ECLI:EU:C:2015:760

JUDGMENT OF THE COURT (Fourth Chamber)

17 November 2015 (*)

(Reference for a preliminary ruling — Article 56 TFEU — Freedom to provide services — Restrictions — Directive 96/71/EC — Article 3(1) — Directive 2004/18/EC — Article 26 — Public procurement — Postal services — Legislation of a regional entity of a Member State requiring tenderers and their subcontractors to undertake to pay a minimum wage to staff performing the services covered by the public contract)

In Case C-115/14,

REQUEST for a preliminary ruling under Article 267 TFEU from the Oberlandesgericht Koblenz (Higher Regional Court, Koblenz, Germany), made by decision of 19 February 2014, received at the Court on 11 March 2014, in the proceedings

RegioPost GmbH & Co. KG

v

Stadt Landau in der Pfalz,

intervening parties:

PostCon Deutschland GmbH,

Deutsche Post AG,

THE COURT (Fourth Chamber),

composed of L. Bay Larsen, President of the Third Chamber, acting as President of the Fourth Chamber, J. Malenovský, M. Safjan, A. Prechal (Rapporteur) and K. Jürimäe, Judges,

Advocate General: P. Mengozzi,

Registrar: K. Malacek, Administrator,

having regard to the written procedure and further to the hearing on 29 April 2015,

after considering the observations submitted on behalf of:

– RegioPost GmbH & Co. KG, by A. Günther, Rechtsanwalt,

– Stadt Landau in der Pfalz, by R. Goodarzi, Rechtsanwalt,

– PostCon Deutschland GmbH, by T. Brach, Rechtsanwalt,

– Deutsche Post AG, by W. Krohn and T. Schneider, Rechtsanwälte,

– the German Government, by T. Henze and A. Lippstreu, acting as Agents,

– the Danish Government, by C. Thorning and M. Wolff, acting as Agents,

– the Italian Government, by G. Palmieri, acting as Agent, and M. Salvatorelli, avvocato dello Stato,

– the Austrian Government, by M. Fruhmann, acting as Agent,

– the Norwegian Government, by K. Nordland Hansen and P. Wennerås, acting as Agents,

– the European Commission, by A. Tokár, J. Enegren and S. Grünheid, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 9 September 2015,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 56 TFEU, read in conjunction with 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 (OJ 1997 L 18, p. 1), and of 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 (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) (‘Directive 2004/18’).

2 The request has been made in proceedings between RegioPost GmbH & Co. KG (‘RegioPost’) and Stadt Landau in der Pfalz (municipality of Landau in the Palatinate, Germany, ‘municipality of Landau’) concerning the obligation, imposed on tenderers and their subcontractors in the context of the award of a public contract for postal services in that municipality, to undertake to pay a minimum wage to staff performing the services covered by that public contract.

Legal context

EU law

Directive 96/71

3 Article 1 of Directive 96/71, entitled ‘Scope’, provides:

‘1. This Directive shall apply to undertakings established in a Member State which, in the framework of the transnational provision of services, post workers, in accordance with paragraph 3, to the territory of a Member State.

…

3. This Directive shall apply to the extent that the undertakings referred to in paragraph 1 take one of the following transnational measures:

(a) post workers to the territory of a Member State on their account and under their direction, under a contract concluded between the undertaking making the posting and the party for whom the services are intended, operating in that Member State, provided there is an employment relationship between the undertaking making the posting and the worker during the period of posting; or

(b) post workers to an establishment or to an undertaking owned by the group in the territory of a Member State, provided there is an employment relationship between the undertaking making the posting and the worker during the period of posting; or

(c) being a temporary employment undertaking or placement agency, hire out a worker to a user undertaking established or operating in the territory of a Member State, provided there is an employment relationship between the temporary employment undertaking or placement agency and the worker during the period of posting.

…’

4 Article 3 of Directive 96/71, entitled ‘Terms and conditions of employment’, provides as follows in paragraphs 1 and 8:

‘1. Member States shall ensure that, whatever the law applicable to the employment relationship, the undertakings referred to in Article 1(1) 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 within the meaning of paragraph 8, insofar as they concern the activities referred to in the Annex:

…

(c) the minimum rates of pay, including overtime rates; this point does not apply to supplementary occupational retirement pension schemes;

…

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.

…

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.

