 3.7 states that this shall not prevent application of terms and conditions of employment which are more favourable to workers.

In addition, Article 3.8 provides for a definition of universally applicable collective agreements, and allows Member States – in which no system for declaring collective agreements exists – to also apply collective agreements which are generally applicable to all similar undertakings in the geographical area and in the profession or industry concerned (see

Annex 2 for precise text) *'provided that their application to the undertakings referred to in Article 1 (1) ensures equality of treatment on matters listed in the first subparagraph of paragraph 1 of this Article between those undertakings and the other undertakings referred to in this subparagraph which are in a similar position'*.

It is important to remind that Germany has opted for guaranteeing the protection of these workers rights via a combination of law (Arbeitnehmerentsendegesetz and Public procurement law) and collective agreements.

It is also worthwhile to remind the objectives of this Directive. The "Explanatory memorandum" to the proposal of the Directive (COM (91) 230 final – SYN 346, 01/08/1991) states amongst others the following:

"3. To increase legal certainty, to ascertain in advance the working conditions applicable and to eradicate practices which may be both detrimental to a fair competition between undertakings and prejudicial to the interests of the workers concerned, a coordination of the law of the Member States is needed. In doing so the Commission is in effect reaffirming its commitment to the principle of subsidiarity for, given the dimension, nature and effects of the task involved, the objectives concerned can be undertaken more effectively in common than by Member States (...)" (page 2).

" 9 bis Fair competition. Many factors have an effect on the competitive situation of individual firms: eg. the attractiveness of the goods or services it offers, the technical support it can provide, and its costs. Among the influences on the latter are the level of investment, the productivity of both capital and the latter. Although pay can be an important element of a firm's costs, it is one element among many, and is not normally considered as affecting fair competition."(page 4 - underscore added).

"12. National differences as to the material content of working conditions and the criteria inspiring the conflict of law rules may lead to situations where posted workers are applied lower wages and other working conditions than those in force in the place where the work is temporarily carried out. This situation would certainly affect fair competition between undertakings; it would from the social point of view be completely unacceptable." (page 8 – underscore added)

It thus seems clear that the referring Court has not considered the Posting of Workers Directive properly and has relied only on ECJ case law. However, ECJ case law also give clarification.

ECJ case law

The ECJ has declared in its earlier case law that the obligation to pay locally applicable wage levels and not merely minimum wages can be based on overriding reasons relating to the public interest, **C-49/98 Finalarte** (the referring Court also mentions this). The ECJ also said that intentions behind restrictions of free movement have to be evaluated for their effects, not only for their aims. The following quote is of interest:

39. According to settled case-law, measures restricting the freedom to provide services cannot be justified by economic aims, such as the protection of national businesses [...]

40. However, whilst the intention of the legislature, to be gathered from the political debates preceding the adoption of a law or from the statement of the grounds on which it was adopted, may be an indication of the aim of that law, it is not conclusive.

41. It is, on the contrary, for the national court to check whether, viewed objectively, the rules in question in the main proceedings promote the protection of posted workers.

42. In this respect, it is necessary to check whether those rules confer a genuine benefit on the workers concerned, which significantly adds to their social protection. In this context, the stated intention of the legislature may lead to a more careful assessment of the alleged benefits conferred on workers by the measures it has adopted.

44. In particular, it may be that under the German rules the worker is entitled to more holidays and a higher daily allowance than under the law of the Member State where his employer is established. Furthermore, it seems that the paid leave funds scheme at issue in the main proceedings has advantages for workers wishing to transfer to the employment of a business established in Germany, since it allows them to keep their holiday entitlement.

45. It is for the national court to consider whether such potential benefits confer real additional protection on posted workers. [...]

To make it fully clear the ECJ stated in the **Case C-164/99 Portugaia Construcoes** (also **Case C-60/03 Wolff & Müller**, paragraph 35 and 36) according to Art. 59 and 60 EC Treaty (now Art. 49 and 50 EC):

*21. As regards, more specifically, national provisions relating to minimum wages, such as those at issue in the main proceedings, it is clear from the case-law of the Court that in principle Community law does not preclude a Member State from requiring an undertaking established in another Member State which provides services in the territory of the first State to pay its workers the minimum remuneration laid down by the national rules of that State (Joined Cases 62/81 and 63/81 *Seco and Desquenne & Giral* [1982] ECR 223,*

paragraph 14; Guiot, paragraph 12; Arblade and Others, paragraph 33; and Mazzoleni and ISA, paragraphs 28 and 29).

