

ECJ case C-346/06
Dirk Rüffert – Land Niedersachsen (DE)
Summary of the Advocate General Conclusions (20.09.2007)

Key points

According to the opinion of the Advocate General of the ECJ in the Rüffert-case, neither the Posting Directive nor Article 49 of the EC Treaty (on the freedom to provide services) must be interpreted as precluding national legislation such as the public procurement law of the German Land Niedersachsen, which requires contractors and subcontractors to pay posted workers at least the wage prescribed by the collective agreement in force at the place where the services are performed, even if that collective agreement is not declared to be generally applicable.

The Posting Directive allows Member States to offer more protection than the mandatory minimum, but Member States using this option must comply with Article 49 EC Treaty. This means that the restrictions thus put on the freedom to provide services must be justified by overriding reasons relating to the public interest.

The protection of workers is such an overriding reason, depending on the question if real additional protection in terms of a real benefit is offered to the workers concerned. In this case, the fact that they would receive a much higher wage is considered to be such a benefit.

The objective of preventing unfair competition, i.e. preventing social dumping, may also be taken into consideration as an overriding reason. In this case, the public procurement law is an appropriate means of preventing social dumping as its main aim is to harmonise the terms of national and foreign service providers providing services in the framework of a public contract, ensuring that local workers and posted workers on the same site will be paid equally.

Since the public procurement law complies with the principle of non-discrimination on the basis of nationality and with the principle of transparency, it must be considered to be consistent with Community law.

The opinion of AG Bot in short:

- the Posting Directive sets a nucleus of minimum protective rules that cannot be denied to posted workers, but allows Member States to improve the level of social protection guaranteed to workers employed on their territory;
- the public procurement law of Niedersachsen sets the minimum wage on the level of the local applicable collective agreement (which is not declared generally binding, and offers a higher wage than the generally binding collective agreement which regulates minimum wages); this however is consistent with the Posting Directive (article 3,7 that offers Member States the option to apply conditions of employment which are more favourable to workers), and must be considered to offer the posted workers concerned protection as well as to prevent social dumping;
- the implementation of such enhanced national protection must be in accordance with what is permitted under Article 49 EC, which is interpreted by the ECJ in settled case law to require not only the elimination of all discrimination against service providers on the ground of their nationality, but also the abolition of any restriction that is liable to prohibit, impede, or render

less attractive the activities of a provider of services established in another Member State;

- in this case there is barely any doubt that a restriction on the freedom to provide services exists; however, as the Landesvergabegesetz applies without distinction to national and foreign service providers, the question is – according to settled case law of the ECJ – if the law is justified because it meets overriding requirements relating to the public interest;
- protection of workers and prevention of social dumping can be overriding reasons relating to the public interest;
- in this case, it is evident that the posted workers received only 46.57% of the applicable minimum wage. Compliance with the Landesvergabegesetz would have ensured them a significantly higher wage than the wage they would normally be paid in the State in which their employer is established. This law therefore ensures the protection of the posted workers;
- the law is also an appropriate means of preventing social dumping, in that one of its main aims is to harmonise the terms on which service providers, whether they are established in Germany or not, must pay their workers in the framework of the performance of a public contract. It thus ensures that local workers and posted workers on the same site will be paid equally;
- the objectives of worker protection and the prevention of social dumping could not be achieved as effectively by means of less binding rules with a less restrictive effect on the freedom to provide services;
- to comply with the principle of non-discrimination on the basis of nationality service providers must be subject to the same obligation to pay the minimum wages applicable at the place where the services are performed, whether they be established in Germany or another Member State. To detect possible discrimination in breach of Community law, it is essential that, in the framework of the same public contract, local workers and posted workers be paid at the same rate;
- Since the contract performance condition relating to the minimum remuneration of workers laid down in the disputed provisions of the ‘Landesvergabegesetz’ complies with the principle of non-discrimination on the basis of nationality and since it complies with the principle of transparency, it must be considered to be consistent with Community law;
- as regards the principle of transparency, it is important that the collective agreements to be complied with must be sufficiently precise and accessible so that they do not render it impossible or excessively difficult in practice for the employer to determine the obligations with which he is required to comply.

The Conclusions are available at:

<http://curia.europa.eu/jurisp/cgi-bin/form.pl?lang=en&Submit=Rechercher&alldocs=alldocs&docj=docj&docop=docop&docor=docor&docjo=docjo&numaff=C-346/06&datefs=&datefe=&nomusuel=&domaine=&mots=&resmax=100>
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