…'

Directive 2004/18

5 Recitals 2, 33 and 34 in the preamble to Directive 2004/18 state:

'(2) The award of contracts concluded in the Member States on behalf of the State, regional or local authorities and other bodies governed by public law entities, is subject to the respect of the principles of the Treaty and in particular to the principle of freedom of movement of goods, the principle of freedom of establishment and the principle of freedom to provide services and to the principles deriving therefrom, such as the principle of equal treatment, the principle of non-discrimination, the principle of mutual recognition, the principle of proportionality and the principle of transparency. However, for public contracts above a certain value, it is advisable to draw up provisions of Community coordination of national procedures for the award of such contracts which are based on these principles so as to ensure the effects of them and to guarantee the opening-up of public procurement to competition. These coordinating provisions should therefore be interpreted in accordance with both the aforementioned rules and principles and other rules of the Treaty.

…

(33) Contract performance conditions are compatible with this Directive provided that they are not directly or indirectly discriminatory and are indicated in the contract notice or in the contract documents. They may, in particular, be intended to favour on-site vocational training, the employment of people experiencing particular difficulty in achieving integration, the fight against unemployment or the protection of the environment. …

(34) 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] 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.'

6 Under the first indent of Article 7(b) of Directive 2004/18, the directive is, inter alia, applicable to public service contracts the estimated value of which, exclusive of value added tax, is equal to or greater than EUR 200 000 awarded by contracting authorities other than the central government authorities listed in Annex IV to that directive.

7 Article 26 of Directive 2004/18, entitled 'Conditions for performance of contracts' provides:

'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.'

8 Article 27 of that directive, entitled 'Obligations relating to taxes, environmental protection, employment protection provisions and working conditions', provides:

'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 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.

…'

German law

Federal law

9 Paragraph 97(4) of the Law against restrictions of competition (Gesetz gegen Wettbewerbsbeschränkungen), in its version of 26 June 2013 (BGBl. 2013 I, p. 1750), as last amended by Paragraph 5 of the Law of 21 July 2014 (BGBl. 2014 I, p. 1066), provides:

'Contracts shall be awarded to skilled, efficient, reliable and law-abiding undertakings. Contractors may be expected to meet other or further requirements involving social, environmental or innovative aspects if these have a direct relation to the subject matter of the contract and are stated in the description of the service to be rendered. Contractors may be expected to meet other or further requirements only if federal law or the laws of a *Land* provide for this.'

10 Pursuant to the Law on mandatory working conditions concerning cross-border services — Posted workers law (Gesetz über zwingende Arbeitsbedingungen bei grenzüberschreitenden Dienstleistungen — Arbeitnehmer-Entsendegesetz) of 26 February 1996 (BGBl. 1996 I, p. 227, 'the AEntG'), a collective agreement setting a mandatory minimum wage for the postal services sector was concluded on 29 November 2007 and was declared universally applicable to all undertakings in that sector by a regulation of 28 December 2007. However, by a judgment of the Bundesverwaltungsgericht (Federal Administrative Court) of 28 January 2010, that regulation was annulled, so that, at the time of the facts in the main proceedings, there was no mandatory minimum wage for the postal services sector.

11 The Law regulating a general minimum wage (Gesetz zur Regelung eines allgemeinen Mindestlohns) of 11 August 2014 (BGBl. 2014 I, p. 1348) provides, in principle, that all workers, from 1 January 2015, are entitled to a minimum wage of EUR 8.50 gross per hour.

Law of the *Land* of Rhineland-Palatinate

12 Paragraph 1(1) of the Law of the *Land* of Rhineland-Palatinate on guaranteeing compliance with collective agreements and minimum wages in public contract awards (Landesgesetz zur Gewährleistung von Tariftreue und Mindestentgelt bei öffentlichen Auftragsvergaben) of 1 December 2010 ('the LTTG') provides:

‘The present Law combats distortions of competition that arise in the award of public contracts because of the use of cheap labour and alleviates the burdens resulting therefrom for social protection systems. To that end, it provides that contracting authorities … may award public contracts, in accordance with the present Law, only to undertakings which pay their employees the minimum wage laid down in the present Law and which comply with collective agreements’.

13 Paragraph 3(1) of the LTTG, entitled ‘Minimum wage’, provides:

‘To the extent that compliance with collective agreements may not be required under Paragraph 4, public contracts may be awarded only to undertakings which, at the time of submitting their tender, undertake in writing to pay their staff, for performing the service, wages of at least EUR 8.50 gross per hour (minimum wage) and to implement, for the benefit of employees, any changes to the minimum wage arising during the period of performance … . … If the declaration relating to the minimum wage is not presented at the time the tender is submitted and is likewise not presented even after it has been requested, the tender shall be excluded from the evaluation. If the [competent] department has published model … declarations relating to minimum remuneration, these may be used’.