22. In other words, it may be acknowledged that, in principle, the application by the host Member State of its minimum-wage legislation to providers of services established in another Member State pursues an objective of public interest, namely the protection of employees.

As regards the present case it should be noted that the rules of the Land of Niedersachsen (§§ 3 und 4 Landesvergabegesetz) provide that public works contracts may be executed only by such companies that obey the collective remuneration agreements applicable for such kind of work at the building site during the works. Thus, these rules have a protective character justifying the limitation of the freedom of services of companies located in other member states.

According to the ECJ's jurisdiction it does not matter that the preamble to the Landesvergabegesetz does not mention workers' protection, but rather puts the emphasis on its aim to prevent distortion of competition.

In the above-mentioned Case Wolff & Müller it declares:

38 In regard to the national court's observation that the priority purpose pursued by the national legislature on adoption of Paragraph 1(a) of the AEntG is to protect the national job market rather than remuneration of the worker, it should be pointed out that it is for that court to verify whether, on an objective view, the legislation at issue in the main proceedings secures the protection of posted workers. It is necessary to determine whether those rules confer a genuine benefit on the workers concerned, which significantly augments their social protection. In this context, the stated intention of the legislature may lead to a more careful assessment of the alleged benefits conferred on workers by the measures which it has adopted (Portugaia Construções, paragraphs 28 and 29 and case law cited).

39 The referring court has doubts concerning the genuine benefit to posted workers of liability as guarantor owing both to the practical difficulties with which they would be faced in asserting before the German courts their right to pay as against the general undertaking and owing to the fact that that protection would lose its economic value when the actual chance to be gainfully employed in Germany is appreciably reduced.

40 However, as Mr Pereira Félix, the German, Austrian and French Governments and the Commission rightly point out, it is none the less the case that a provision such as Paragraph 1(a) of the AEntG benefits posted workers on the ground that, to the advantage of the latter, it adds to the first debtor of the minimum rate of pay, who is the employer, a second debtor who is jointly liable with the first debtor and is generally more solvent. On an objective view a rule of that kind is therefore such as to ensure the protection of posted workers.

Moreover, the dispute in the main proceedings itself appears to confirm that Paragraph 1(a) of the AEntG is of protective intent.

41 Inasmuch as one of the objectives pursued by the national legislature is to prevent unfair competition on the part of undertakings paying their workers at a rate less than the minimum rate of pay, a matter which it is for the referring court to determine, such an objective may be taken into consideration as an overriding requirement capable of justifying a restriction on freedom to provide services provided that the conditions mentioned in paragraph 34 hereof are met.

42 Moreover, as the Austrian Government has rightly pointed out in its observations, there is not necessarily any contradiction between the objective of upholding fair competition on the one hand and ensuring worker protection, on the other. The fifth recital in the preamble to Directive 96/71 demonstrates that those two objectives can be pursued concomitantly.

ILO Convention 94

It is also important to note the connection to the **ILO convention 94** (although until now ratified by 9 EU countries, although not including Germany).

Article 2 in this context establishes a very clear principle of equal wages:

1. [Public] Contracts to which this Convention applies shall include clauses ensuring to the workers concerned wages (including allowances), hours of work and other conditions of labour which are not less favourable than those established for work of the same character in the trade or industry concerned in the district where the work is carried on--

(a) by collective agreement or other recognised machinery of negotiation between organisations of employers and workers representative respectively of substantial proportions of the employers and workers in the trade or industry concerned; [...]

The ECJ may therefore have to consider the relationship between ILO conventions and EU law.

Conclusion

On the basis of all the above mentioned material, it seems to be clear that the Landesvergabegesetz is not in breach of Art. 49 and 50 TEC: The companies providing public building works are obliged by the law to pay their employees during the execution of the building works **at least** the salary provided for in the collective remuneration agreement relevant for the location of the building site.

When it regards workers in wage groups 1-2, which is most likely the case, this obligation is based on the AEntsGes in combination with the 5.Verordnung and the applicable collective agreement for the construction sector 'Tarifvertrag Mindestlohn', and in addition on the Public Procurement law of Niedersachsen.

