

**Krzysztof Horubski**

University of Wrocław  
e-mail: krzysztof.horubski@uwr.edu.pl  
ORCID: 0000-0003-3062-6015

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**SOCIO-ECOLOGICAL INSTRUMENTALIZATION  
AND THE ECONOMIC OBJECTIVES  
OF PUBLIC PROCUREMENT LAW\***

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**SPOŁECZNO-EKOLOGICZNA  
INSTRUMENTALIZACJA A CELE EKONOMICZNE  
PRAWA ZAMÓWIEŃ PUBLICZNYCH**

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**Abstract:** According to the law of the European Union, the freedoms of the single market (free movement of goods, capital and of people (workers), freedom of establishment and freedom to provide services), coexist with the obligations of Member States to achieve environmental objectives, protect vulnerable social groups against discrimination and exclusion, as well as to ensure a high level of employment. This competition between the EU policies undoubtedly necessitates the determination of how public procurement as a legal institution (an area of activity of the widely understood state) can be used to achieve instrumental (social, environmental) objectives, aside from its primary goal, i.e. maximizing the direct economic benefit from a public contract. This paper, within the scope of the abovementioned problem, analyses relevant judgments of the Court of Justice of the European Union, as well as opinions with regard to these judgments presented by legal experts on public procurement. In effect, the phenomenon of increasing socio-ecological instrumentalization of public procurement law (seemingly the direction towards which this regulation is aimed), was demonstrated in light of the selected examples.

**Keywords:** public procurement law, social and ecological instrumentalization of public procurement law, primary and secondary objectives of public procurement.

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**Streszczenie:** W prawie europejskim współistnieją swobody rynku wewnętrznego (swoboda przepływu towarów i kapitału, przepływu osób (pracowników), swoboda prowadzenia działalności gospodarczej i świadczenia usług) i obowiązki państw członkowskich do osiągnięcia celów środowiskowych, ochrony wrażliwych grup społecznych przed dyskryminacją i wykluczeniem lub zapewniania wysokiego poziomu zatrudnienia. Ta konkurencja polityk UE wymusza ustalenie, w jaki sposób instytucja prawna zamówień publicznych (jako obszar działania szeroko rozumianego państwa) może być wykorzystana do realizacji celów instrumentalnych (społecznych, środowiskowych) obok swojego nadrzędnego celu, tj. maksymalizacji bezpośredniej korzyści ekonomicznej z zamówienia publicznego. W artykule dokonano analizy stosownego orzecznictwa Trybunału Sprawiedliwości Unii Europejskiej oraz przedstawianych na tle tego orzecznictwa poglądów nauki prawa zamówień publicznych. W rezultacie na wybranych przykładach ukazano pogłębiające się zjawisko społeczno-ekologicznej instrumentalizacji prawa zamówień publicznych jako kierunku rozwojowego tego zespołu unormowań.

**Słowa kluczowe:** prawo zamówień publicznych, społeczna i ekologiczna instrumentalizacja prawa zamówień publicznych, pierwotne i wtórne cele zamówień publicznych.

## 1. Introduction

Since the last century the issue of permissible and justified scope of instrumentalization in awarding and the execution of public contracts has been among the most important problems underlying the creation and application of public procurement law in the European Union (Prieß, 2005, pp. 272-292). This arises from the potential to use public contracts, still a traditional instrument of effective public spending and an element of the internal market (common market), to achieve broad social, ecological and economic objectives. This possibility is connected with massive expenditure incurred as part of the public procurement at EU scale but, first of all, it concerns the areas where the state, local government and institutions of the public law act as buyers of goods and services procured with great frequency. The source of the mentioned problem is the coexistence in EU law of both internal market rules, such as freedom of movement of goods, persons, services and capital, and protection of competition freedom to conduct business and provide services, and the obligations of Member States to achieve environmental objectives, protecting vulnerable groups against discrimination and exclusion, and ensuring a high level of employment. These competing objectives and policies make it necessary to determine to what extent the legal institution of public contracts may be used to accomplish social and ecological objectives.

