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Edited by Sue Arrowsmith and Peter Kunzlik

Excerpt

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Editors' Note – the decision in *Rüffert v. Land Niedersachsen*

In April 2008 the Second Chamber of the European Court of Justice (ECJ) gave judgment in the case of *Rüffert v. Land Niedersachsen*¹ which may have significant implications for the ability of public authorities to advance certain social goals through the exercise of their procurement function. In brief, the judgment indicated that, in the context of the Posted Workers Directive, it is a violation of the EC Treaty to impose working conditions for those working on public contracts that do not apply to workers in general (that is, to those working on private as well as on public contracts). This raises the possibility that, more generally, the Treaty precludes standards of behaviour being imposed on those who obtain government contracts that do not apply to businesses in general, both in carrying out the contract and in relation to the activities of a government's contractor outside its government contracts. It is a striking feature of the judgment, however, that the ECJ does not refer to its own jurisprudence on public procurement or to the provisions on social and environmental considerations in the Community directives on public procurement. This is in spite of the fact that this jurisprudence and legislation arguably should have been taken into account in the ECJ's decision-making and is potentially affected by the *Rüffert* judgment.

Production of the present book was too advanced at the time of judgment to incorporate an analysis of the *Rüffert* case into the main text. However, the case's potential significance for the subject matter of this book is sufficient to warrant a brief note on its possible implications and on our own response to the judgment.

¹ Case C-346/06, *Dirk Rüffert v. Land Niedersachsen*, 3 April 2008.

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[More information](#)**The facts and judgment**

The *Rüffert* case concerned German legislation which required that public contracts for building works worth more than EUR 10,000 be awarded only to undertakings which agreed to pay staff working on such contracts a minimum wage as prescribed by a collective agreement on 'building and public works'. The law applied equally regardless of whether the contractor in question was a domestic undertaking or an undertaking from another Member State. The ECJ held that Directive 96/71, the Posted Workers Directive,² precluded the adoption of such a law. This was because, although the Posted Workers Directive permitted Member States to require the payment of minimum wages as prescribed by 'collective agreements' which had been declared 'universally applicable', the collective agreement in this case did not conform to that requirement: the Court held that since the requirement to pay the minimum wage specified by the agreement applied only to workers engaged on public contracts and not equally to those engaged on private contracts it could not be regarded as having been declared to be universally applicable. Indeed the referring court had itself confirmed that it had not been so declared under German law.

Although the case was concerned specifically with the preclusory effects of the Posted Workers Directive, the reasoning and statements of the Court in reaching this conclusion may, as noted above, have wider implications.

First, before addressing the question raised by the referring court, the ECJ gave a general characterisation of the situation which had arisen in the case by noting that the obligations provided by the German legislation meant that 'construction undertakings from other Member States must adapt the remuneration they pay to their workers to the normally higher level in force at the place [in Germany] where the contract is to be performed. Such a requirement causes those undertakings to lose the competitive advantage which they enjoy by reason of their lower wage costs. Consequently, the obligation to comply with the collective agreements constitutes an impediment to market access.'³ In this spirit, interpreting the Posted Workers Directive in light of Article 49 EC, the Court went on to hold that by requiring undertakings performing public works contracts to apply the minimum wage laid down by the local law a Member State may be considered as imposing an additional economic

² The Posted Workers Directive, OJ 1997 No. L18/1. ³ The *Rüffert* judgment, para. 14.

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burden that may impede or render less attractive the provision of services in the host Member State with the result that the measure was therefore capable of constituting a restriction on intra-community trade within the meaning of Article 49 EC.⁴ On this reasoning, we should note here that in chapter 2 we argue that not all procurement measures that impede or render less attractive the provision of services in another Member State are potentially to be considered as restrictions on trade and – as is relevant here – that workforce conditions limited to the performance of the public contract awarded (and not extending to the contractor's other business activities) are capable of constituting a restriction on trade *only* when directly or indirectly discriminatory. This issue has not been directly considered by the ECJ, however. Although the Court's language in *Rüffert* may imply, contrary to our view, that such measures *are* potentially caught by the Treaty even when non-discriminatory, it is important to note that *Rüffert* actually concerned a measure that was discriminatory in effect, and that the Court thus did not specifically address the position of non-discriminatory measures (as also in the case of *Contse*,⁵ which is discussed in chapter 2). Thus we consider that the position of such non-discriminatory measures still remains open for consideration by the ECJ.

