

The Award of Rescue Services: Higher Regional Court Düsseldorf submits Controversial Legal Questions to the ECJ

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BLOMSTEIN achieved an important success before the Higher Regional Court (**HRC**) Düsseldorf for the Falck-Group. On 12 June 2017, the public procurement division submitted several questions to the ECJ about the interpretation of public procurement law in order to clarify controversial and fundamental legal questions concerning the award of rescue services (Az VII Verg 34/16). The ECJ's decision on these legal questions will significantly influence the market for rescue services. The ultimate aim is to clarify whether private service providers will have a realistic chance of fair competition concerning public procurement in this market segment in Germany.

The award of rescue services is a specific sector in procurement law, which has caught the attention of the reviewing authorities as well as the ECJ multiple times in recent years. The economic value of this sector is substantial. The total value of public awards amounts to an estimated 500 million euros per year. Individual contracts of bigger cities are typically worth a double-digit million euro amount: the municipality of Cologne is planning a 50 million euro contract without following the regular procurement procedure set-out by the German Act against Restraints of Competition (**ARC**) and under exclusion of private rescue service companies.

The legal questions that the HRC Düsseldorf submitted to the ECJ on 12 June 2017 belong to the most controversial of the 2016 procurement law reform: Art. 107 sec. 1 no. 4 ARC consists of an entirely new exemption for services in the area of civil defence services provided by “non-profit organisations” or associations. Almost every word of this provision is controversial. Furthermore, difficult legal questions arise in relation to EU primary law.

In the present proceeding, the city of Solingen limited the procurement procedure to certain charities despite the legal uncertainty. The Falck-Group challenged this approach before the review bodies. The HRC Düsseldorf subsequently submitted several relevant questions regarding the interpretation of Art. 107 sec. 1 no. 4 ARC to the ECJ. One of these questions about rescue services rendered in Germany concerns the requirements that the Directive 2014/24/EU imposes on “non-profit organisations”.

Only after the ECJ answers this question will the HRC Düsseldorf decide whether German charities that offer rescue services are “non-profit organisations” according to EU law – a requirement imposed by Art. 107 sec. 1 no. 4 ARC. The HRC thereby considers that the implementation of the Directive into German national law is insufficient. In its current form Art. 107 sec. 1 no. 4 ARC states that merely associations recognized as civil defence or rescue organisations under federal or state law are to be considered “non-profit organisations” for the purpose of that provision. This is problematic since the corresponding provisions in federal and state law do not specify what constitutes a “non-profit organisation”.

The Falck-Group is the biggest private rescue service company in Germany with approximately 2,500 employees and 470 vehicles in more than 60 stations across eight federal states (*Länder*). The BLOMSTEIN team, represented by Pascal Friton, Max Klasse, Hans-Joachim Prieß and Florian Wolf, advises the Falck-Group on matters of procurement and antitrust law.