Reports of Cases

OPINION OF ADVOCATE GENERAL
SZPUNAR
delivered on 11 June 2015[1]

Case C-552/13

Grupo Hospitalario Quirón SA
v
Departamento de Sanidad del Gobierno Vasco
and
Instituto de Religiosas Siervas de Jesús de la Caridad(Request for a preliminary ruling from the

Juzgado de lo Contencioso-Administrativo No 6 de Bilbao (Spain))

(Request for a preliminary ruling — Procedures for the award of public contracts — Directive 2004/18/EC — Article 2 and Article 23(2) — Principle of equal treatment of tenderers — Health-care services — Requirement that the services be provided exclusively at facilities located within a particular municipality)

I – **Introduction**

1. Can the technical specifications relating to a public contract for the provision of health-care services include a requirement that those services be provided exclusively at facilities located within a particular municipality? Can that requirement be justified on grounds of accessibility and quality of health care?

2. The foregoing questions illustrate the doubts which prompted the Juzgado de lo Contencioso-Administrativo No 6 de Bilbao (Administrative Court No 6, Bilbao (Spain)) to make a reference to the Court in a case involving two calls for tenders issued by the Basque authorities for the award of contracts for services connected with surgical procedures. The purpose of those contracts was to make operating theatre units located at private hospitals available for procedures carried out by doctors employed at public health service facilities in order to reduce waiting times for those procedures.

1 — Original language: Polish.

II – **Legal framework**

A – *EU law*

3. Article 2 of Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts,[2] entitled 'Principles of awarding contracts', provides:

'Contracting authorities shall treat economic operators equally and non-discriminatorily and shall act in a transparent way.'

4. Article 21 of that directive provides as follows:

'Contracts which have as their object services listed in Annex II B shall be subject solely to Article 23 and Article 35(4).'

5. Under Article 23(2) of Directive 2004/18:

'Technical specifications shall afford equal access for tenderers and not have the effect of creating unjustified obstacles to the opening up of public procurement to competition.'

6. Annex II B to Directive 2004/18 refers to 'Health and social services' (category 25).

B – *Spanish law*

7. Articles 2 and 23(2) of Directive 2004/18 were respectively transposed into Spanish law by Articles 101(2) and 123 of Law 30/2007 of 30 October 2007 on Public Sector Contracts (Ley 30/2007, de 30 de octubre, de Contratos del Sector Público).[3]

III – **The main proceedings and the question referred for a preliminary ruling**

8. The main proceedings concern the award of two public procurement contracts relating to services provided by hospitals in connection with the performance of procedures in the fields of general surgery, digestive tract surgery, urology, gynaecology, orthopaedic surgery, traumatology, minor surgery and ophthalmology. The contracts in question do not include the actual services provided by the surgeon, who is employed by the public health service and travels to the private hospital selected following the contract award in order to perform the procedure.

9. On 15 December 2010, the Departamento de Sanidad del Gobierno Vasco (Department of Health of the Basque Government; 'the Departamento de Sanidad') approved the specifications for public contract No 21/2011 for the performance of public service surgical procedures in the Vizcaya health-care district (a district covered by public hospitals in Basurto and Galdakao). The estimated value of the contract was EUR 5841041.84.

10. On 10 May 2011, the Departamento de Sanidad approved the specifications for public contract No 50/2011 relating to the provision of public services in the field of ophthalmic surgery. Those services related to the district covered by the public hospital in Galdakao. The estimated value of the contract was EUR 6273219.53.

2 — OJ 2004 L 134, p. 114, as last amended by Commission Regulation (EC) No 1177/2009 of 30 November 2009 (OJ 2009 L 314, p. 64).

3 — *Boletín Oficial del Estado* (Official State Journal) of 31 October 2007.

11. Both tender notices were published in the *Boletín Oficial del País Vasco* (Official Journal of the Basque Country) on 31 January and 14 June 2011 respectively. In section 2(d) of each notice, it was stated that the place of performance of the services was to be Bilbao.