Having concluded that the measure was capable of constituting a restriction on trade under Article 49 EC the Court in *Rüffert* then went on to consider whether legislation such as that in question could be justified by the objective of protection of workers. The Court concluded that it could not because it did not comply with the requirements of the Posted Workers Directive, and especially because it was only applicable to workers (albeit regardless of whether they were nationals of the host state or of another Member State) engaged on public contracts but *not* also to those engaged on private contracts: the file contained no evidence that such protection was necessary for construction workers engaged in the former but not the latter. Nor could the measure be justified as being necessary to further the financial balance of the social security system or the protection of the independence of trades unions.⁶

In summary, therefore, the Court appears to have concluded that both the Posted Workers Directive and Article 49 EC prevent a Member State

⁴ *Ibid.* para. 37.

⁵ Case C-234/03, *Contse SA, Vivisol Srl & Oxigen Salud SA v. Instituto Nacional de Gestión Sanitaria (Ingesa)* ('*Contse*') [2005] ECR I-9315.

⁶ *Rüffert*, paras. 41 and 42.

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from legislating to require that workers engaged on public contracts are to be entitled to higher standards as regards minimum wages than are legally applicable to workers engaged on purely private contracts, even though the rule for public contracts is equally applicable as between workers of domestic undertakings and those from other Member States.

It is notable that Advocate General Bot took a different view from the Court, including on the question of justification. Whilst he considered that the German legislation was to be regarded as restricting intra-community trade in services he also considered that it was capable of justification as being for the protection of workers and prevention of social dumping.⁷ In particular, he rejected the view that the legislation could not be justified because it distinguished between workers and on public and private contracts. In this respect he noted that 'while it is true that the aim of public procurement is above all to meet an identified administrative need for works, services or supplies, the award of public contracts also authorises the attainment of other public interest requirements, such as environmental policy, or, as in the present case, social objectives'.⁸ Further, citing *Beentjes* and *Nord Pas de Calais*, the Advocate General noted that 'the possibility of integrating social requirements into public procurement contracts has already been recognised by the Court ... and is now enshrined in [Article 26 of] Directive 2004/18'.⁹

In chapter 3 we suggested that there are in fact two justifications for the government to impose standards for the performance of public contracts, or – more broadly – that are applicable for *firms* working on public contracts, but not to apply the same measures to the whole private sector.

One is ensuring that government is associated with the highest possible standards. As with policies designed to ensure legal compliance this may be done both to set an example – which may encourage wider acceptance of the standards – and to avoid public criticism. This justification has particular force for policies limited to the contract, but is also relevant more generally. The second justification for 'regulation through procurement' concerns the effectiveness of the policy: procurement is in some fields a more effective policy instrument than alternatives, such as criminal or administrative sanctions, thus justifying a decision to focus limited resources on enforcing the policy in this limited field ... This is again particularly the case where the policy is limited to the government contract, but is also of broader relevance.

⁷ Advocate General's Opinion of 20 September 2007, para. 114.

⁸ *Ibid.*, para. 132. ⁹ *Ibid.*, para. 133.

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Although he does not articulate them in this way, these kinds of considerations would seem to lie behind the more flexible view taken by the Advocate General. The ECJ's judgment in *Rüffert*, on the other hand, appears to reject these as general justifications for measures confined to public contracts in the context of the kind of legislation that was in issue in this case.