14 Following the adoption of the regulation of the Government of the *Land* of Rhineland-Palatinate of 11 December 2012, the minimum hourly wage referred to in Paragraph 3(1) of the LTTG is now EUR 8.70 gross per hour.

15 Under Paragraph 4 of the LTTG, entitled ‘Obligation to comply with collective agreements’:

‘(1) Public contracts which fall within the scope of the Law on mandatory terms of employment for workers posted cross-border and workers regularly working within the national territory [(Gesetz über zwingende Arbeitsbedingungen für grenzüberschreitend entsandte und für regelmäßig im Inland beschäftigte Arbeitnehmer und Arbeitnehmerinnen of 20 April 2009 (BGBl. 2009 I, p. 799))], in the applicable version, may be awarded only to undertakings which undertake in writing, at the time of submitting their tender, to pay their staff, for performing the service, a remuneration which, in its amount and form, corresponds at least to the provisions of the collective agreement by which the undertaking is bound under [that Law].

…

(6) If the declaration relating to compliance with collective agreements is not presented at the time the tender is submitted and is likewise not presented even after it has been requested, the tender shall be excluded from the evaluation. If the [competent] department has published model … declarations relating to compliance with collective agreements, these may be used.’

16 Paragraph 5(2) of the LTTG, entitled ‘Subcontractors’, provides:

‘Where contractual services are to be performed by subcontractors, the undertaking shall ensure that those subcontractors comply with the obligations referred to in Paragraphs 3 and 4 and shall provide the contracting authority with the subcontractors’ declarations regarding the minimum wage and compliance with collective agreements. …’

17 Paragraph 6 of the LTTG, entitled ‘Proof and monitoring’, imposes certain obligations on the successful tenderer and subcontractors, relating, inter alia, to record-keeping and to the making available of documents and data, in order to enable the contracting authority to monitor compliance with the obligations imposed under the LTTG.

18 Paragraph 7 of the LTTG, entitled ‘Penalties’, provides:

‘(1) In order to ensure compliance with the obligations set out in Paragraphs 3 to 6, the contracting authorities shall agree with the successful tenderer, for each case of culpable failure to fulfil obligations, a contractual penalty of 1% of the value of the contract; in the case of multiple failures to fulfil obligations, the total amount of penalties cannot exceed 10% of the value of the contract. The successful tenderer shall also be obliged to pay the contractual penalty mentioned in the first sentence where the failure to fulfil obligations is attributable to one of the successful tenderer’s subcontractors and the successful tenderer was aware or ought to have been aware of that failure. If the contractual penalty is disproportionately high, it may be reduced to an appropriate amount by the contracting authority, at the request of the successful tenderer. …

(2) The contracting authorities shall agree with the successful tenderer that a failure to fulfil obligations that constitutes at least gross and serious negligence by the successful tenderer with regard to the requirements of Paragraphs 3 to 6 shall entitle the contracting authority to terminate the contract without notice on serious grounds.

(3) If the successful tenderer or a subcontractor has failed to fulfil its obligations under the present Law at least as a result of gross negligence or on a repeated basis, the contracting authorities may exclude that tenderer or that subcontractor from the award of public contracts for a period of up to three years.

…’

The dispute in the main proceedings and the questions referred for a preliminary ruling

19 The order for reference states that, on 23 April 2013, the municipality of Landau issued a European Union-wide call for tender, under an open procedure, in respect of a public contract — divided into two lots — relating to postal services in that municipality, in particular, for the conclusion of a framework contract for the collection, carriage and delivery of letters, parcels and packages. The planned duration of the contract was two years, the contracting authority being entitled to extend it twice at most, for a period of one year each time.

20 Under point 4 of section III 2.2 of the contract notice, under the heading ‘Economic and financial standing’, ‘the successful tenderer shall comply with the provisions of [the LTTG]’.

21 At the time of the facts in the main proceedings, there was no collective agreement setting a minimum wage and binding the undertakings in the postal services sector under the AEntG. Nor were the undertakings subject, at that time, to the obligation to pay the general minimum wage established by the Law of 11 August 2014 regulating a general minimum wage.

22 Annex E6 to the specifications for the contract at issue in the main proceedings was entitled ‘Model declaration under Paragraph 3(1) of the LTTG’. That annex was intended to enable tenderers to present, at the time of submitting their tender, their own declaration relating to the minimum wage and those of their subcontractors.

