Minimum Wages in the Award of Public Contracts After *RegioPost*

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1 Introduction

This paper discusses the judgment of the Court of Justice of the EU (the 'CJEU') in the *RegioPost* case[1] and its bearing on minimum wage obligations in the context of the award of public contracts for postal services. The case concerned the decision by a municipality in the Rhineland-Palatinate Land (Germany) to exclude RegioPost from an EU-wide call for tender relating to postal services in that municipality. The municipality had excluded RegioPost for not having undertaken, at the time of submitting the tender, to pay its staff the minimum wage set by the Law of the Land for public contract awards. The CJEU ruled that the Law of the Land is compatible with Article 26 of the Public Procurement Directive (2004/18/EC),[2] which provides that contracting authorities may lay down special conditions relating to the performance of a contract concerning social considerations. The judgment seems to deviate from the restrictive interpretation of the rules on minimum wages given by the CJEU in previous similar cases, which generally restrained the imposition of national or regional labor standards in the presence of a cross-border dimension in a procurement process. As such, the judgment is of interest for the labour market in the postal sector, where providers of postal services are increasingly relying on "non-standard" employment contracts.

[1]Judgement of the CJEU of 17 November 2015, Case C-115/14, *RegioPost GmbH & Co. KG v Stadt Landau in der Pfalz*, EU:C:2015:760.

[2]Directive 2004/18/EC of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (OJ 2004 L 134, p. 114, and corrigendum OJ 2004 L 351, p. 44), as amended by Commission Regulation (EU) No 1251/2011 of 30 November 2011 (OJ 2011 L 319, p. 43).

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After a brief description in Sect. 2 of the rules and previous case law that the case is set against, Sect. 3 turns to the legal reasoning of the CJEU, in particular where it moves away from that case law by relying on the characteristics of the measure at issue, in order to determine to what extent *RegioPost* restricts the effects of the previous line of cases in this area. Section 4 reviews the impact of the judgment in the light of the new Procurement Directive 2014/24/EU,[3] as the CJEU's reasoning is equally applicable to the new Directive under its Article 70. Section 5 concludes with an examination of whether *RegioPost* can be suitably relied upon by contracting authorities tendering out postal services, to enforce "social considerations" in the postal and transport sectors.

2 *RegioPost* in Context: The Applicable Rules and Precedents

Before examining the reasoning of the CJEU, it is necessary to set the *RegioPost* judgment within the complex system of EU rules governing public procurement and social policy objectives. The relevant rules and precedents the case draws on are Article 56 of the Treaty on the Functioning of the EU ('TFEU') on the free movement of services, the Directive on the posting of workers in the framework of the provision of services (Directive 96/71/EC),[4] the 2004 Public Procurement Directive (Directive 2004/18/EC); and previous case law in this area, particularly the *Rüffert* and *Bundesdruckerei* judgments.[5]

Article 56 TFEU prohibits restrictions on "freedom to provide services" with respect to parties that are established in a State other than that of the intended recipients of those services. Any discrimination based on nationality is prohibited. A restriction can be justified, however, if it satisfies one of a number of exemptions in the Treaty, including if it is necessary for the protection of workers' rights.

The Directive on the Posting of Workers ('PWD') provides that workers who are temporarily "posted" from one EU Member State to another by their employers are entitled to enjoy the same minimum employment rights as those available to workers permanently located in the host Member State (Article 3). These employment rights are limited to terms and conditions laid down by "law,

[3]Directive 2014/24/EU of 26 February 2014 on public procurement repealing Directive 2004/18/EC (OJ 2014 L 94, p. 65).

[4]Directive 96/71/EC of 16 December 1996 concerning the posting of workers in the framework of the provision of services (OJ 1997 L 18, p. 1).