However, it can be noted that the Court did leave room for the possibility that it might be possible to justify different treatment of workers on public and private contracts in certain cases: as mentioned above the Court mentioned that there was nothing in the file to indicate why special protection was needed for workers on public contracts, which implies that it might be possible to show this. This raises the possibility that it might be prepared to accept some arguments of this kind – if perhaps not as a justification for all policies limited to public sector contract workers, at least where a specific argument is made based on the particular facts (such as the practical difficulties of enforcing legislation outside the context of public contracts). It remains to be seen how receptive the Court will be to any such specific arguments.

Implications for other social policy measures relating to the contract workforce

The judgment in *Rüffert* seems to indicate at the very least that Article 49 EC and the Posted Workers Directive in principle preclude the government from imposing in public contracts conditions beyond those that apply more generally in the state concerned, when these are conditions of the type covered by the Posted Workers Directive. However, it is not clear how far the principle that the ECJ has applied to the working conditions in issue in *Rüffert* also extends to legislation providing for other forms of social opportunity for workers on public contracts, such as access to training, medical benefits and so on. Nor is it clear how the principle laid down in *Rüffert* might affect measures governing the *composition* of the workforce on government contracts, such as conditions or award criteria that require or encourage government contractors to provide job opportunities for the long-term unemployed or for disabled persons. In chapter 4 of this book we argue that many of these kinds of horizontal policies are lawful under the Treaty: we suggest that even to the extent that they are potentially hindrances to trade they are justifiable on various social and environmental grounds as mandatory or general interest requirements. It might be contended, however, that the Court's reasoning in *Rüffert* as regards Article 49 EC now affects those

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arguments, and precludes any social opportunity requirement imposed by domestic legislation which applies to workers employed on public contracts only and not also to those engaged on private contracts.

Such a contention, however, sits uneasily with the prior developments that have taken place in the EC regime in relation to horizontal considerations in public procurement. This applies both to the Court's previous jurisprudence on social measures in public procurement – such as the *Beentjes* ruling which contemplates conditions requiring employment for the long-term unemployed in the contract – and with the provisions of the procurement directives, which also specifically contemplate conditions of this kind in the new Article 26 on contract conditions (which codifies *Beentjes*) as well as the possibility of limiting contracts altogether to workshops for those with disabilities. Technically speaking it would not be incompatible with these provisions to conclude that such social policy measures that require contractors to provide various kinds of social benefits are not permitted in public procurement contracts since (as explained in chapter 2 and chapter 4) both the jurisprudence and the directives make it clear that their positive provision for such social measures is always subject to their compatibility with the Treaty. However, there is no doubt that all those involved have assumed throughout that such measures are valid in principle and that the constraints on them merely relate to, for example, the need to formulate them in a non-discriminatory manner so far as possible. It would be remarkable if such measures were to be considered unlawful, and it is for this reason that Advocate General Bot considered the existence of the prior jurisprudence and secondary legislation to be relevant to the question before the ECJ in *Rüffert*. Clearly the Advocate General considered that measures of the kind mentioned above are lawful and considered it inconsistent with that position not to accept justification of comparable measures concerning working conditions.

Since the ECJ in *Rüffert* did not accept the possibility of justification of the legislation in that case, however, does this imply that other social policy measures also cannot be justified where they are limited to public contracts? We would suggest that it does not. We consider that the Advocate General is correct in his implication that such measures may in principle be justified, and that the ruling in *Rüffert* is in fact limited to the context of conditions covered by the Posted Workers Directive.

The fundamental importance of the Posted Workers Directive to the outcome of the case is, however, clear when one remembers that both the

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operative part of the ruling and the Court's reasoning¹⁰ make explicit that it was the directive which precluded the legislation such as that in issue, albeit that the directive was interpreted in light of Article 49 EC.¹¹ This might argue for a narrow application of the case to facts in which the directive is relevant since it makes clear that the Court itself approached the case on a basis which focused on an interpretation of the specific directive in issue rather than upon wider principles applicable to free movement in the procurement context more generally. Indeed, in our view, that can be the only explanation for the fact that the Court managed to come to judgment without once mentioning any provision of Community procurement legislation at all, nor any of its previous judgments, such as *Beentjes*,¹² interpreting that legislation, or applying the free movement of goods/services rules in the procurement context.