The public procurement system both at national and EU level has been in effect for a long time, and its objective of the maximization of a direct economic (financial) effect of the contract has been perceived as the main goal consistent with the intention of opening the market of public contracts to entrepreneurs from other EU states. Basing public contracts solely on strictly economic criteria was declared

as most suitable to remove national barriers in the development of a common market and to apply the principle of equal opportunities of tenderers for public procurement contracts. However, already in the 1980s the judicial decisions of the Court of Justice of the European Union (CJEU), and also the position of the European Commission, promoted the idea of a deviation from this formula and a search for a solution as to how public procurement may be used to accomplish social objectives or objectives connected with environmental protection. These considerations were reflected in the judgment of 1987 in case C-31/87 Beentjes (Case C-31/87 Gebroeders Beentjes BV...). Despite the fact that the Court of Justice admitted a clearly social criteria while assessing the tenders (number of the unemployed employed for works which were the subject of the contract) by the contracting authority, still, in the later period, there was no uniform view as to the admissibility of, and conditions for the applicability of this type of criteria in awarding contracts. Hence, conclusions arising from particular judgments of the CJEU or positions of the European Commission were contradictory and unclear. This may be explained by the fact that the directives of EU public procurement law, which were aimed at the standardization of national legal systems, did not address clearly the applicability of social or ecological criteria in awarding contracts at that time. The issue of whether such criteria may be applied by contracting authorities has been clearly indicated and regulated in EU directives on public procurement law, issued in this century, yet they do not eliminate the difficulty of combining the economic objectives, basic for the procurement law, and the instrumental social or ecological objectives while awarding or executing public contracts. This issue is the subject of further deliberations in this study.

## **2. Ecological instrumentalization of public procurement law**

The instrumentalization of public procurement means, in general, that the public procurement system is used to accomplish specific economic, social and ecological objectives which go beyond the effective satisfaction of the direct needs of the contracting authority (Horubski, 2017, pp. 54-55). It should be noted that in the preambles of the currently applicable EU directives on public procurement law (Directive 2014/24/EU of 26 February 2014...; Directive 2014/25/EU of 26 February 2014...), the regulator combined the objectives of public procurement with the objectives of the policy of development of the European Union, indicating the essential role of public procurement in the execution of the strategy of Europa 2020, the EU plan of overcoming the economic crisis and a return to growth, adopted in 2010. Thus, public procurement was acknowledged as the most efficient use of public funds (Nowicki & Wierzbowski, 2018, pp. 43-55). The combination of the objectives mentioned above is yet another sign of the ongoing instrumentalization of public procurement law in the meaning indicated above.

The instrumental criteria in awarding public contracts concern different issues than the efficiency of public spending; they are to serve other objectives than the

maximization of the economic benefits of contracts (efficiency of public spending). Despite the fact that the instrumentalization of public procurement, in the meaning provided above, is undoubtedly one of the evolutionary trends of contemporary public procurement law, this does not change the fact that the economic efficiency of procurement in the public sector is still of primary importance in this branch of law. Yet the basic objective of a public contract is to purchase specific goods in order to achieve the most efficient relation between the value of the purchased goods on one hand and the price paid or cost of purchase and utilisation of the goods on the other (Szydło, 2013, pp. 3-4). This means that the ecological or social objectives are of secondary importance in public procurement law, however their presence and availability in the execution of public contracts necessitates taking into consideration the above relation referred to as best value for money (Arrowsmith, 2011, pp. 5-15). Obviously, in cases where the contracting authorities would like to use ecological criteria, they cannot do so in isolation from the current achievements and findings of natural sciences (Sjåfjell & Wiesbrock, 2016, p. 14).

Undoubtedly, the judgment in case C-513/99 *Concordia Bus Finland* (Case C-513/99 *Concordia Bus Finland Oy Ab...*) was of fundamental importance for the admissibility and development of ecological criteria in public procurement. The judgment finally confirmed the admissibility of instrumental criteria in the process of awarding public contracts, and also became the basis for the development of a new formula of using socio-economic conditions while awarding public contracts.