[5]Judgment of the CJEU of 3 April 2008, Cases C-346/06, *Rechtsanwalt Dr. Dirk Rüffert, in his capacity as liquidator of Objekt und Bauregie GmbH & Co. KG v Land Niedersachsen* (*Rüffert*), EU:C:2008:189; Judgment of the CJEU of 18 September 2014, Case C-549/13, *Bundesdruckerei GmbH v Stadt Dortmund*, EU:C:2014:2235.

regulation or administrative provision" or collective agreements or arbitration awards that have been declared "universally applicable", i.e., "which must be observed by all undertakings in the geographical area and in the profession or industry concerned" (Article 3(8)).

The 2004 Public Procurement Directive ('PPD') provides that contracting authorities are entitled to lay down "special conditions relating to the performance of a contract" concerning social and environmental considerations, provided that these conditions are not directly or indirectly discriminatory, are otherwise compatible with general EU law, and are indicated in the contract notice or in the specifications (Article 26).

The 2006 *Rüffert* case concerned a regional law of Lower Saxony that required public authorities to obtain a written undertaking from bidders and subcontractors tendering for a public services contract to pay their employees the minimum remuneration set by a collective wage agreement when performing that contract. The CJEU held that the collective wage agreement which the regional law sought to impose on subcontractors could not be imposed under the PWD in respect of Polish workers "posted" to Germany to carry out the contract at issue (in the construction sector), as it was neither a "law" nor a universally applicable collective agreement within the meaning of its Article 3(8). In addition, the CJEU noted that the wage agreement applied to workers in relation only to public contracts but not private contracts. Following Article 56 TFEU, the CJEU further held that the regional law constituted a restriction on free movement of services and that it could not be justified by reference to the objective of protecting workers' rights, as there was no information to suggest that workers who were employed under a public service contract, as opposed to those under a private contract, needed such enhanced protection.

Conversely, the 2014 *Bundesdruckerei* case concerned the obligation to guarantee the payment of a minimum wage to the employees of subcontractors of tenderers, provided for by the regional law of North Rhine-Westphalia, even when the subcontractor is established in another Member State and all of the services relating to the performance of the contract are to be carried out in that other Member State (Poland in that case). As there was no issue of "posted" Polish workers to Germany in the case, the CJEU held that the PWD was not applicable and assessed the regional law's compatibility with EU law from the perspective of the TFEU.

Consistent with *Rüffert*, the CJEU held that the minimum wage requirement was capable of constituting a restriction within the meaning of Article 56 TFEU, as it constituted an additional economic burden for subcontractors that could prohibit, impede or render less attractive the provision of their services in the host Member State. Such a restriction could not be justified by reference to the objective of ensuring that employees are paid a reasonable wage in order to avoid both social dumping and the penalization of competing undertakings that grant a reasonable wage to their employees. The CJEU determined that the measure was not "universally applicable", as it applied only to public contracts. In addition, as it bore no relation to the cost of living in Poland, it was disproportionate.

3 The Reasoning of the CJEU in *RegioPost*

In *RegioPost* the CJEU was asked, once again by a German court, to rule on the compatibility of the minimum wage requirement after RegioPost challenged its exclusion from the municipality of Landau's postal services procurement process on the grounds that it had not declared that it would pay any staff providing the services a minimum wage. Both the contract notice and the specifications referred to the Law of the Land for public contract awards,[6] which required those providing services under public contracts to pay their staff no less than a gross minimum hourly wage of EUR 8.70. At the time of the facts that gave rise to the case, there was no federal law or collective agreement setting a mandatory minimum wage for postal workers in Germany more generally. RegioPost argued that the condition breached EU law as it infringed its freedom to provide services within the EU.

Although RegioPost submitted its tender before the deadline, it did not include the minimum wage compliance declaration required by the contract notice. The local authority wrote to RegioPost, allowing 14 days to remedy the omission. In the absence of the requested declaration, RegioPost was excluded from the procurement procedure. It challenged this exclusion before the German Public Procurement Board, which dismissed the application for review. The Higher Regional Court of Koblenz found that the outcome of the proceedings turned on whether it was required to disapply the contested provision of the Law of the Land on the grounds that it was incompatible with EU law.