23 The model declaration was worded as follows:

‘I/We hereby undertake:

1. to pay employees for the performance of the contract at least the (gross) hourly remuneration payable under the regulation of the *Land* in force for the purposes of setting the minimum wage referred to in the third sentence of Paragraph 3(2) of [the LTTG], unless the services are provided by trainees;

2. to select subcontractors carefully and in particular to check whether their offers could have been calculated on the basis of the minimum wage to be paid;

3. where the contract is performed by subcontractors or by employees of a temporary employment agency or by employees of a temporary employment agency engaged by the subcontractor, to ensure fulfilment of the obligations under Paragraph 4(1) of the LTTG or Paragraph 3(1) of the LTTG, and to provide the contracting authority with the declarations by which those subcontractors and temporary employment agencies undertake to comply with the minimum remuneration and collective agreements;

4. to have available complete and verifiable documents concerning the employees assigned to the performance of the contract, to present those documents to the contracting authority at its request and to inform employees of the possibility of the contracting authority carrying out checks.’

24 By letter of 16 May 2013, RegioPost complained that the declarations relating to the minimum wage 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 period, declarations by its subcontractors, which it had itself drawn up. It did not, however, submit a minimum wage compliance declaration for itself.

25 By e-mail of 25 June 2013, the municipality of Landau gave RegioPost the opportunity to provide, within a period of 14 days, the declarations relating to the minimum wage referred to in Paragraph 3 of the LTTG, while indicating that it would exclude RegioPost's tender if it failed to comply with that request.

26 By letter of 27 June 2013, RegioPost merely reiterated its complaints and stated that, if its tender were excluded, it would seek a review.

27 By letter of 11 July 2013, the municipality of Landau informed RegioPost that because of the failure to provide the declarations relating to the minimum wage referred to Paragraph 3 of the LTTG, its tender could not be assessed. In that same letter, it stated that the first lot of the contract would be awarded to PostCon Deutschland GmbH and the second lot to Deutsche Post AG.

28 By decision of 23 October 2013, the Vergabekammer Rheinland-Pfalz (Public Procurement Board of the *Land* of Rhineland-Palatinate) dismissed the application for review filed by RegioPost on 15 July 2013, on the grounds, inter alia, that the latter's tender had rightly been excluded because of the failure to provide the declarations relating to the minimum wage, which had legitimately been required by the contracting authority.

29 Hearing the dispute on appeal, the referring court considers that the outcome of the proceedings turns on whether it is required to disapply Paragraph 3 of the LTTG on the grounds that that provision is incompatible with EU law.

30 It considers that Paragraph 3(1) of the LTTG contains a special condition relating to the performance of the contract which, under Article 26 of Directive 2004/18, is lawful only if it is compatible with EU law.

31 The referring court considers that it is not in a position to determine that compatibility, even in the light of the case-law of the Court and, in particular, the judgment in *Rüffert* (C-346/06, EU:C:2008:189).

32 The referring court considers that the fact that RegioPost is an undertaking established in Germany and that the other tenderers also have their seat in Germany does not preclude a request for a preliminary ruling, since the question whether a provision of national law must be disapplied because it may be incompatible with EU law is a question of law that arises regardless of the nationality of the parties to the contract award or review procedure.

33 As regards the compatibility with the first paragraph of Article 56 TFEU of the national measure at issue in the main proceedings, the referring court observes that the obligation for undertakings established in Member States other than the Federal Republic of Germany to adjust the wages paid to their employees to the higher level of remuneration applicable in the place where the contract is to be performed in Germany deprives those undertakings of the competitive advantage they derive from their lower

wage costs, whereas that advantage is often necessary in order to offset the structural advantages enjoyed by national undertakings and to have access to the contract in question. The obligation to pay the minimum wage laid down in Paragraph 3(1) of the LTTG therefore constitutes an obstacle for undertakings established in those other Member States that is, in principle, prohibited by the first paragraph of Article 56 TFEU.

34 However, the referring court considers that EU law does not preclude the application of Paragraph 3(1) of the LTTG to those undertakings if the conditions for the application of Article 3(1) of Directive 96/71 are satisfied. Nevertheless, according to the referring court, doubts might arise in that regard.

35 On the one hand, that court observes that, although Paragraph 3(1) of the LTTG is indeed a legislative provision which lays down the minimum rate of pay, that provision does not guarantee workers the payment by their employer of the minimum wage. That national provision merely prohibits contracting authorities from awarding a public contract to tenderers that have not undertaken to pay the minimum wage laid down in it to workers assigned to the performance of the public contract in question.

36 On the other hand, the referring court notes that the obligation relating to the minimum wage laid down in Paragraph 3(1) of the LTTG concerns only those workers of the successful tenderer who are assigned to the performance of the public contract concerned. However, a worker assigned to the performance of a private contract is no less deserving of social protection than a worker who is assigned to the performance of a public contract.