Whilst considering the case, the CJEU needed to answer the question of whether using strictly ecological conditions which do not translate directly into a measurable monetary benefit of the contracting authority, impact the price of delivery and limit the access to the contract (high technical requirements) as a criterion of tender assessment (separate points), is admissible in light of the notion of the most advantageous tender. In the facts of the case, Helsinki put out a tender for the purchase of buses for public transport, and apart from the price criterion, the city set down ecological requirements (low external noise emission and low nitrogen oxides in exhaust fumes) which in fact prejudged the choice of the most advantageous tender (as opposed to similar prices of offered buses). *Concordia Bus Finland*, which did not win the tender, regarded the criteria as discriminating, preferring a low number of entrepreneurs who could deliver buses of such stringent ecological standards (including the winning city transport company in Helsinki), and indicated that they were not related to the subject of the tender (see point 30 of the judgment). In considering the appeal of *Concordia Bus Finland*, the Finnish court decided to apply to the CJEU to issue a preliminary ruling, requesting a decision whether the application of ecological criteria is compliant with the notion of the most economically advantageous tender set forth in the then applicable EU directives on public procurement.

In reply, the Court of Justice found that not every criteria applied by the contracting authority in the assessment of tenders, serving to select the most advantageous tender,

must be of a clearly economic character, and that it was possible that a feature of a tender which was not of a strictly economic character might represent a value for the contracting authority (see points 54 and 55 of the judgment). In the analysed judgment it was held that while considering the content of Art. 6 of the then applicable Treaty on the European Union, obliging that the requirements of the natural environment were taken into consideration while determining and implementing the EU policy, it was possible to apply aspects of environmental protection when awarding public contracts. The findings proved to be highly important for understanding the notion of the economically most advantageous tender in EU public procurement law as they set out that also the criteria which were not of clearly monetary character (economic) might be used and did not have to bring a direct economic benefit to the contracting authority being aimed at the accomplishment of the general public objectives. The admissibility of the criterion of energy-saving of the ordered devices in the assessment of tenders (which means a direct economic benefit to the contracting authority – lower maintenance costs), but also the environment-friendly production process which does not directly translate into a financial benefit, e.g. supply of energy from renewable sources, is an illustrative example of the thus broad understanding of the notion of the economically most advantageous tender.

The judgment discussed above and other judicial decisions referring to ecological criteria in awarding public contracts, in particular the judgment in case C-448/01 *Wienstrom*, contributed to the development of a certain set of conditions which if fulfilled, can be the basis for the application of ecological and also social criteria in awarding public contracts, such as: a broad connection between the criterion with the subject of the tender; objectivity of the criterion (measurability and actual verifiability); compliance of the criterion with the basic principles of EU law (including, first of all, the principle of non-discrimination); necessity to inform potential tenderers about the criterion in the invitation to tender (transparency criterion).

The above judicial decisions resulted in the introduction of a set of legal solutions to the directives of EU law on public procurement which may be used by the contracting authorities to accomplish ecological objectives, even if it results in a significant increase of the cost of the contract. This phenomenon can be described as the ‘ecologization of public procurement law’ (Romera & Carranta, 2017, pp. 286-287). It is worth indicating the notion of life-cycle costing of the requested product (Arrowsmith, 2014, pp. 21-23) as an example of such considerations. The provisions of 2014/24/EU Directive state that the costs ascribed to ecological externalities related to production, service or construction works in their life-cycle provided their value may be determined and verified; such costs may include the cost of greenhouse gas emissions and other pollutants and other costs of mitigating climate change (article 68) which are an element of the above mentioned costing. The abovementioned legal act indicates that the contracting authorities which wish to purchase construction works, supplies or services with specific environmental,

social or other characteristics should be able to refer to particular labels, such as the European Eco-label, (multi)national eco-labels or any other label provided that the requirements for the label are linked to the subject matter of the contract, such as the description of the product and its presentation, including packaging requirements. The catalogue of the possible criteria of the assessment of tenders in the awarding of contracts also include the non-price aspects relating to environmental and innovative characteristics.