12. In the case of both contracts, Part A of the technical specifications, entitled 'Structure, equipment and scope of hospital services', contains the following point 2 relating to minimum requirements and is entitled 'Location':

'Having regard for the need for those services to be provided with sufficient proximity to patients and their families, the availability of public transport and travelling time, and the need to minimise the necessary travel by the medical staff of the hospitals [belonging to the public health service], the health-care centres proposed must be situated within the municipality of Bilbao.'

13. Grupo Hospitalario Quirón SA ('Grupo Hospitalario Quirón') is the owner of a general hospital located in the municipality of Erandio. It is apparent from the order for reference that that hospital meets the requirements contained in the technical specifications, except for the fact that it is not located within the municipality of Bilbao but in an adjacent municipality.

14. On 13 September 2011, Grupo Hospitalario Quirón contested the decisions taken by the Departamento de Sanidad in connection with the aforementioned two public calls for tenders, lodging an application with the Juzgado de lo Contencioso-Administrativo No 6, Bilbao. It submitted, inter alia, that that court should annul the aforementioned decisions and order the issue of new calls for tenders not including the requirement that the services must be provided within Bilbao.

15. The Instituto de Religiosas Siervas de Jesús de la Caridad, which owns a health-care facility in Bilbao, was joined as defendant in the two sets of proceedings, which had been joined by the referring court.

16. In its application, Grupo Hospitalario Quirón submits that the requirement that the services be provided exclusively in facilities located in Bilbao is contrary to the principle of equality, freedom of access to public procurement procedures and the principles of non-discrimination, equal treatment of tenderers and free competition. It points out that, in order to meet that requirement, it is essential to have a complex material infrastructure in Bilbao the establishment of which would require significant investment and time. Such investment would not be justified for the purpose of providing the services covered by the calls for tenders. The only tenderers capable of taking part in the calls for tenders are therefore, it submits, hospitals located within Bilbao.

17. Grupo Hospitalario Quirón submits that, even if account is taken of travel difficulties for patients and surgeons employed at public hospitals in Basurto and Galdakao, the aforementioned requirement is unjustified, particularly in the case of the applicant, which owns a hospital in a municipality adjacent to Bilbao.

18. In reply to the application, the Departamento de Sanidad submits that the contested requirement does not limit the right of any tenderer to participate in the calls for tenders, since it does not require them to have facilities available in Bilbao, but simply that they must be capable of providing services in facilities located within Bilbao if a contract is awarded. It also submits that the condition that the services must be provided in Bilbao is justified by potential travel-related inconvenience for patients. The radial nature of public transport in the metropolitan area of Bilbao, it submits, will therefore make travel easier for them.

19. The referring court points out that it cannot be excluded that the contested requirement may constitute an inadmissible restriction of free competition in the calls for tenders. That court notes that that requirement does not appear to be necessary from a practical point of view. The award of contracts for health services at facilities located in a municipality distinct from the patient's place of residence is a common practice of public health authorities in Spain. Moreover, there are several possible ways of travelling from Bilbao to the hospital owned by Grupo Hospitalario Quirón, by metro and bus, while a journey by private transport takes an average of 14 minutes.

20. The referring court considers that it is necessary to determine, first, whether, in this case, the requirement that the service be carried out exclusively within Bilbao is justified by the subject-matter of the contract and, secondly, whether that requirement constitutes an inadmissible restriction on competition, since it does not appear to be justified by the criterion of patient accessibility to the services. In particular, in that court's opinion, there are no objective grounds for not permitting an entity owning a hospital located in an adjacent municipality to participate in the calls for tenders, where the travel time from a patient's place of residence to the hospital is reasonable. The referring court also points out that the provision of services does not concern exclusively patients resident in the municipality of Bilbao. In its opinion, it cannot therefore be ruled out that the contested requirement contained in the technical specifications of the calls for tenders infringes Articles 2 and 23(2) of Directive 2004/18.

21. In those circumstances, the Juzgado de lo Contencioso-Administrativo No 6, Bilbao decided to stay the proceedings and to refer the following question to the Court for a preliminary ruling:

'Is the requirement, included in public contracts for the management of public health-care services, that the provision of health services which is the subject-matter of such contracts be carried out only in a determined municipality, which is not necessarily the municipality in which the patients reside, compatible with EU law?'

IV – **Procedure before the Court**

22. The order for reference was received at the Court on 25 October 2013. The Court requested the referring court to provide clarification, which that court provided on 11 April 2014.