It thus referred two questions to the CJEU, the most relevant here being whether Article 56 TFEU—in conjunction with the PWD—precludes a national provision which makes it mandatory for a contracting authority to award contracts only to tenderers which undertake (and whose subcontractors undertake) in writing to pay their employees performing the contract work a minimum wage fixed by the State for public contracts (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.[7]

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[6]The Law of the Land on guaranteeing compliance with collective agreements and minimum wages in public contract awards of 1 December 2010 required tenderers and subcontractors to undertake to pay a minimum wage to staff performing the services covered by a public contract. Currently, the "*Minimum Wage Act*" of 11 August 2014 (BGBl. 2014 I, p. 1348) provides, in principle, that all workers are entitled to a minimum wage of EUR 8.50 gross per hour from 1 January 2015.

[7]By the second question, the referring court asked whether the exclusion from participation in the award procedure of tenderers who refused to submit in writing the undertaking above complied with the PPD (Article 26), given that the latter does not provide for grounds for exclusion for infringement of special conditions. In addition, the undertakings required from tenderers are of a declaratory nature only and issues of compliance with the special condition they undertook to comply with only arise after the award of the contract to an operator. As such, in the referring court's opinion, it is not a qualitative selection criterion that might justify the exclusion of a tenderer (see § 40 of the Judgement).

The case offered the CJEU the opportunity to step once again in the debate about whether the EU internal market is a social market and to either confirm or mitigate its previous case law[8] on this point (criticized by some, e.g., Monti Report 2010).[9] If the solution finally adopted by the CJEU mitigates its existing strict approach, it does so with some interesting turns based on the specific characteristics of the case without openly overturning its precedents. These turns concern three issues in particular: the application of the PWD to a situation which entailed no posting of workers from another Member State, via a re-formulation of the first preliminary question; the compatibility of the minimum wage requirement with the PWD even where applicable to public contracts alone; and the compatibility of the requirement with primary EU law (Article 56 TFEU).

3.1 Re-Formulation of 1st Question and Application of PWD to a Situation with no Posting of Workers

To answer these questions, the CJEU engaged in a step-by-step analysis. First, in assessing the admissibility of the first question, the CJEU noted that the PPD was applicable to the main proceedings, as the value of the contract for postal services at stake clearly exceeded the relevant threshold for the application of that directive (at the time set at 200,000 EUR). The contract was thus to be regarded as having "a certain cross-border interest".[10] Undertakings established in Member States other than Germany might have been interested in the contract even if, ultimately, they decided not to participate because of the minimum wage obligation, particularly those in Member States where the cost of living and the applicable minimum pay were significantly lower than those in the Land of Rhineland-Palatinate. Therefore, a question relating to the interpretation of one of its provisions, namely Article 26, was admissible even though it was raised in the context of a dispute where all the elements were confined within a single Member State. Moreover, the CJEU has jurisdiction to rule on Article 56 TFEU to the extent that the degree of

[8]Besides *Rüffert*, *Viking,* judgment of the CJEU of 11 December 2007, case C-438/05, EU: C:2007:772; and *Laval*, judgment of the CJEU of 18 December 2007, Case C-341/05, EU: C:2007:809.

[9]The Report argues that that line of case law has revived the divide between advocates of greater market integration and those who feel that the call for economic freedoms and for breaking up regulatory barriers is code for dismantling social rights protected at national level. See Monti Report, p. 68: "The revival of this divide has the potential to alienate from the Single Market and the EU a segment of public opinion, workers' movements and trade unions, which has been over time a key supporter of economic integration".

[10]*RegioPost*, cit., § 51.

harmonization envisaged in that directive so permits.[11] The first question was thus re-formulated as in the first place concerning the interpretation of Article 26 of the PPD.