37 As regards the lesson to be drawn from the judgment in *Rüffert* (C-346/06, EU:C:2008:189), the referring court observes that, in German academic writings, it has been argued, inter alia, that that judgment must be understood as meaning that Article 3(1) of Directive 96/71 does not preclude a provision such as Paragraph 3(1) of the LTTG, which lays down, in a legislative provision, a minimum rate of pay, even if it has to be complied with in the performance of public contracts only, since the requirement as to universal application does not concern legislative provisions, but only collective agreements.

38 The referring court states, none the less, that is has serious doubts as to whether that proposition is correct. In the case of a restriction on a fundamental freedom such as the freedom to provide services, it considers that it would be illogical to interpret Article 3(1) of Directive 96/71 as meaning that it requires collective agreements setting a minimum wage to be of universal application, including all workers in the sector concerned, whether they be employed in the performance of public contracts or private contracts, while the scope of legislative provisions laying down a minimum wage may be limited to only those workers assigned to the performance of public contracts.

39 The referring court considers that, if it were to be concluded that a national provision such as Paragraph 3(1) of the LTTG, requiring tenderers and their subcontractors to undertake to pay a minimum wage to staff performing the services

covered by a public contract, is compatible with Article 56 TFEU, it would be necessary to consider whether the penalty provided for by that national provision should that obligation be infringed, namely, the tenderer's exclusion from participation in the contract award procedure, is compatible with Article 26 of Directive 2004/18.

40 The referring court considers that that compatibility is doubtful since, although Paragraph 3(1) of the LTTG constitutes a special condition relating to the performance of a contract within the meaning of Article 26 of Directive 2004/18, that directive does not provide for grounds for exclusion from participation in a contract for infringement of such a special condition. Moreover, such grounds for exclusion would be difficult to understand since the question of a tenderer's compliance with the special conditions with which it has undertaken to comply arises only after the award of the contract to that operator. It is not therefore a qualitative selection criterion that might justify the exclusion of a tenderer.

41 That court considers that the penalty of exclusion of the tender in the event of non-compliance with Paragraph 3(1) of the LTTG is not based on valid grounds, since the undertakings required under that provision are of a declaratory nature only.

42 Moreover, the referring court considers that that penalty is nugatory since, in the context of a procedure for the award of a public contract such as that at issue in the main proceedings, the obligation relating to the payment of the minimum wage laid down in Paragraph 3(1) of the LTTG forms part of the obligations set out both in the contract notice and in the specifications by which the successful tenderer is contractually bound following the award of the contract and in respect of which the contractual penalty imposed in Paragraph 7(1) of the LTTG is intended to ensure compliance.

43 In those circumstances, the Oberlandesgericht Koblenz (Higher Regional Court, Koblenz) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'1. Is the first paragraph of Article 56 TFEU, read 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, at the time of 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?'

Consideration of the questions referred

Admissibility

44 The municipality of Landau and the German and Italian Governments submit that the first question is inadmissible, relying on the lack — confirmed by the referring court — of any cross-border element in the dispute in the main proceedings, in so far as all the undertakings which participated in the procedure for the award of the contract at issue in the main proceedings are established in the territory of the Member State of the contracting authority, namely, the Federal Republic of Germany. They submit that, failing a cross-border element, the Court of Justice does not have jurisdiction to rule on the compatibility of the measure at issue in the main proceedings with Directive 96/71 and/or Article 56 TFEU. The Italian Government also disputes the admissibility of the second question, for similar reasons.

45 Those objections must be rejected.

46 As a preliminary point, it must be recalled that the fact that a national court has, formally speaking, worded a question referred for a preliminary ruling with reference to certain provisions of EU law does not preclude the Court from providing the national court with all the elements of interpretation that may be of assistance in adjudicating on the case pending before it, whether or not that court has referred to them in its questions. It is, in this context, for the Court to extract from all the information provided by the national court, in particular from the grounds in the order for reference, the points of EU law that require interpretation, regard being had to the subject-matter of the dispute (see, inter alia, judgment in *Vicoplus and Others*, C-307/09 to C-309/09, EU:C:2011:64, paragraph 22).

47 In order to give a useful answer to the referring court, the first question must in the first place be examined in the light of the provision of EU law that specifically governs it, namely, Article 26 of Directive 2004/18, a provision to which the referring court, moreover, expressly refers in its second question (see, by analogy, judgment in *Rüffert*, C-346/06, EU:C:2008:189, paragraph 18).

48 It is clear from the documents before the Court, in particular, from the decision of the Vergabekammer Rheinland-Pfalz (Public Procurement Board of the *Land* of Rhineland-Palatinate) to which reference is made in paragraph 28 above, that that directive is applicable to the case in the main proceedings, since the value of the public contract in question far exceeds the relevant threshold for the application of that directive, which, at the time of the facts in the main proceedings, was set at EUR 200 000.