23. The defendants in the main proceedings, the Spanish Government and the Commission have submitted written observations. The Departamento de Sanidad and the Spanish Government requested a hearing. Grupo Hospitalario Quirón, the Departamento de Sanidad, the Spanish Government and the Commission took part in the hearing, which was held on 20 April 2015.

V – **Analysis**

A – *Initial remarks*

24. The main proceedings concern two public calls for tenders relating to public health-care services. It is apparent from the order for reference that those calls for tenders relate to services provided by a hospital in connection with surgical procedures, as part of a special mechanism for cooperation between the public health service and private hospitals designed to reduce patient waiting times in the public health service. The contracts in question do not cover the actual services provided by surgeons, since the procedures are to be performed by doctors employed at public hospitals, who would travel to the private hospital selected following the contract award.

25. It is not clear from the order for reference whether the calls for tenders in question concern public contracts for the supply of services or also contracts for the award of service concessions, which are excluded from the scope of Directive 2004/18. [4]

26. However, it is apparent from the additional clarification provided by the referring court, at the Court's request, and also by the parties at the hearing, that the main proceedings relate to public service contracts coming within the scope of the aforementioned directive.

27. It is apparent from those clarifications that the successful tenderer receives remuneration for the services provided directly from the contracting authority and also does not bear a fundamental part of the economic risk connected with the provision of the services. [5] In particular, as the Departamento de Sanidad pointed out at the hearing, the public health service remains liable for any harm suffered by the patient as a result of a procedure. Similarly, the Spanish Government points out in its written observations that the aforementioned contracts are also classified as contracts for the supply of services under the provisions of national law referred to in the tender notice.

28. It should also be pointed out that the estimated value of each of the contracts significantly exceeds the thresholds indicated in Article 7 of Directive 2004/18.

29. Those circumstances, which it is, of course, for the referring court to establish, indicate clearly that Directive 2004/18 is applicable.

30. However, I would like to point out that the principle of equal treatment of tenderers in the provision of services, which will be the subject of submissions set out below, would also be applicable in the case of contracts awarded as a service concession.

31. Despite the fact that, as European Union (EU) law currently stands, service concession contracts are not governed by Directive 2004/18, public authorities are nevertheless bound to comply with the fundamental rules of the Treaty on the Functioning of the European Union, including Articles 49 TFEU and 56 TFEU, on condition that the contract concerned undoubtedly has a transnational dimension. [6] Furthermore, in the case at issue, as the Spanish Government itself points out in its written observations, it appears likely that, in view of their high estimated value and the geographical position of the Basque Country, the contracts will have a transnational dimension.

32. Services provided as part of a public health-care system, such as those which are the subject of the calls for tenders in the present case, are undoubtedly of fundamental social importance.

33. It should be borne in mind that it follows from both Article 168(7) TFEU and the case-law of the Court that EU law does not detract from the power of the Member States to organise their public health-care systems. [7]

4 — See Article 1(14) and Article 17 of Directive 2004/18.

5 — See, to that effect, the judgments in *Contse and Others*, C-234/03, EU:C:2005:644, paragraph 22; *Eurawasser*, C-206/08, EU:C:2009:540, paragraphs 66 and 67; and *Privater Rettungsdienst und Krankentransport Stadler*, C-274/09, EU:C:2011:130, paragraph 37.

6 — Judgments in *Coname*, C-231/03, EU:C:2005:487, paragraph 16, and in *Privater Rettungsdienst und Krankentransport Stadler*, C-274/09, EU:C:2011:130, paragraph 49. Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts (OJ 2014 L 94, p. 1) does not apply to the present case, in view both of the deadline for its transposition and of the transitional provisions contained in the second paragraph of Article 54 thereof.

7 — See the judgment in *Azienda sanitaria locale n. 5 'Spezzino' and Others*, C-113/13, EU:C:2014:2440, paragraph 55 and the case-law cited therein.