### **3. Social instrumentalization of the public procurement law**

The issue of the coexistence of the freedom of movement of workers, and the principles of protection of competition set forth in the legal provisions regulating awarding and executing contracts is a major, from the perspective of the subject of the article, problem of the social instrumentalization of public procurement (Carranta, 2015, pp. 391-459). In this case there is a conflict between the obligation to open the procurement to Europe-wide competition and the freedom of movement of workers which includes a prohibition of discrimination due to nationality in employment. Article 45 (2) of TFEU provides that the freedom of movement of workers includes the abolishment of discrimination due to nationality among workers of Member States as regards employment, remuneration and other working conditions. The problem signalled here becomes glaringly obvious in the situation of workers delegated by the contractor of a public contract to work to execute the contract, in particular regarding construction work. The notion of identity (close similarity) of their position in comparison to the position of local workers from the country of the contract is the basic issue which arises while assessing the situation of this group of workers. Therefore, the problem is the relevance of the principle of non-discrimination as the basis for determination of whether the delegated works are discriminated against on the basis of employment conditions, is to identify at least one close similarity of their situation to the situation of local workers. This complex issue has become the subject of judicial decisions issued by the CJEU whose essential findings will be presented below, after formulating the general comments concerning the freedom of movement of workers in EU law.

The freedom of movement of workers, similarly to the freedom of business activity, belong to the freedoms of the EU internal market of the individual character. They enable citizens of the EU to work abroad or become self-employed (free professions), and to start up business activity in another member state (establishment of an enterprise or its branch office). The freedoms are individual as they are an expression of human (individual) activity, and the guaranteeing provisions are to remove all obstacles which could impede the free movement of people (carrying out an activity as an employed person or business activity) in the area of the whole common market. The discussed freedoms are the source of subjective rights for the beneficiaries (natural persons – citizens of the EU in the case of the freedom of

movement of workers) which cannot be infringed by the discriminating practices of other member states, including the public contracting authorities. Therefore, the beneficiaries of the freedoms request treatment identical to the treatment of national entities (prohibition of formal discrimination) or even to refrain from using certain national regulations if they limit or prevent the beneficiaries from access to the market of another member state (which is an example of direct discrimination). The freedom of movement of workers is founded on the national basis in the treatment of workers from other member states. This means that regarding access to employment and related benefits (professional training, social benefits) workers of another member state have the right to the same treatment as citizens of the receiving state. EU citizens may enter and stay in another member state (and leave the territory of the country of origin) in order to search, take on and carry out work. Limitations of freedom arise from Art. 45 (3) of the Treaty on the Functioning of the European Union (The Treaty on the Functioning of the European Union...).

Among the judicial decisions of the CJEU there are examples of infringements of freedoms in the process of awarding contracts. For instance in case C-113/89 *Rush Portuguesa* (Case C-113/89 *Rush Portuguesa Ld v Office National D'immigration...*) the Court found that the member state might not infringe the freedom of movement of people carrying out a service in another member state on behalf of an entrepreneur (its workers) in such manner that in relation to the arrival of these persons (staff), the member state might not apply discriminating practices such as obliging the entrepreneur (executing the contract) to use the local work force or demand that its workers obtain permits to work in the state of execution of the contract. Such restrictions cause a worsening of the competitive position of foreign entrepreneurs in comparison to national entrepreneurs (the country of contract execution) who may use their own workforce (point 12 of the judgment). Similarly, in judgment C-243/89 *Storebaelt* (Case C-243/89 *Commission of the European Communities v Kingdom of Denmark...*) the Danish content clause was deemed a violation of the freedom of movement of workers used by the contracting authority obliging the contractor to use the Danish work force for execution of the contract (point 23 of the judgment).

The judgment of the Court of Justice in case C-346/06 *Dirk Ruffert* (Case C-346/06 *Dirk Ruffert v Land Niedersachsen...*) should be highlighted in the considerations. The above-mentioned conflict of principles of protection of competition in awarding and execution of public contracts with the freedom of movement of workers and the related prohibition to discriminate due to nationality in employment conditions was settled in the judgment. The subject of the procedure in this case was to determine compliance of the provisions of the German Land of Niedersachsen with EU law under which the contracting authority was obliged to award contracts only to those entrepreneurs who, while submitting their tenders, obliged themselves to pay to their workers remuneration compliant with the applicable collective agreements in the place of execution of the contract. Additionally, the contractor was to be obliged to ensure that the rates of remuneration were also applied by its subcontractors employing