49 Since, in this case, Directive 2004/18 is applicable, a point which has not, moreover, been disputed by any of the parties who submitted written observations or

were present at the hearing before the Court, a question of interpretation relating to one of its provisions, in this instance, Article 26 thereof, is admissible, even though it is raised, as in the present case, in the context of a dispute all the elements of which are confined within a single Member State.

50 Moreover, even though, in the present case, all the elements of that dispute are confined within a single Member State, the Court has jurisdiction to give a ruling on Article 56 TFEU, to the extent that the degree of harmonisation envisaged in that directive so permits.

51 Thus, the value of the contract at issue in the main proceedings clearly exceeding the relevant threshold for the application of Directive 2004/18, that contract must be regarded as having a certain cross-border interest. It is, therefore, by no means inconceivable that undertakings established in Member States other than the Federal Republic of Germany were interested in participating in that contract following the publication of the contract notice, even though they decided ultimately not to participate for reasons of their own, but which might have included — for some of those undertakings established in Member States in which the cost of living and the minimum rate of pay in force are significantly lower than those prevailing in *Land* of Rhineland-Palatinate — the obligation expressly laid down to comply with the minimum wage imposed in that *Land*.

52 It follows that the first question, reformulated as in the first place concerning the interpretation of Article 26 of Directive 2004/18, is admissible, as is the second question.

Substance

The first question

53 In the light of the foregoing considerations as to the admissibility of the request for a preliminary ruling, the view must be taken that, by its first question, the referring court asks, in essence, whether Article 26 of Directive 2004/18 must be interpreted as precluding legislation of a regional entity of a Member State, such as that at issue in the main proceedings, which requires tenderers and their subcontractors to undertake, by means of a written declaration to be enclosed with their tender, to pay staff who are called upon to perform the services covered by the public contract in question a minimum wage laid down in that legislation.

54 A national provision such as Paragraph 3 of the LTTG, in so far as it requires all tenderers and subcontractors to undertake to the contracting authority to pay staff called upon to perform the public contract concerned a minimum wage established by law, must be regarded as a ‘special condition relating to the performance of a contract’ concerning ‘social considerations’, within the meaning of Article 26 of that directive.

55 In this case, that special condition was set out in the contract notice and in the specifications, so that the procedural condition as to transparency, laid down in Article 26 of that directive, is satisfied.

56 Moreover, it is clear from recital 33 to that directive that a special condition relating to the performance of a contract is compatible with EU law only in so far as it is not directly or indirectly discriminatory. It is not disputed that a national provision such as that at issue in the main proceedings satisfies that condition.

57 Furthermore, in accordance with the settled case-law of the Court, where a national measure falls within a field that has been exhaustively harmonised at EU level, that measure must be assessed in the light of the provisions of that harmonising measure and not in the light of the primary law of the European Union (see, to that effect, inter alia, judgments in *DaimlerChrysler*, C-324/99, EU:C:2001:682, paragraph 32; *Brzeziński*, C-313/05, EU:C:2007:33, paragraph 44; and *Commission* v *Hungary*, C-115/13, EU:C:2014:253, paragraph 38).

58 Under Article 26 of Directive 2004/18, special conditions relating to the performance of a contract may be laid down 'provided that these are compatible with Community law'.

59 It follows that that directive does not lay down exhaustive rules in respect of special conditions relating to the performance of contracts, so that the legislation at issue in the main proceedings may be assessed in the light of the primary law of the European Union.

60 That being so, in accordance with recital 34 to Directive 2004/18, in examining whether the national measure at issue in the main proceedings is compatible with EU law, it is necessary to determine whether, 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, the minimum conditions laid down in Directive 96/71 are observed in the host member State in respect of posted workers.

61 In this case, the referring court raises the question of the effects of the national measure at issue in the main proceedings on undertakings established outside Germany that may have been interested in participating in the procedure for the award of the public contract in question and envisaged posting their workers to that territory, on the ground that those undertakings may have decided not to participate because of the obligation placed on them in respect of the minimum wage imposed by the LTTG. Therefore, it is necessary to examine that national measure in the light of Article 3(1) of Directive 96/71.

