



Reports of Cases

JUDGMENT OF THE COURT (Fifth Chamber)

6 October 2021 *

[Text rectified by order of 6 December 2021]

(Reference for a preliminary ruling – Public procurement – Directive 2014/24/EU – Article 20 – Reserved contracts – National legislation reserving the right to participate in certain public procurement procedures to Social initiative special employment centres – Additional conditions not provided for by the directive – Principles of equal treatment and proportionality)

In Case C-598/19,

REQUEST for a preliminary ruling under Article 267 TFEU from the Tribunal Superior de Justicia del País Vasco (High Court of Justice of the Basque Country, Spain), made by decision of 17 July 2019, received at the Court on 6 August 2019, in the proceedings

Confederación Nacional de Centros Especiales de Empleo (Conacee)

v

Diputación Foral de Gipuzkoa,

THE COURT (Fifth Chamber),

composed of E. Regan, President of the Chamber, M. Ilešič, E. Juhász, C. Lycourgos (Rapporteur) and I. Jarukaitis, Judges,

Advocate General: E. Tanchev,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

- Confederación Nacional de Centros Especiales de Empleo (Conacee), by F. Toll Musteros, Procurador, and by L. García Del Río, and A. Larrañaga Ysasi-Ysasmendi, abogados,
- Diputación Foral de Gipuzkoa, by B. Urizar Arancibia, Procuradora, and I. Arrue Espinosa, abogado,

* Language of the case: Spanish.

- the Spanish Government, by J. Rodríguez de la Rúa Puig, acting as Agent,
- the European Commission, by M. Jáuregui Gómez, L. Haasbeek, and P. Ondrůšek, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 29 April 2021,

gives the following

Judgment

- 1 This request for a preliminary ruling concerns the interpretation of Article 20 of Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC (OJ 2014 L 94, p. 65).
- 2 The request has been made in proceedings between the Confederación Nacional de Centros Especiales de Empleo (Conacee) (National Confederation of Special Employment Centres, Spain) and the Diputación Foral de Gipuzkoa (Provincial Council of Gipuzkoa, Spain) concerning a decision of the Governing body of that provincial council of 15 May 2018 approving instructions issued to that institution's contracting authorities for certain reserved contracts.

Legal context

European Union law

Directive 2004/18/EC

- 3 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) was repealed with effect from 18 April 2016. The first paragraph of Article 19 of that directive provided:

‘Member States may reserve the right to participate in public contract award procedures to sheltered workshops or provide for such contracts to be performed in the context of sheltered employment programmes where most of the employees concerned are handicapped persons who, by reason of the nature or the seriousness of their disabilities, cannot carry on occupations under normal conditions.’

Directive 2014/24

- 4 Recitals 1 and 36 of Directive 2014/24 state:

‘(1) The award of public contracts by or on behalf of Member States’ authorities has to comply with the principles of the Treaty on the Functioning of the European Union (TFEU), and in particular the free movement of goods, freedom of establishment and the freedom to provide services, as well as the principles deriving therefrom, such as equal treatment, non-discrimination, mutual recognition, proportionality and transparency. However, for

public contracts above a certain value, provisions should be drawn up coordinating national procurement procedures so as to ensure that those principles are given practical effect and public procurement is opened up to competition.

...

- (36) Employment and occupation contribute to integration in society and are key elements in guaranteeing equal opportunities for all. In this context, sheltered workshops can play a significant role. The same is true for other social businesses whose main aim is to support the social and professional integration or reintegration of disabled and disadvantaged persons, such as the unemployed, members of disadvantaged minorities or otherwise socially marginalised groups. However, such workshops or businesses might not be able to obtain contracts under normal conditions of competition. Consequently, it is appropriate to provide that Member States should be able to reserve the right to participate in award procedures for public contracts or for certain lots thereof to such workshops or businesses or reserve performance of contracts to the context of sheltered employment programmes.'