workers for the contract execution and an obligation to control subcontractors in this respect. Observance of the orders was subject to sanctions in the form of monetary penalties or even exclusion of the contractor for a period of one year from among the entities who could execute contracts for a given contracting authority (see points 6-7, 9 of the judgment). Based on the facts of the case, the contractor executing the contract for construction works subcontracted some of the work to the Polish entity which employed a few dozen workers and delegated them to work in Germany from Poland and did not fulfil the obligation to pay the remuneration at the rates corresponding to the local collective agreements. In the judgment the Court considered the presented facts of the case in the context of the EU law on delegated workers to carry out services. The Directive determined the mandatory rules of minimal protection in the area of work conditions and employment of delegated workers in another member state. As regards the remuneration, the requirement was that it was paid to workers at least at the minimum rates of pay applicable under the relevant regulations of the member state or collective agreements deemed to be generally applicable in the member state. As regards the issue, the Court of Justice determined that the collective agreement which the regulations of the Land of Niedersachsen referred to had not been generally applicable on the one hand and on the other the protection in a form of the rate of pay (exceeding the minimum rate of pay, applicable under the German act on delegation of workers) was not necessary in the case of a delegated worker carrying out work while executing a public contract (see points 30 and 40 of the judgment). In other words, the requirement imposed on contractors of construction works caused that the contractors had to pay more than the minimum remuneration to their delegated workers, guaranteed by the general German act which was an implementation of the EU directive mentioned above. The state of affairs raised doubts of the national court, which requested a preliminary ruling of the Court of Justice, indicating that this type of requirements, exceeding the mandatory minimum wage caused that “in the case of foreign workers, the obligation to comply with the collective agreements did not enable them to achieve genuine equality of treatment with German workers but rather prevented workers originating in a Member State other than the Federal Republic of Germany from being employed in Germany because their employer was unable to exploit his cost advantage with regard to the competition” (see point 15 of the judgment). The Court of Justice upheld the view. In the judgment discussed above the Court found that “requiring undertakings performing public works contracts and, indirectly, their subcontractors to apply the minimum wage laid down by the ‘Buildings and public works’ collective agreement, a law such as the Landesvergabegesetz may impose on service providers established in another Member State where minimum rates of pay are lower, an additional economic burden that may prohibit, impede or render less attractive the provision of their services in the host Member State”. Therefore, it was found that the indicated measure was “deemed unjustified by the protection of workers”. The facts of case C-341/05 *Laval un Partneri* (Case C-341/05 *Laval*

un Partneri Ltd v Svenska Byggnadsarbetareförbundet...) considered by the CJEU may be a characteristic example of the effects of the introduction of the contract execution conditions, discussed here. In the facts of the case, a Latvian entrepreneur was prevented from execution of the contract with workers delegated to Sweden for the reason of failure to pay wages under local collective agreements, thus failed to execute the contract.

The conclusions resulting from the judgments of the Court of Justice provided above were also used in case C-549/13 Bundesdruckerei GmbH versus Stadt Dortmund (Case C-549/13 Bundesdruckerei GmbH v Stadt Dortmund...). While assessing the situation in which the contracting authority – Dortmund city – required, referring to the Act of the Land of North Rhine-Westphalia on compliance with collective agreements, social norms and fair competition in the award of public contracts that the contractor paid the minimum wage to its workers and required that its subcontractors pay the same rates of wages to their workers. The tenderer interested in the contract, Bundesdruckerei GmbH, which if awarded the contract intended to subcontract the execution of the contract to a Polish subcontractor informed the contracting authority that, if it were awarded the contract, the services under that contract would be performed exclusively in another member state, in this case Poland, by a subcontractor established in that state. The German entrepreneur indicated above stated that its subcontractor would be unable to comply with the minimum wage requirement since such wage was not provided for in collective agreements in Poland or did not arise from the applicable statutory provisions and was not general in commercial relations due to lower maintenance costs, and requested the contracting authority to confirm that the requirements did not apply to such subcontractor. With regard to the dispute between the contracting authority and the tenderer, the competent German court settling the dispute requested an opinion of the CJEU, concerning the legality of the requirement to pay a minimum wage in accordance with the provisions applicable in the place of execution of the contract by a subcontractor from another member state which would carry out services in the country of its registered office for the benefit of the main contractor. While settling the dispute, the CJEU relied on its previous ruling in case C-346/06 Dirk Rüffert, reminding that, first of all, the imposition, under national legislation, of a minimum wage on subcontractors of a tenderer which was established in a member state other than that to which the contracting authority belonged and in which minimum rates of pay were lower, constituted an additional economic burden that might 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. At the same time, the Court of Justice admitted that such a restriction may be justified by the intention to protect workers. However, the Court held that such a national measure, in the proceedings being the subject of reference of the case, was inappropriate, disproportionate and went beyond what was necessary for the achievement of that