34. In the exercise of that power, the Member States may not, however, introduce or maintain unjustified restrictions on the exercise of fundamental internal market freedoms. In the assessment of compliance with that prohibition, account must be taken of the fact that the health and life of humans rank foremost among the assets or interests protected by the Treaty and that it is for the Member States, which have a discretion in the matter, to decide on the degree of protection which they wish to afford to public health and on the way in which that degree of protection is to be achieved. [8]

35. Moreover, the way in which health-care systems are organised in individual Member States varies considerably and the transnational dimension of the services provided as part of those systems is of a limited nature.

36. Those circumstances were taken into account by the EU legislature in deciding to place 'health services' within the category of non-priority services listed in Annex II B to Directive 2004/18. [9]

37. The EU legislature has proceeded on the assumption that such services are not a priori of cross-border interest and, for that reason, were not fully covered by the material scope of the directive. [10]

38. According to Article 21 of Directive 2004/18, the services listed in Annex II B, including 'health and social services', are to be subject solely to Article 23 and Article 35(4) of the directive.

39. In the light of the case-law of the Court, Article 21 of Directive 2004/18 does not, however, preclude application of the general and final provisions of that directive, including Article 2 thereof, referred to in the order for reference. [11]

B – *Restriction of access by tenderers to public procurement procedures in the light of Article 2 and Article 23(2) of Directive 2004/18*

40. It should be noted that both Article 2 and Article 23(2) of Directive 2004/18 express the principle of equal treatment of tenderers, which is also a general principle deriving from the fundamental internal market freedoms defined in, inter alia, Article 49 TFEU and Article 56 TFEU. In this regard, the case-law of the Court concerning the interpretation of the fundamental internal market freedoms is also important for the purposes of interpreting the aforementioned provisions of Directive 2004/18.

41. In the analysis of the case at issue in the light of the aforementioned case-law, it should, however, be borne in mind that Directive 2004/18 extends the application of the principle of equal and non-discriminatory treatment of tenderers to internal situations. Since the matter here at issue relates to an area harmonised by EU law, it is not necessary to seek a transnational dimension in order to apply that principle to contracts coming within the scope of the directive.

8 — *Ibid*., paragraph 56 and the case-law cited therein.

9 — The special regime for health services is also retained by the new 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 2004 L 94, p. 65) (Article 74 and Annex XIV), although it is not applicable to the present case *ratione temporis*, and, in relation to the award of concession contracts, by Directive 2014/23 (Article 19 and Annex IV).

10 — Judgment in *Commission* v *Ireland*, C-507/03, EU:C:2007:676, paragraph 25. This issue has also been analysed in the legal literature; see A. Sołtysińska, *Europejskie prawo zamówień publicznych*, Warsaw, LEX Wolters Kluwer 2012, p. 167.

11 — See, to that effect, the judgment in *Contse and Others*, C-234/03, EU:C:2005:644, paragraph 47.

42. In the light of the general principle expressed in Article 2 of Directive 2004/18, contracting authorities must treat economic operators equally and non-discriminatorily and must act in a transparent way. These principles are of crucial importance with regard to the technical specifications, in the light of the risks of discrimination linked to the choice of those specifications or the manner in which they are formulated. [12]

43. In this regard, Article 23(2) of Directive 2004/18, which defines the rules for drawing up technical specifications and the formulation of requirements by contracting authorities in those specifications, provides that technical specifications must afford equal access for tenderers and must not have the effect of creating unjustified obstacles to the opening-up of public procurement to competition.

44. In the case here at issue, there can be no doubt that the obligation to have a health-care facility available in Bilbao, contained in the technical specifications of both disputed calls for tenders, is liable to hinder access to the public procurement market for potential tenderers which do not have such a facility available.

45. I wish to stress that that requirement does hinder such access, even though it was not used as a qualifying criterion for tenderers, and the availability of a facility is essential only at the stage of performance of the contract.

46. On this point, I disagree with the position of the Departamento de Sanidad, based on the judgment in *Contse and Others*, [13] to the effect that the requirement to have a facility available in the place of performance of the services does not restrict access to a call for tenders if it is formulated as a condition for the performance of the contract.

47. I would mention that the judgment in *Contse and Others* [14] concerned the requirement to have an office available in a particular province in order to participate in a call for tenders for the provision of respiratory treatment services. That requirement was a qualification criterion applicable at the time when tenders were submitted and would probably not have been problematic if it had had to be met only at the stage of performance of the services.