- 5 Under Article 2(1), points (5) and (10), of that directive:

'For the purposes of this Directive:

...

- (5) "public contracts" means contracts for pecuniary interest concluded in writing between one or more economic operators and one or more contracting authorities and having as their object the execution of works, the supply of products or the provision of services;

...

- (10) "economic operator" means any natural or legal person or public entity or group of such persons and/or entities, including any temporary association of undertakings, which offers the execution of works and/or a work, the supply of products or the provision of services on the market.'

- 6 Article 18(1) of that directive, entitled 'Principles of procurement', provides:

'Contracting authorities shall treat economic operators equally and without discrimination and shall act in a transparent and proportionate manner.

The design of the procurement shall not be made with the intention of excluding it from the scope of this Directive or of artificially narrowing competition. Competition shall be considered to be artificially narrowed where the design of the procurement is made with the intention of unduly favouring or disadvantaging certain economic operators.'

- 7 Article 20 of that directive states, under the heading 'Reserved contracts':

'1. Member States may reserve the right to participate in public procurement procedures to sheltered workshops and economic operators whose main aim is the social and professional integration of disabled or disadvantaged persons or may provide for such contracts to be performed in the context of sheltered employment programmes, provided that at least 30% of the

employees of those workshops, economic operators or programmes are disabled or disadvantaged workers.

2. The call for competition shall make reference to this Article.'

Spanish law

- 8 Ley 9/2017 de Contratos del Sector Público, por la que se transponen al ordenamiento jurídico español las Directivas del Parlamento Europeo y del Consejo 2014/23/UE y 2014/24/UE, de 26 de febrero de 2014 (Law 9/2017 on Public Sector Procurement, which transposes Directives 2014/23/EU and 2014/24/EU of the European Parliament and of the Council of 26 February 2014 into Spanish law), of 8 November 2017 (BOE No 272, of 9 November 2017, p. 107714) ('Law on public sector contracts') transposes Directive 2014/24 into Spanish law. The Fourth Additional Provision of that law, entitled 'Reserved contracts', provides:

'1. By decision of the Council of Ministers or of the competent body within the sphere of the autonomous communities and local authorities, minimum percentages shall be set for reservation of the right to participate in procurement procedures for the award of certain contracts or certain lots of those contracts to social initiative special employment centres and to work integration social enterprises, governed, respectively, by Real Decreto Legislativo 1/2013 por el que se aprueba el Texto Refundido de la Ley General de derechos de las personas con discapacidad y de su inclusión social [(Royal Legislative Decree 1/2013 approving the consolidated text of the General Law on the rights of persons with disabilities and their social inclusion) of 29 November 2013 ("Royal Legislative Decree 1/2013")] and by Ley 44/2007 para la regulación del régimen de las empresas de inserción [(Law 44/2007 on work integration social enterprises)] of 13 December 2007, which satisfy the eligibility criteria laid down in that legislation to qualify as such, or establish a minimum percentage for reservation of the performance of those contracts in the context of sheltered employment programmes, provided that the proportion of disabled or socially excluded staff of special employment centres, work integration social enterprises and programmes is that stipulated in the legislation in question and, in any event, at least 30%.

The decision of the Council of Ministers or of the competent body within the sphere of the autonomous communities and local authorities shall set out the minimum requirements for ensuring compliance with the provisions of the previous paragraph.

...

2. The call for competition shall make reference to this Article.

...'