62 In this connection, it must be stated that a provision such as Paragraph 3 of the LTTG must be regarded as a 'law', for the purposes of the first indent of the first subparagraph of Article 3(1) of Directive 96/71, laying down a 'minimum rate of pay', within the meaning of point (c) of the first subparagraph of Article 3(1) thereof. First, contrary to the Law of the *Land* Niedersachsen on the award of public contracts at issue

in the case that gave rise to the judgment in *Rüffert* (C-346/06, EU:C:2008:189), a provision such as Paragraph 3 of the LTTG itself lays down the minimum rate of pay. Secondly, at the time of the facts in the main proceedings, the AEntG did not impose, nor did other national legislation impose, a lower wage for the postal services sector.

63 That categorisation cannot be called in question on the basis that the national measure in question applies to public contracts and not to private contracts, since the condition as to universal application defined in the first subparagraph of Article 3(8) of Directive 96/71 applies only to the collective agreements or arbitration awards referred to in the second indent of the first subparagraph of Article 3(1) of that directive.

64 Moreover, since the national measure at issue in the main proceedings falls within the scope of Article 26 of Directive 2004/18, which permits, 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.

65 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 Directive 2004/18.

66 It follows that Article 26 of Directive 2004/18, read in conjunction with Directive 96/71, permits the host Member State to lay down, in the context of the award of a public contract, a mandatory rule for minimum protection referred to in point (c) of the first subparagraph of Article 3(1) of that directive, such as that at issue in the main proceedings, which requires undertakings established in other Member States to comply with an obligation in respect of a minimum rate of pay for the benefit of their workers posted to the territory of the host Member State in order to perform that public contract. Such a rule is part of the level of protection which must be guaranteed to those workers (see, to that effect, judgment in *Laval un Partneri*, C-341/05, EU:C:2007:809, paragraphs 74, 80 and 81).

67 That interpretation of Article 26 of Directive 2004/18 is confirmed, furthermore, by a reading of that provision in the light of Article 56 TFEU, since that directive seeks in particular to bring about the freedom to provide services, which is one of the fundamental freedoms guaranteed by the Treaty (see, by analogy, judgment in *Rüffert*, C-346/06, EU:C:2008:189, paragraph 36).

68 It is clear, moreover, from recital 2 to Directive 2004/18, that the coordinating provisions contained in that directive in respect of public contracts above a certain value must be interpreted in accordance with the rules and principles of the Treaty, including those relating to the freedom to provide services.

69 In this regard, according to the case-law of the Court, the imposition, under national legislation, of a minimum wage on tenderers and their subcontractors, if any, established in a Member State other than that of the contracting authority and in which

minimum rates of pay are lower constitutes an additional economic burden that may prohibit, impede or render less attractive the provision of their services in the host Member State. Consequently, a measure such as that at issue in the main proceedings is capable of constituting a restriction within the meaning of Article 56 TFEU (see to that effect, inter alia, judgment in *Bundesdruckerei*, C-549/13, EU:C:2014:2235, paragraph 30).

70 Such a national measure may, in principle, be justified by the objective of protecting workers (see, to that effect, judgment in *Bundesdruckerei*, C-549/13, EU:C:2014:2235, paragraph 31).

71 However, as the referring court has observed, the question arises whether it follows from paragraphs 38 to 40 of the judgment in *Rüffert* (C-346/06, EU:C:2008:189) that such a justification cannot be accepted on the grounds that the minimum wage imposed by Paragraph 3(1) of the LTTG applies to public contracts only, and not to private contracts.

72 That question calls for a negative answer.

73 It is clear from paragraphs 38 to 40 of the judgment in *Rüffert* (C-346/06, EU:C:2008:189) that although the Court concluded, in the context of the examination of the national measure at issue in the case that gave rise to that judgment in the light of Article 56 TFEU, that that measure could not be justified by the objective of the protection of workers, it 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.

74 Thus, in the judgment in *Rüffert* (C-346/06, EU:C:2008:189), the Court based its conclusion on the finding that what was at issue in the case that gave rise to that judgment was a collective agreement applying solely to the construction sector, which did not cover private contracts and had not been declared universally applicable. Furthermore, the Court observed that the rate of pay set by that collective agreement exceeded the minimum rate of pay applicable to that sector under the AEntG.

75 The minimum rate of pay imposed by the measure at issue in the main proceedings is laid down in a legislative provision, which, as a mandatory rule for minimum protection, in principle applies generally to the award of any public contract in the *Land* of Rhineland-Palatinate, irrespective of the sector concerned.

76 Furthermore, that legislative provision confers a minimum social protection since, at the time of the facts in the main proceedings, the AEntG did not impose, nor did other national legislation impose, a lower minimum wage for the postal services sector.