Moving on to the substance, the CJEU admitted that the minimum wage requirement under the Law of the Land was a "special condition" within the meaning of Article 26 and acknowledged that it had been appropriately set out in the contract and was not discriminatory. However, under Article 26, special conditions are allowed "provided that these are compatible with Community law". With an unpredicted turn, to determine to what extent such requirement could be assessed under EU law, the CJEU analyzed it first against the PWD instead of the Treaty. Despite having stated that the minimum wage requirement was to be assessed in light of EU primary law, consistent with the CJEU's settled case law and given that the PPD had not exhaustively harmonized EU law in this area, the CJEU examined the requirement against the PWD (which would qualify as secondary, rather than primary law).[12] On this point, the CJEU deviated from the view of Advocate General Mengozzi, who stated that in a situation such as the one in *RegioPost*, the *renvoi* made to EU law by Article 26 of the PPD related exclusively to Article 56 TFEU and the PWD was not applicable, as also found in *Bundesdruckerei*.[13]

Without declaring that the PWD applied based on the facts of the case, the CJEU relied on a reference to it in recital 34 of the Procurement Directive. The PPD says that "in cross-border situations in which workers from one Member State provide services in another Member State for the purpose of performing a public contract", it is necessary to determine whether the minimum conditions laid down in the PWD are observed.[14] While this may be justified by the preliminary question being framed in terms of the interpretation of Article 56 TFEU "in conjunction with" the PWD, it can be reasonably expected that the latter be always applicable to situations falling within the scope of application of the PPD, even where these do not directly involve the posting of workers. At the same time, that leaves the door open for future cases that explicitly involve a cross-border element to be covered by the judgment.

[11] *Ibidem*, §§49–50.

[12] It has been argued that, had the Court assessed the compatibility of the requirement with the Treaty, it would have most probably come to the same conclusions as in *Bundesdruckerei,* i.e. that it constituted a restrictive measure that could not be justified by the objective of protecting workers, absent evidence of the need to grant greater protection under public contracts than in private contracts (Norton Rose Fulbright 2016).

[13] Opinion of AG Mengozzi, delivered on 9 September 2015, in *RegioPost*, cit. §§ 51–60.

[14] *RegioPost*, cit., §§ 66–77.

3.2 *Compatibility of Minimum Wage Requirements with the PWD, When Applicable Solely to Public Contracts*

Framing its analysis in terms of the PWD, the CJEU confirmed that the measure at issue in *RegioPost* was to be regarded as a "law", for the purposes of Article 3(1) of the PWD, laying down a "minimum rate of pay". In that respect, it distinguished it from the measure that gave rise to the judgment in *Rüffert* on two grounds. In *RegioPost*, it is the law itself that laid down the minimum rate of pay, while in *Rüffert* the law referred to the minimum wage set out by a collective labor agreement that was not declared to be generally binding by a legislative measure. In addition, at the time of the facts in the main proceedings, Germany had not established a lower minimum wage for the postal services sector.[15] In other words, the finding in *Rüffert* that the measure in question could not be justified by the objective of protecting workers was not relevant in this case. *Rüffert* related to a collective agreement applicable in the construction sector that had not been declared universally applicable and to a minimum wage set at a level higher than under the federal law applicable to cross-border service provision.

The CJEU further clarified that the measure in question was compatible with EU law more generally, despite only applying to public contracts, since the condition regarding the universal application, as defined in Article 3(8) of the PWD, only applies to collective agreements or arbitration awards. In addition, since the national measure at issue falls within the scope of Article 26 of the PPD which allows, subject to certain conditions, the imposition of a minimum wage in public contracts, "that measure cannot be required to extend beyond that specific field by applying generally to all contracts, including private contracts."[16] In fact, the "limitation of the scope of the national measure to public contracts is the simple consequence of the fact that there are rules of EU law specific to that field, in this case, those laid down" in the PPD.[17]

On this point, the Advocate General had clearly said that the implications of *Rüffert* in the *RegioPost* case were to be reconsidered in the light of Article 26 of the PPD, which he defined as "an entirely new provision in EU public procurement law which was not applicable at the time of the facts giving rise to that judgment."[18] He had explicitly stated that Article 26 of the PPD would be denied its practical effect. He added that its "special conditions" would cease to be special if Member States

[15] *Ibidem*, § 62.