- 9 The Fourteenth Final Provision of the Law on public sector contracts, which defines the concept of 'social initiative special employment centres' to which the Fourth Additional Provision of that Law restricts the reservation of public contracts, states:

'... Social initiative special employment centres are those which satisfy the criteria laid down in paragraphs 1 and 2 of [Article 43 of the consolidated text of the General Law on the rights of persons with disabilities and their social inclusion], and are promoted and in which more than 50 per cent of the shares are held, directly or indirectly, by one or more public or private

undertakings which are not-for-profit or whose social nature is referred to in their articles of association, whether these are associations, foundations, bodies governed by public law, social initiative cooperatives or other social economy entities, and also those owned by commercial companies referred to above, whether directly or indirectly (through the concept of dominant company governed by Article 42 of the Commercial Code), and provided in all cases that it is stipulated in their articles of association or a shareholders' resolution that their profits must be reinvested in full in the creation of employment opportunities for persons with disabilities and the continuous improvement of their competitiveness and their social economy activity, while having, in any event, the right to opt to reinvest profits in the special employment centre itself or in other social initiative special employment centres.'

- 10 Article 43 of the consolidated text of the General Law on the rights of persons with disabilities and their social inclusion, which defines special employment centres, provides in paragraphs 1, 2 and 4:

'1. The principal objective of special employment centres is to carry on activities for the production of goods or services, by participating regularly in market operations, in order to provide paid employment to disabled persons; they are also a means of including as many of those persons as possible in regular employment. ...

2. Special employment centres shall be staffed by as many disabled workers as the nature of the production process allows and, in any case, at least 70% of the employees shall be disabled.

...

4. [This paragraph reproduces the definition of "social initiative special employment centres" as set out in the Fourteenth Final Provision of the Law on public sector contracts]'

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

- 11 Conacee is a non-profit-making association governed by Spanish law whose members are federations and associations of special employment centres.
- 12 On 23 July 2018, Conacee brought an administrative action before the Tribunal Superior de Justicia del País Vasco (High Court of Justice of the Basque Country, Spain) seeking annulment of the decision of the Diputación Foral de Gipuzkoa of 15 May 2018, which approved the instructions issued to that institution's contracting authorities and reserved the right to participate in procedures for the award of contracts or certain lots of those contracts to social initiative special employment centres or to work integration social enterprises, and the performance of a number of such contracts in the context of sheltered employment programmes.
- 13 The contracts included in those instructions are those that are referred to as being reserved in the Fourth Additional Provision and the Fourteenth Final Provision of the Law on public contracts, which transpose Article 20 of Directive 2014/24 into Spanish law.
- 14 Those provisions reserve access to the contracts referred to in Article 20 to social initiative special employment centres and work integration social enterprises, thereby excluding from the scope of those provisions and, consequently, from the reservation of those contracts, the business initiative special employment centres which Conacee represents at the national level.

- 15 The referring court states that, by determining the scope *ratione personae* of reserved contracts, those provisions impose requirements in addition to those laid down in Article 20 of Directive 2014/24. That provision, by limiting its scope to only ‘social initiative special employment centres’, has the effect of excluding from the reservation undertakings and economic operators which otherwise satisfy the conditions laid down in Article 20 in that at least 30% of their employees are disabled or disadvantaged persons and their main aim is to further the social and professional integration of those persons.
- 16 In those circumstances, the Tribunal Superior de Justicia del País Vasco (High Court of Justice of the Basque Country) decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

‘Must Article 20 of Directive [2014/24] be interpreted as meaning that the scope *ratione personae* of the reservation laid down therein cannot be defined in terms which exclude from its scope undertakings or economic operators which satisfy the condition that at least 30% of their employees must be persons with disabilities and which meet the aim or objective of the social and professional integration of those persons, by setting additional criteria related to the constitution, character and aims of those bodies, to their activities and investments, or to other matters?’