When it would regard workers in wage groups 2a-6, this obligation is based on the Public Procurement law of Niedersachsen, obliging all contractors on its territory, regardless of their nationality, to comply with the minimum wage levels for these wage groups, when tendering for a contract, thereby creating a level playing field for all companies.

These wages do not exclude the right to higher entitlements but only guarantee a minimum wage level which will be, depending on their wage group, either equal (in case of wage level 1-2) or higher (in case they are skilled workers) than what they should get if only the AentG (combined with 5.Verordnung) would apply (and certainly higher than they would earn on the basis of their employment contract in the home state of their company). The Landesvergabegesetz in an objective regard ensures protection of the posted workers as it gives them real advantages. This alone already justifies the restriction of the freedom of services for the posting companies: the Landesvergabegesetz is based on an urgent public interest.

That, moreover, it avoids unfair competition by companies not complying with the rules is not just innocuous under European law but a further reason justifying a certain limitation of freedom of services, limiting exactly unfair competition on the basis of low wages, but allowing for any other form of fair competition. If foreign companies, only because being non-nationals, could avoid the Public procurement regulations whereas national companies could not, this would not only create a situation of unfair competition, but of discrimination of national companies that will have to abide by the national rules.

Annex 1

Interpretative communication of the Commission on the Community law applicable to public procurement and the possibilities for integrating social considerations into public procurement (COM (2001) - 0566 final OJC 333 , 28/11/2001 P. 0027 – 0041. (This communication was therefore adopted before the 2004 Directive on Public Procurement).

Quotes of relevant text parts of the Communication:

"(...) All relevant national rules in force in the social field, including those implementing relevant Community rules in the field, are binding on contracting authorities, insofar as they are compatible with Community law. Such rules include, in particular, provisions on workers' rights and on working conditions.

** Non-compliance by tenderers with certain social obligations may in some cases lead to their exclusion. It is for Member States to determine in which cases this should arise. (...)" (Executive summary page, p. 27)*

As to the specific phase of the "execution of the contract (section 1.6) is stated that "One way to encourage the pursuit of social objectives is in the application of contractual clauses or of conditions for execution of the contract, provided that they are implemented in compliance with Community law and, in particular, that it does not discriminate directly or indirectly against tenderers from other Member States." In addition, "Transparency must also be ensured by mentioning such conditions in the contract notice, so they are known to all candidates or tenderers [65]." "Finally, a public procurement contract should, in any event, be executed in compliance with all applicable rules, including those in the social and health fields (see Chapter III, below)." (page 33)

"Chapter 3 "Social provisions applicable to public procurement":

"3.1. Introduction

From the outset, it must be reiterated that, even if the public procurement directives do not contain a specific provision to this effect, all Community, international and national regulations, rules and provisions, which are applicable in the social field shall apply fully during the performance of a public procurement contract following award of the contract. Where necessary, they should be stated in the contract notice or contract documents. The public procurement directives already permit [72] contracting authorities to identify, or for them to be obliged by a Member State to identify, in the contract documents the national competent authority or authorities from whom tenderers may obtain relevant information on obligations regarding safety and working conditions which are applicable at the place where the works are carried out or on the sites where the services are provided . (...)

These obligations include respect of national rules deriving from Community directives in the social field. Of particular relevance in the context of public procurement are the directives on the health and safety of workers and the directives on the "transfer of undertakings" and the "posting of workers" (see Point 3.2.2.2, below), as well as recent directives on equality of treatment. Such obligations may also derive from certain Conventions of the International Labour Organisation (ILO) [75]. As regards core labour standards recognised at international level, the fundamental principles and rights at the workplace defined by the International Labour Organisation of course apply in their entirety to the Member States. Bids from tenderers who have not taken account of obligations on employment protection provisions and working conditions identified by the contracting authority in the contract documents cannot be considered as complying with the contract documents. Moreover, where tenderers have not taken sufficient account of these obligations in their tenders, their tenders might be considered as abnormally low and, in some cases, might be rejected for this reason" (page 34 – underscore added)

"3.2. Determining the working conditions applicable

In the case of national, international and Community standards and rules that must be applied in the social field, a distinction must be made between situations of a cross-border nature and other situations (which can, in principle, be considered purely national). (...)In "cross-border" situations, requirements justified by overriding reasons in the general interest that are in force in the host country (the catalogue of such rules was put on a Community basis by Directive 96/71/EC, see point 3.2.1.2 below) must, among others, be complied with by service providers, in the respect of the principle of equal treatment. In both situations, provisions more favourable to workers may, however, also be applied (and must then also be complied with), provided that they are compatible with Community law. (...)