[16] *Ibidem,* § 64.

[17] *Ibidem,* § 65.

[18] Opinion of AG Mengozzi in *RegioPost,* § 70. It is worth recalling that, at the time of *Rüffert*, AG Bot concluded in favour of compatibility, noting that the "*possibility of integrating social requirements into public procurement contracts has already been recognised by the Court and is now enshrined in Directive 2004/18"* (Case C-346/06, cit., Opinion of AG Bot, delivered on 20 September 2007, § 133).

were not permitted to adopt laws and regulations applicable only to public contracts.[19]

Based on the above, the CJEU concluded that Article 26 of the PPD, read together with the PWD, allows a contracting authority to require tenderers to comply with a special condition relating to minimum hourly wages for work under public contracts, where that special condition is based on a "law" within the meaning of the PWD and, arguably, a collective agreement of universal application. In fact, as raised by the referring court,[20] it would be illogical to interpret Article 3 (1) of the PWD as it requires collective agreements setting a minimum wage to cover those employed in the performance of public contracts or private contracts, while minimum legislative provisions can be limited only to those workers assigned to the performance of public contracts. If *Rüffert* could be overcome on this point, the CJEU could temper its interpretation of the level of universality required of minimum wages based on collective agreements for the purpose of their application to posted workers (Dumont 2016).

3.3 *Compatibility of Minimum Wage Requirement with Article 56 TFUE (Necessity Test)*

The aforementioned interpretation of Article 26 of the PPD, according to the CJEU, is further confirmed by a reading of it in the light of Article 56 TFEU, since that article seeks to bring about the freedom to provide services, a fundamental freedom guaranteed by the Treaty. Consistently with *Bundesdruckerei*,[21] the measure may impose an additional economic burden and constitute a restriction within the meaning of Article 56 TFEU, yet it may, in principle, be justified by the objective of protecting workers.[22] In *Rüffert*, the CJEU had considered that the national measure imposing a minimum wage could not be justified under that objective. There was no evidence in the file to show that such protection was necessary for workers in the context of a public contract and not in private contracts. In addition, the minimum wage rate set by the collective agreement exceeded that provided by national law.

To justify its divergent reading in this case, the CJEU underlined that it had "based that conclusion on certain characteristics specific to that measure, which clearly distinguish that measure from the national measure at issue in the main proceedings." Contrary to the *Rüffert* case, the national measure at issue was laid down in a legislative provision that, as a mandatory rule for minimum protection, in principle applies generally to the award of any public contract in the Land of Rhineland-Palatinate. With regard to postal workers, that legislative provision

[19] *Ibidem*, §§ 71–73.

[20] *RegioPost*, cit., § 38.

[21] *Bundesdruckerei,* cit. § 30.

[22] *RegioPost*, cit., §§ 70–73.

conferred a minimum social protection since, at the time of the facts in the main proceedings, no other national legislation set a lower minimum wage for the postal services sector.[23]

There are conflicting views as to whether the facts at stake were sufficiently different to justify a different decision. At any rate, the reasoning of the CJEU here appears somewhat rushed when compared to the traditional compatibility test run by the CJEU when assessing national measures restricting the freedom to provide services. That test typically involves an analysis of whether the measure can be justified by overriding reasons of general interest, such as protection of workers, and whether the measure is necessary and proportionate to achieving that objective. In *Rüffert*, the CJEU found that the measure was not necessary to the protection of workers as it concerned public procurements alone and provided for a minimum wage rate higher than that provided at the national level. In *RegioPost*, the CJEU barely hinted at the necessity of the measure in its reference to the "minimum social protection" that it provided workers.