77 In the light of all the foregoing considerations, the answer to the first question is that Article 26 of Directive 2004/18 must be interpreted as not precluding legislation of a regional entity of a Member State, such as that at issue in the main proceedings, which

requires tenderers and their subcontractors to undertake, by means of a written declaration to be enclosed with their tender, to pay staff who are called upon to perform the services covered by the public contract in question a minimum wage laid down in that legislation.

The second question

78 By its second question, the referring court asks, in essence, whether Article 26 of Directive 2004/18 must be interpreted as precluding legislation of a regional entity of a Member State, such as that at issue in the main proceedings, which provides for the exclusion from participation in a procedure for the award of a public contract of tenderers and their subcontractors who refuse to undertake, by means of a written declaration to be enclosed with their tender, to pay staff who are called upon to perform the services covered by the public contract in question a minimum wage laid down in that legislation.

79 It follows from the answer given to the first question that Article 26 must be interpreted as not precluding legislation of a regional entity of a Member State, such as that at issue in the main proceedings, which requires tenderers and their subcontractors to undertake, by means of a written declaration to be enclosed with their tender, to pay staff who are called upon to perform the services covered by the public contract in question a minimum wage laid down in that legislation.

80 Paragraph 3(1) of the LTTG also provides that if no such declaration has been made at the time the tender is submitted and is likewise not presented even after it has been requested, the tender is to be excluded from the evaluation.

81 Furthermore, Paragraph 7 of the LTTG provides for a system of penalties that applies to various situations in which such a written undertaking was enclosed with the tender, but was not complied with in the course of the performance of the public contract. That system is not relevant to the main proceedings, which concern the exclusion of a tenderer that has refused to enclose that undertaking with its tender.

82 In this case, RegioPost was excluded from participation in the procedure for the award of the public contract at issue in the main proceedings after refusing to put its tender in order by appending its written undertaking to comply with the obligation to pay the minimum wage laid down in Paragraph 3(1) of the LTTG.

83 Exclusion from participation in that contract cannot be regarded as a penalty. It is merely the consequence of the failure, characterised by the failure to enclose with the tender the written undertakings required under Paragraph 3(1) of the LTTG, to meet a requirement formulated in a particularly transparent manner in the contract notice and intended to emphasise, from the outset, the importance of compliance with a mandatory rule for minimum protection expressly authorised by Article 26 of Directive 2004/18.

84 Consequently, just as that provision does not preclude a written undertaking as to compliance with that rule being required, Article 26 permits such exclusion.

85 The importance of compliance with that mandatory rule for minimum protection is moreover expressly made clear in recital 34 to Directive 2004/18 in so far as it states that, in the event of non-compliance with the obligations imposed by national law concerning, inter alia, 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 that is liable to lead to the exclusion of that economic operator from the procedure for the award of a public contract.

86 Moreover, the burden — on tenderers and their subcontractors, if any — represented by the obligation to include an undertaking to pay a minimum wage, such as that laid down in Paragraph 3(1) of the LTTG, is negligible, particularly since they can simply complete standard forms.

87 The appropriateness and proportionality of the exclusion of an operator from participation in a procedure for the award of a public contract, such as the exclusion provided for in Paragraph 3(1) of the LTTG, are also clear from the fact that that provision expressly provides that such exclusion can be applied only where, after having been invited to supplement its tender by adding the undertaking, the operator concerned refuses to comply, as in the main proceedings.

88 It follows from all the foregoing considerations that the answer to the second question is that Article 26 of Directive 2004/18 must be interpreted as not precluding legislation of a regional entity of a Member State, such as that at issue in the main proceedings, which provides for the exclusion from participation in a procedure for the award of a public contract of tenderers and their subcontractors who refuse to undertake, by means of a written declaration to be enclosed with their tender, to pay staff who are called upon to perform the services covered by the public contract in question a minimum wage laid down in that legislation.

Costs

89 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Fourth Chamber) hereby rules:

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, as amended by Commission Regulation (EU) No 1251/2011 of 30 November 2011, must be interpreted as not precluding legislation of a regional entity of a Member State, such as that at issue in the main proceedings, which requires tenderers and their subcontractors to undertake, by means of a written declaration to be enclosed with**

their tender, to pay staff who are called upon to perform the services covered by the public contract in question a minimum wage laid down in that legislation.

2. **Article 26 of Directive 2004/18, as amended by Regulation No 1251/2011, must be interpreted as not precluding legislation of a regional entity of a Member State, such as that at issue in the main proceedings, which provides for the exclusion from participation in a procedure for the award of a public contract of tenderers and their subcontractors who refuse to undertake, by means of a written declaration to be enclosed with their tender, to pay staff who are called upon to perform the services covered by the public contract in question a minimum wage laid down in that legislation.**

[Signatures]

---

* Language of the case: German.