3.2.1. The limits laid down by Community law on the application of national provisions

3.2.1.1. The EC Treaty

Since the relevant provisions can be applied only if they are compatible with Community law, the limits and restrictions laid down by Community law should be examined.

*The established case law of the Court, as summarised in the *Arblade* judgment [78], is that Article 49 (ex 59) of the EC Treaty requires not only the elimination of any discrimination against a service provider established in another Member State by reason of its nationality, but also the elimination of any restriction, even if it applies indiscriminately to national service providers and to those from other Member States, which is likely to prevent, hamper or make less attractive the activities of a service provider established in another Member State where it lawfully provides similar services [79]. Moreover, even in the absence of harmonisation in the field, as a fundamental principle of the EC Treaty,*

the freedom to provide services may be limited only by rules which are justified by imperative reasons relating to the public interest and which apply to all persons or undertakings pursuing an activity in the State of destination, insofar as that interest is not protected by the rules to which the service provider is subject in the Member State in which he is established [80]. Moreover, application of such national rules of a Member State to service providers established in another Member State must be necessary to ensure attainment of the objective pursued and must not exceed what is necessary to attain the objective. [81]

[78] See the Arblade judgment, cited above, and in particular points 33-39.

[79] See the judgments of 25.7.1991, Säger, Case C-76/90, ECR p. I-4221, point 12; of 9.8.1994, Vander Elst v. OMI of 9.8.1994 in Case C-43/93, ECR p. I-3803, point 14; of 12.12.1996, Reisebüro Broede, Case C-3/95, ECR p. I-6511, point 25; and of 9.7.1997, Parodi, Case C-222/95, ECR p. I-3899, point 18, and point 10 of the Guiot judgment, cited above.

[80] See, in particular, the Webb judgment cited above, point 17, and judgments of 26.2.1991, Commission/Italy, Case C-180/89, ECR p. I-709, point 17; Commission v. Greece, Case C-198/89, ECR p. I-727, point 18; Säger, cited above, point 15; Vander Elst, cited above, point 16, and Guiot, cited above, point 11.

[81] See in particular the Säger judgment, cited above, point 15, and judgments of 31.3.1993, Kraus, Case C-19/92, ECR p. I-1663, point 32; of 30.11.1995, Gebhard, Case C-55/94, ECR p. I-4165, point 37, and Guiot, cited above, points 11 and 13.

The Court has already accepted worker protection [82], including protection of workers in the construction sector [83], as an imperative reason in the general interest.

[82] See the Webb judgment, cited above, point 19, and judgments of 3.2.1982, Seco and Desquenne & Giral, cited above, point 14, and of 27.3.1990, Rush Portuguesa, cited above, point 18.

[83] Guiot judgment, cited above, point 16." (page 35

Annex 2

Posting Directive, relevant articles

Article 3. Member States shall ensure that [...] the undertakings [...] guarantee workers posted to their territory the terms and conditions of employment covering the following matters which, in the Member State where the work is carried out, are laid down:

- by law, regulation or administrative provision, and/or
- by collective agreements or arbitration awards which have been declared universally applicable [...]

(c) the minimum rates of pay, including overtime rates;
(...)

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

Article 3.7 Paragraphs 1 to 6 shall not prevent application of terms and conditions of employment which are more favourable to workers.

Article 3.8. Collective agreements or arbitration awards which have been declared universally applicable` means collective agreements or arbitration awards which must be observed by all undertakings in the geographical area and in the profession or industry concerned.

In the absence of a system for declaring collective agreements or arbitration awards to be of universal application within the meaning of the first subparagraph, Member States may, if they so decide, 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, and/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,

provided that their application to the undertakings referred to in Article 1 (1) ensures equality of treatment on matters listed in the first subparagraph of paragraph 1 of this Article between those undertakings and the other undertakings referred to in this subparagraph which are in a similar position.

Equality of treatment, within the meaning of this Article, shall be deemed to exist where national undertakings in a similar position:

- are subject, in the place in question or in the sector concerned, to the same obligations as posting undertakings as regards the matters listed in the first subparagraph of paragraph 1, and
- are required to fulfil such obligations with the same effects.