On other occasions, the CJEU had the opportunity to clarify that in order to justify a measure restricting freedom to provide services as a means of protecting workers, it needed to confer a genuine and significant benefit on the workers concerned.[24] In *RegioPost*, without addressing whether a measure that only applies to public contracts may be regarded as necessary for the protection of workers, the CJEU merely stated that the measure provided minimum protection, as at the time of the facts there was no national regulation setting lower minimum wage rates. Yet, as commented above, the Advocate General had clearly put forward a different view with regard to the entry into force of the PPD after *Rüffert* and, in particular, its Article 26, which allows Member States to impose special conditions on public procurement contractors. For the Advocate General, imposing an extension of special working conditions, such as minimum wage rates, to the performance of private contracts "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".[25]

A clarification by the CJEU would have been welcome, especially in the light of *Bundesdruckerei,* where the CJEU had unambiguously stated that, to the extent it did not apply to private contracts, the national measure at issue was not appropriate for achieving the objective of protecting workers.[26] That was the case even if the measure, as in *RegioPost*, was a law that itself set the minimum wage (rather than a collective agreement that had not been declared universally applicable).

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[23] *Ibidem,* §§ 74–76.

[24] Judgment of the CJEU of 24 January 2002, Case C-164/99, *Portugaia Construções Lda*, EU:C:2002:40, § 29.

[25] Opinion of AG Mengozzi in *RegioPost,* § 73.

[26] *Ibidem*, § 32.

It has been argued (Dumont 2016) that it will require a new court decision or legislative revision of the PWD[27] to clarify when a national measure (law, administrative provision or collective agreement) concerning public procurement alone may require that service providers comply with a minimum wage. However, as explained in the next section, the implementation of the 2014 Public Procurement Directive, which will be applicable in 2018, will most likely play a significant role in limiting the impact of *RegioPost*.

4 The 2014 Public Procurement Directive

The 2004 PPD has been replaced by Directive 2014/24/EU (the '2014 Public Procurement Directive'). In the new Directive, Article 70 largely mirrors the language of Article 26 of the 2004 PPD and similarly allows contracting authorities to lay down special conditions for the performance of contracts, including "social or employment-related considerations". That provision shall be read in light of recital 37 of the 2014 Directive, which explains that Member States and contracting authorities shall take relevant measures to ensure compliance with social and labor law obligations that apply where the services are provided and result from both national and Union laws and regulations, as well as from collective agreements, provided that such rules, and their application, comply with EU law. Article 70 shall be also read against recital 98 of the new Directive, which states that "… award criteria or contract performance conditions concerning social aspects (…) should be applied in accordance with Directive 96/71/EC, as interpreted by the Court (…) and should not be chosen or applied in a way that discriminates directly or indirectly against economic operators from other Member States (…)".

Thus, requirements concerning the basic working conditions regulated in Directive 96/71/EC, such as minimum rates of pay, should remain at the level set by national legislation or by collective agreements applied in accordance with Union law in the context of that Directive. Article 71 of the new Directive further provides that contracting authorities may require that subcontractors comply with applicable labor and social laws and collective agreements and require tenderers to replace any subcontractors that do not comply.[28] The above implies that the ability to exclude a tenderer or subcontractor based on non-compliance with minimum wage requirements is limited to those that are set out in EU or national law and collective agreements,[29] thus limiting the effect of *RegioPost*. However, it will be now very

[27]Following the Work Programme 2016 and the commitment to submit a labour mobility package comprising a targeted revision of the PWD, on 8 March 2016 the Commission presented a proposal for revision of the PWD (COM (2016) 128 final).

[28]In that respect, the Directive affords an expanded ability to evaluate the supply-chain management measures that a tenderer has in place at the selection stage (Article 60(1) and Annex XII, Part II (d)).