Consideration of the question referred

- 17 By its question the referring court asks, in essence, whether Article 20(1) of Directive 2014/24 must be interpreted as precluding a Member State from imposing requirements in addition to those laid down in that provision, thereby excluding from reserved public procurement procedures certain economic operators which satisfy the criteria laid down in that provision.
- 18 Article 20(1) of Directive 2014/24 gives Member States the option of reserving the right to participate in public procurement procedures to certain entities and makes that provision subject to fulfilment of the two cumulative conditions listed in that provision, namely, (i) that the participants in the procurement procedure are sheltered workshops or economic operators whose main aim is the social and professional integration of disabled or disadvantaged persons, and (ii) that at least 30% of the employees of those workshops and economic operators are disabled or disadvantaged persons.
- 19 In order to reply to the question referred, it is necessary to determine whether those two conditions are listed exhaustively in Article 20(1), in such a way that that provision precludes Member States from imposing additional criteria and thereby excluding from the reserved public procurement procedures referred to in that provision economic operators which, despite satisfying the conditions laid down in that provision, do not satisfy the additional criteria laid down by national law.
- 20 According to settled case-law, when interpreting a provision of EU law it is necessary to consider not only its wording but also the objectives of the legislation of which it forms part and the origin of that legislation (judgment of 15 November 2018, *Verbraucherzentrale Baden-Württemberg*, C-330/17, EU:C:2018:916, paragraph 23 and the case-law cited).

- 21 In the first place, as regards the wording of Article 20(1) of Directive 2014/24, it should be noted, first, that that provision confers on Member States the option of reserving to sheltered workshops and certain economic operators the right to participate in public procurement procedures and sets out the conditions to which that option is subject. As the Advocate General has stated, in essence, in points 41 and 42 of his Opinion, that provision is worded in terms which in no way indicate that all entities which meet those conditions must benefit from that right.
- 22 Secondly, the second condition laid down in that provision, namely that disabled or disadvantaged persons must make up at least 30% of the employees of the entities referred to in that provision, constitutes merely a minimum requirement.
- 23 Third, it is important to point out that the reference to ‘economic operators’ indicates, in the light of the definition of those terms in Article 2(10) of that directive and as the Advocate General stated, in essence, in point 42 of his Opinion, that those conditions are broad and unspecific as to which entities may benefit from the public procurement procedures referred to in Article 20(1), provided that the main aim of those operators is the social and professional integration of disabled or disadvantaged persons.
- 24 Thus it follows from the wording of Article 20(1) of Directive 2014/24 that, when they decide to reserve to certain participants the right to participate in public procurement procedures, pursuant to that provision, Member States enjoy a degree of latitude in implementing the conditions laid down in that provision.
- 25 In the second place, as regards the objective pursued by Article 20(1) of Directive 2014/24, it is clear from recital 36 of the directive that, in order for employment and occupation to contribute to integration in society and to guarantee equal opportunities for all, the option provided for in that provision must be exercised for the benefit of sheltered workshops and economic operators whose main aim is to support the social and professional integration or reintegration of disabled or disadvantaged persons, such as the unemployed, members of disadvantaged minorities or otherwise socially marginalised groups who might not be able to obtain contracts under normal conditions of competition.
- 26 It follows that the EU legislature wished to promote, by means of employment and occupation, the integration of disabled or disadvantaged persons in society, by allowing Member States to reserve the right to participate in award procedures for public contracts, or for certain lots of those contracts, to protected workshops and economic operators which, in view of their social objective, operate in the market with a competitive disadvantage.
- 27 Thus, Article 20(1) of Directive 2014/24 pursues a social policy objective, relating to employment. However, as EU law currently stands, the Member States have a wide margin of discretion in defining the measures likely to achieve a given social and employment policy objective (see, to that effect, judgment of 19 September 2018, *Bedi*, C-312/17, EU:C:2018:734, paragraph 59 and the case-law cited).
- 28 Consequently, an examination of the objective pursued by Article 20(1) of Directive 2014/24 supports the interpretation arising from the wording of that provision, in the sense that, in the light of that discretion, the Member States enjoy a certain latitude in the implementation of that provision. It follows that Article 20(1) of Directive 2014/24 does not contain an exhaustive list of conditions, but leaves it to Member States to adopt additional criteria which the entities referred

to in that provision must satisfy in order to be allowed to participate in reserved public procurement procedures pursuant to that provision, provided that those additional criteria contribute to ensuring the social and employment policy objectives pursued by that provision.