objective for the following reasons: the imposition relates only to public contracts, omitting employers working in the private sector; the requirement concerning the minimum wage corresponding to that required in order to ensure reasonable remuneration for employees in the member state of the contracting authority in light of the cost of living in that member state, but which bears no relation to the cost of living in the member state in which the services relating to the public contract at issue are performed and for that reason prevents subcontractors established in that member state from deriving a competitive advantage. It is also worth noting that although in the currently applicable EU directives there are references to collective agreements, however, in order to treat them as a point of reference while drawing out conditions of public contracts, one needs to ensure their compliance with the EU law first.

The analysis of the presented considerations of the CJEU allows to conclude that not every action formally aimed at the protection of workers' rights in public procurement (by attempting to ensure equality of working and wage conditions) may be deemed compliant with the freedoms of the internal market in a situation when it concerns the group of workers in a different situation (local workers and delegated workers) and may be a significant constraint for employers of employees from Member States competing for contracts who derive their competitive advantage from lower costs of labour. These measures may in fact result in significant constraints in employment of delegated workers from other member states for the execution of contracts, which is definitely not in their interest. One may conclude that the instruments apparently aimed at ensuring equal conditions in employment, and in practice limiting the possibility of employment of specific groups of workers for execution of public contracts, such as delegated workers from Member States with lower wages than the average wage rates applied in the place of execution of the contract, are not compliant with the freedom of movement of workers and thus such actions should be discontinued in all member states in awarding public contracts.

The examples analysed above illustrate the peculiar distortion of the notion of social instrumentalization of public procurement law. Yet, the currently applicable EU public procurement law includes a range of instruments which can be used in a non-discriminating manner to accomplish social objectives avoiding, at the same time, excessive, unfavourable results as regards opening the public procurement market to competition (Corvaglia, 2017, pp. 162-164). For instance, provisions of the above mentioned Directives stipulate that it is possible to introduce criteria in the awarding or execution of contracts, which are aimed at the protection of health of the staff involved in the production process, the favouring of the social inclusion of disadvantaged persons or members of vulnerable groups amongst the persons assigned to performing the contract, or training in the skills needed for the contract in question, can also be the subject of the award criteria or contract performance conditions provided that they relate to the works, supplies or services to be provided under the contract. For instance, such criteria or conditions might refer, amongst other

things, to the employment of long-term job-seekers, the implementation of training measures for the unemployed or young persons in the course of the performance of the contract to be awarded. In technical specifications, the contracting authorities can provide such social requirements which directly characterise the product or service in question, such as accessibility for persons with disabilities, or its design for all users.

## 4. Conclusions

The above considerations show certain conflicts which may arise at the interface between the social and ecological instrumentalization of public procurement and the pursuit to accomplish the basic objective, i.e. the economic efficiency of the contract. Based on the above analysis one may definitely conclude that it is not possible to apply the criteria of instrumentalization in public procurement in a manner which is clearly contrary to the principle of protection of competition. This applies to situations when the contracting authorities use apparent criteria which in fact serve other objectives (e.g. protectionist) than the declared social or ecological objectives. The application of the criteria of instrumentalization in public procurement in practice results in an increase of the cost of the contract (sometimes a significant increase). If such an increase serves the social or ecological objective which mainly rests with the contracting authority, then the defences of the contravention of the criteria of instrumentalization with the principle of opening public procurement to competition are unjustified. However, it is important that these criteria are verifiable and there is an actual connection between the intention to accomplish the intended social or ecological objective and the applied criteria. In light of the findings, it is certain that the fundamental challenge in the development of public procurement law is to skilfully combine the process of social and ecological instrumentalization with the fundamental principles of the equality in the treatment of participants of the public procurement market and the protection of competition on this market.

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