In summary, we would thus suggest that the *Rüffert* case does not significantly affect the general arguments that we make in chapter 4 regarding the legality of social and environmental policy measures concerning the performance of government contracts. Rather, it affects only the specific issue of working conditions of a kind covered by the Posted Workers Directive.

We should also recall here that, as mentioned earlier in this note, it is our contention that the issue of justification is not generally relevant in any case for non-discriminatory measures relating to performance of a government contract, on the basis that these cannot be hindrances to trade. If that is correct, the *Rüffert* principle will be relevant only for horizontal measures that are directly or indirectly discriminatory, and will be less important than it would be if all procurement measures affecting the workforce were regarded as potential hindrances to trade.

¹⁰ Para. 43 of the judgment.

¹¹ If we are right in characterising the *Rüffert* decision as depending upon the preclusory effect of a Community directive, that would appear consistent with the approach of the Court in another recent decision, namely *Case C-6/05 Medipac-Kazantzidis v. Venizelio-Pananio* ('*Medipac*') [2007] ECR I-455 in which the Court held that a contracting authority was not entitled to reject medical devices which conformed to its invitation to tender on public health grounds without following the harmonised safeguard procedure laid down for such devices by Directive 93/42 (the Medical Devices Directive) which were binding upon the authority in question. Although the Court explained this decision by reference to the principle of equal treatment and transparency, it is clear that any other decision would have permitted the contracting authority to render the safeguard procedure nugatory so far as it applies to public purchases and so undermine the effective application of the directive. The directive was therefore clearly being accorded preclusory effect as regards the contracting authority's conduct within its scope similarly to the way in which Directive 96/71 was considered preclusory in *Rüffert*.

¹² *Case 31/87 Gebroeders Beentjes BV v. Netherlands* [1988] ECR 4635, discussed at p. 208 below.

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Implications for other types of measures involving regulation by contract

It is finally also necessary to note the potential relevance of the *Rüffert* judgment to horizontal policies that go beyond contract performance – for example, requirements that government contractors should employ a certain proportion of disabled workers in their business as a whole. In chapter 3 we distinguish these measures – which can be broadly characterised as measures that are ‘regulatory’ – from measures limited to contract performance, such as those in issue in *Rüffert* (see chapter 3, section 3). As chapter 3 explains, measures of this kind (like measures limited to contract performance also) are often concerned merely with using public procurement as an additional tool to enforce standards already imposed on other firms in the market, and to this extent do not seem to be affected by the *Rüffert* judgment. However, such procurement measures may also be used effectively to impose regulatory standards on government contractors in their whole business that do not apply at all to other businesses. We explain in chapter 4 that many measures of this kind are now prohibited by the procurement directives, so that they are not now common in the EC. However, we argue there also that such measures may be compatible with the Treaty and thus lawful to the extent allowed by the directives or where applied to contracts that are not caught by the directives at all. In this respect we suggest that the justifications set out earlier – ensuring that government is associated with high standards, by way of example or for other reasons, and providing an effective method of policy enforcement for some cases – apply in this context also, although not always (as we noted above) to the same degree as with measures limited to contract performance.

Are such measures affected by *Rüffert*? As with measures limited to contract performance, we suggest again that this is not generally the case, on the basis that *Rüffert* is concerned only with the kind of working conditions that are dealt with in the Posted Workers Directive. Thus we consider that only measures relating to these kinds of conditions are affected. We can note that the issue may be important in the context of measures in this group, since (as we explain in chapter 2) we consider that these kinds of measures are all potentially hindrances to trade – at least when general in nature rather than applied to isolated contracts – even when they are non-discriminatory.