- 29 In the third place, that interpretation is also borne out by the origin of Article 20(1) of Directive 2014/24. Article 19(1) of Directive 2004/18, which was applicable to reserved contracts before it was repealed by Directive 2014/24, imposed considerably stricter requirements on the right to participate in public contract award procedures which could be reserved by Member States, as regards both the entities allowed to participate in those procedures, which were limited to sheltered workshops, and the persons employed by those entities, which had to be staffed predominantly by handicapped persons who, by reason of the nature or the seriousness of their disabilities, were unable to pursue an occupation under normal conditions.
- 30 It should be noted that it is not apparent from Directive 2014/24 or the origin of that directive that the EU legislature, when it broadened the scope *ratione personae* for public procurement procedures reserved by Article 20(1) of Directive 2014/24, intended to create a situation in which the economic operators referred to in that provision, which employ a lower percentage of disabled or disadvantaged persons, would replace economic operators meeting the stricter requirements under Article 19(1) of Directive 2004/18. Moreover, such an outcome would be contrary to the objective pursued by Article 20(1) of Directive 2014/24, which, as is apparent from paragraph 26 above, is to integrate disabled and disadvantaged persons in society by means of occupation and employment.
- 31 However, as the Advocate General observed, in essence, in point 51 of his Opinion, that is precisely what would happen if Member States were required to allow the participation of all economic operators fulfilling the conditions laid down in Article 20(1) in public procurement procedures for reserved contracts. There is a risk that, in such a situation, economic operators meeting the stricter requirements laid down in Article 19(1) of Directive 2004/18 would be obliged to dismiss some of the less productive disabled or disadvantaged workers, in order to be able to participate in those public contract award procedures on an equal footing with economic operators with only 30% disabled or disadvantaged workers.
- 32 Consequently, Article 20(1) of Directive 2014/24 must be interpreted as meaning that the conditions which it sets out are not exhaustive and that Member States may, where appropriate, stipulate additional criteria which the entities referred to in that provision must satisfy in order to be allowed to participate in reserved public procurement procedures.
- 33 However, it is important to note that Member States, in making use of this option, must respect the fundamental rules of the TFEU, in particular those relating to the free movement of goods, the freedom of establishment and the freedom to provide services, as well as the principles deriving from them, such as the principles of equal treatment and proportionality (see, to that effect, judgment of 3 October 2019, *Irgita*, C-285/18, EU:C:2019:829, paragraph 48 and the case-law cited), which are, moreover, reflected in Article 18 of Directive 2014/24.
- 34 Accordingly, the referring court will have to examine whether the national legislation at issue in the main proceedings, according to which, in the context of reserved procurement procedures under Article 20(1) of Directive 2014/24, special employment centres must, first, be promoted and have more than 50% of their shares held, directly or indirectly, by not-for-profit entities and, second, reinvest their profits in full in their own establishment or in another centre of the same kind, is consistent with those principles.