[29]Or the international conventions listed in Annex X of the new Public Procurement Directive.

difficult for an excluded tenderer to claim that such requirements are not compatible with EU law because they apply only to public contracts and not to private ones.

5 Conclusions

Employment-related social conditions in public contracts raise a whole series of complex legal questions. *RegioPost* was welcome as striking a balance between the economic freedom to provide cross-border services and the respect for workers' social rights within the EU. The judgment has a broad significance, at least when it comes to public tenders that fall under the Public Procurement Directives, for the labor market in the postal sector, where providers are increasingly relying on "non-standard" employment contracts, outside collective agreements (flexible and temporary employment, outsourcing, self-employed delivery staff) to improve their competitiveness.

Following *RegioPost*, it is clear that any employment-related conditions, while allowed under the Public Procurement Directives, must comply with the PWD if they are applicable (even just hypothetically) to workers sent from another Member State for the provision of a service. It follows that, to comply with EU law, a contractual condition to pay a minimum wage shall be set by law (or by a collective agreement which is made universally applicable by law) and not at a higher level than the generally applicable minimum wage. Otherwise, it is unlikely to meet the requirement not to go beyond the mandatory protection provided for by the PWD.[30] Similarly, there may be grounds for a tenderer to refuse to comply with employment-related conditions in the host Member State if these exceed those applicable in its country of establishment, even if it intends to carry out the public contract entirely in its Member State or subcontract the public contract entirely to an entity based outside the adjudicating entity's Member State. But it is very unlikely that such circumstances (no worker physically located in the host Member State during the performance of the contract) would arise in practice in connection with the provision of postal services.

RegioPost confirms that public procurement is a powerful instrument that can usefully support other public and social policies. However, in declining to enforce the non-discrimination requirement regarding public contracts vs. private contracts, the Court has left the door open for the dissimilar treatment of workers carrying out the same activity within the same company or in different companies, depending on whether it is a under public contract or a private contract.

[30]The Scottish Government, for example, obtained clarification from the Commission to the effect that contracting authorities are unable to make payment of the "Living Wage" a mandatory requirement as part of a competitive procurement process, where the "Living Wage" is greater than any minimum wage set by law. See letter of Commissioner Barnier of 8 May 2014, available at: http://www.gov.scot/Resource/0045/00456861.pdf (lastly visited on 11 July 2016).

In the short term, it remains to be seen whether the judgment, and the newly established balance between the economic freedom to provide cross-border services and the protection of workers' social rights, will affect the outcome of the pending infringement procedures concerning the systematic application of the minimum wage legislation by France and Germany to all transport operations which touch their respective territories.[31] The Commission has raised doubts in that respect in relation to the PWD, the freedom to provide services and freedom of movement of goods, and the principle of proportionality,[32] as it considered that more proportionate measures than the minimum wage are available to safeguard the social protection of workers and to ensure fair competition, whilst allowing for free movement of goods and services.[33] The two new letters of formal notice having been sent after *RegioPost*, it appears that the Commission remains convinced that the application of the minimum wage to certain international transport operations "*having only a marginal link to the territory of the host Member State*"[34] cannot be justified, as it creates disproportionate administrative barriers, which prevent the internal market from functioning properly.

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[31]On 19 May 2015, while "*fully supporting the introduction of a minimum wage in Germany*", the Commission opened an infringement procedure against Germany (see IP/15/5003). On 16 June 2016, a supplementary letter of formal notice was sent to Germany and a similar infringement procedure was opened against France, in connection with the law on the application of French minimum wage to the transport sector (see IP/16/2101).

[32]The Commission considers that "the application of the Minimum Wage Act to all transport operations which touch German territory restricts the freedom to provide services and the free movement of goods in a disproportionate manner" (see IP/15/5003).

[33]Commission's press release of 19 May 2015, IP/15/5003.

[34]Commission's press release of 16 June 2016, IP/16/2101.