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1

Public procurement and horizontal policies in EC law: general principles

SUE ARROWSMITH AND PETER KUNZLIK

1. Introduction

Public procurement is the process whereby government bodies purchase from the market the goods, works and services that they need. Whether buying paper clips, commissioning major projects for the construction of hospitals, schools or offices, or procuring multimillion-pound IT and communications systems, the authorities in question are participating in the public procurement market. It is a market of great economic importance, and in the EC context is of particular concern from the perspective of the single market. In 1994 the market in regulated procurement (including utilities) represented no less than 14 per cent of Community GDP¹ and the UK public procurement market alone has been estimated as worth £117 billion.²

In this book we are concerned with the impact of EC law on one facet of public procurement, namely its use to promote social, environmental and other societal objectives that are not *necessarily* connected with the procurement's functional objective, in the sense of acquiring paper clips, an IT system, or whatever. This phenomenon embraces, for example, government policies against buying from suppliers that use child labour, and policies requiring suppliers to provide employment for ethnic minorities or disabled persons. These have commonly been referred to in Europe as 'secondary' procurement

¹ European Commission, *The Single Market Review*, sub-series III, *Dismantling of Barriers*, Volume 2, Public Procurement (1997), pp. 171–178. As for the size of global public procurement markets, see D. Audet, 'Government Procurement: A Synthesis Report' (2003) 2 *OECD Journal on Budgeting* 156; and F. Tronfetti, 'Discriminatory Procurement and International Trade' (2002) 23 *The World Economy* 57, 60.

² Office of Fair Trading, *Assessing the Impact of Public Sector Procurement on Competition* (September 2004). This excludes purchasing of public corporations.

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policies³ and in the United States as ‘collateral’ policies.⁴ However, for reasons explained below, we prefer the label ‘horizontal’ policies.

The first, and hitherto most important, dimension of the debate about horizontal policies under EC procurement law concerns the extent to which the law limits the *discretion* of Member States to pursue their chosen policies, in order to advance the internal market. This is an important issue for many Member States, since specific horizontal policies can be politically highly charged. In many countries, for example, it would be regarded as outrageous if government offices were to be furnished using hardwood from non-sustainably managed forests, and if EC laws were to prevent authorities from purchasing only sustainably harvested timber there would thus be widespread outcry. Similarly, one might well expect popular criticism if the EC procurement regime were to prohibit Member States from reserving contracts for workshops for the disabled or from rejecting goods manufactured using child labour. These are but a few of the controversial topics in the debate about the way in which horizontal policies and procurement practices should interrelate.

In addition, a second dimension of the subject is the extent to which EC law does or should *require* or *encourage* Member States to use their procurement power to promote certain policies, notably those of concern to the EC itself, such as development of renewable energy sources or gender equality. This dimension is relatively novel, but potentially important, especially as the EC’s most recent procurement directives include for the first time provisions that harness the procurement powers of Member States for EC objectives, by requiring states to exclude contractors convicted of corruption and certain other offences.⁵ Similarly, as we shall see, Community measures have been enacted to encourage use of procurement to promote objectives related to energy policy.⁶

Use and regulation of horizontal policies is one of the few areas of EC public procurement law to have attracted wide interest⁷ and there is a

³ Including by the present authors: for early use of this term see, for example, S. Arrowsmith, *Government Procurement and Judicial Review* (Toronto: Carswell, 1988), p. 81, and (in relation to EC law) S. Arrowsmith, ‘Public Procurement as a Tool of Policy and the Impact of Market Liberalisation’ (1995) 111 *LQR* 235, note 1.

⁴ See the standard text, J. Cibinic and R. Nash, *Formation of Government Contracts*, 3rd edn (Washington, DC: George Washington University Law School, 1998), chapter 10.

⁵ See section 5.3 below and chapter 12.

⁶ Directive 2006/32/EC on Energy End-use Efficiency and Energy Services, OJ 2006 No. L114/64.

⁷ Perhaps not only because of the interest of the subject matter but also because of important decisions of the ECJ in cases such as Case C-31/87, *Gebroeders Beentjes BV*