- 35 In order to provide that court with the information necessary to carry out such an examination, the following should be noted.
- 36 In the first place, it should be noted that the principle of equal treatment, which is one of the fundamental principles of EU law, requires that comparable situations must not be treated differently and that different situations must not be treated in the same way unless such treatment is objectively justified (see, to that effect, judgment of 17 December 2020, *Centraal Israëlitisch Consistorie van België and Others*, C-336/19, EU:C:2020:1031, paragraph 85 and the case-law cited).
- 37 In particular, in the field of EU public procurement law, the principle of equal treatment, which constitutes the basis of the EU rules on procedures for the award of public contracts, means, in particular, that tenderers must be in a position of equality when they formulate their tenders, the aim of which is to promote the development of healthy and effective competition between undertakings taking part in a public procurement procedure (see, to that effect, judgment of 11 July 2019, *Telecom Italia*, C-697/17, EU:C:2019:599, paragraphs 32 and 33 and the case-law cited).
- 38 Thus, in the present case, the referring court will have to determine, inter alia, whether social initiative special employment centres are in the same situation as business initiative special employment centres as regards the objective pursued by Article 20(1) of Directive 2014/24.
- 39 In making that determination, that court must take into account, in particular, first, the fact that it is apparent from the national legislation that the purpose of a special employment centre, whether a social or business initiative, is to provide paid employment for disabled persons and is regarded as a means of including as many of those people as possible in regular employment, and, second, that at least 70% of the employees of special employment centres are disabled.
- 40 It follows that, subject to the findings of the referring court, business initiative special employment centres, like social initiative special employment centres, appear to be in a situation in which they would not be able to participate in award procedures for public contracts under normal conditions of competition.
- 41 However, that court will also have to determine whether, as the Spanish Government stated, in essence, in its written observations, social initiative special employment centres, on account of their particular characteristics, are in a position to implement more effectively the social integration objective pursued by Article 20(1) of Directive 2014/24, which could objectively justify a difference in treatment with respect to business initiative special employment centres. In that regard, the Spanish Government states that social initiative special employment centres maximise social and non-economic value, given, first, that they have no profit-making aim and that they reinvest all their profits in their social objectives, second, that they tend to be governed by democratic and participatory principles and, third, that they thus achieve greater social impact by providing better quality employment and better social and professional integration and reintegration for disabled and disadvantaged persons.
- 42 In the second place, it follows from settled case-law that, in accordance with the principle of proportionality, which is a general principle of EU law, the rules laid down by the Member States or contracting authorities in implementing the provisions of Directive 2014/24, such as the rules

intended to lay down the implementing conditions of Article 20(1) of that directive, must not go beyond what is necessary to achieve the objectives of that directive (see, to that effect, judgment of 30 January 2020, *Tim*, C-395/18, EU:C:2020:58, paragraph 45 and the case-law cited).

- 43 In that regard, it should be noted that both the condition that centres be promoted and more than 50% of its shares be held, directly or indirectly, by non-profit entities, and the condition relating to the obligation to reinvest all profits in social initiative special employment centres, referred to in paragraph 34 above, appear to be suitable for ensuring that the main purpose of such special employment centres is the integration of disabled or disadvantaged persons, as required by Article 20(1) of Directive 2014/24.
- 44 [As rectified by order of 6 December 2021] As to whether those requirements go beyond what is necessary to achieve that objective, it is for the referring court to determine whether both the fact that a for-profit entity has a majority shareholding, directly or indirectly, in a special employment centre, and the reinvestment of only part of the profits in those centres, are such as to ensure that those centres are able to achieve that objective as effectively as by application of the conditions mentioned in the preceding paragraph.
- 45 In the third place, it should be added, as the Spanish Government and the European Commission have observed, that it does not appear from the analysis of the Spanish legislation submitted by the Spanish Government in response to the Court's written questions that economic operators established in accordance with the law of other Member States are excluded from the right to take part in reserved public procurement procedures, provided for by that Spanish legislation, as long as those operators fulfil the conditions expressly laid down in that legislation for social initiative special employment centres. However, it is for the referring court to carry out the necessary checks in that regard.
- 46 In the light of the foregoing considerations, the answer to the question referred is that Article 20(1) of Directive 2014/24 must be interpreted as not precluding a Member State from imposing additional criteria beyond those laid down by that provision, thereby excluding from reserved public procurement procedures certain economic operators which satisfy the criteria laid down in that provision, provided that that Member State complies with the principles of equal treatment and proportionality.

Costs

- 47 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 (Fifth Chamber) hereby rules:

Article 20(1) of Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC must be interpreted as not precluding a Member State from imposing additional criteria beyond those laid down by that provision, thereby excluding from reserved public procurement procedures certain economic operators which satisfy the criteria laid down in that provision, provided that that Member State complies with the principles of equal treatment and proportionality.

[Signatures]