48. Nevertheless, it is clear from the judgment in *Contse and Others* that the requirement to have an office available in a particular province did not require significant investment and also that, in view of its nature, it could easily be met at any time. That is not true in the case here at issue since, as the referring court points out, the creation of hospital infrastructure in Bilbao would require significant investment requiring a great deal of time, which would probably not be cost-effective in view of the limited scope of the services covered by the calls for tenders.

49. As a result of the requirement being contested in the main proceedings, a tenderer must, in order to participate in the calls for tenders, assume the obligation to make the investments necessary to provide the services at facilities within Bilbao.

50. Furthermore, the requirement to have a facility available in the aforementioned municipality, despite the fact that it applies exclusively to the stage at which the contract is being performed, is liable to hinder or make less attractive the exercise of the freedom to provide services guaranteed by the Treaty.

51. In the light of the foregoing considerations, the contested requirement undoubtedly hinders tenderers' access to public procurement procedures within the meaning of Article 2 and Article 23(2) of Directive 2004/18.

12 — Judgment in *Commission* v *Netherlands*, C-368/10, EU:C:2012:284, paragraph 62.

13 — Judgment in *Contse and Others*, C-234/03, EU:C:2005:644.

14 — *Contse and Others*, paragraphs 55 to 57.

C – Justification by requirements in the general interest

52. Next, it is necessary to consider whether that requirement may be justified by imperative requirements in the general interest and whether it is compatible with the principle of proportionality.

53. I wish to point out that, if the contested requirement were to constitute a justified restriction, it would, in the light of the principles developed in the case-law of the Court concerning restrictions on the exercise of the fundamental internal market freedoms, also be necessary to consider whether it is compatible with Article 2 and Article 23(2) of Directive 2004/18, since those provisions prohibit the creation of 'unjustified obstacles' to the opening-up of public procurement to competition.

54. It follows from the Court's case-law that the criteria applied when awarding public contracts must comply with the principle of non-discrimination as derived from the provisions of the Treaty relating to freedom to provide services. Moreover, restrictions on the freedom to provide services may be justified if they fulfil the conditions set out in the case-law concerning that freedom. [15]

55. In order to be considered compatible with Article 49 TFEU and Article 56 TFEU, national measures liable to hinder or make less attractive the exercise of fundamental freedoms must fulfil four conditions: they must be applied in a non-discriminatory manner; they must be justified by imperative requirements in the general interest; they must be suitable for securing the attainment of the objective which they pursue; and they must not go beyond what is necessary in order to attain that objective. [16]

56. The defendants in the main proceedings and the Spanish Government justify the contested requirement by citing the need to ensure high quality and reliability in the operation of the public health-care system.

57. The Spanish Government maintains that the objective of the contested procedures is to support public health services in the field of surgical procedures. Since these are essential social services provided for the public by the Basque Government, it does not seem surprising that, guided by requirements in the general interest, the latter decided to enter into a contract with a private entity owning a hospital in Bilbao, where a large proportion of the residents of the Province of Vizcaya live. Considerations relating to the quality and reliability of health services provided on behalf and at the expense of the public authorities should be sufficient to justify such a restriction of the freedoms guaranteed by the Treaty.

58. In order to justify the aforementioned requirement, the Departamento de Sanidad cites travel difficulties for surgeons and also for patients and their relatives, pointing out the radial nature of public transport within the metropolitan area of Bilbao and the existence of direct public transport links between Bilbao and other towns in the province. It also points out that the choice of the most suitable location for medical facilities from the patients' point of view is one of the duties devolving on the public health service.

59. Furthermore, the Departamento de Sanidad cites the territorial division established for the purpose of providing public health services. That division, it submits, must also be maintained where public services are supported by private health facilities selected following a call for tenders. As regards the technical specifications of such calls for tenders, the place of performance in a particular health district is an essential requirement applied to the provision of services to support the public services.

15 — *Contse and Others*, paragraph 49.

16 — Judgment in *Gebhard*, C-55/94, EU:C:1995:411, paragraph 37.

The Departamento de Sanidad points out that the hospital belonging to the Grupo Hospitalario Quirón is located in Erandio and, therefore, in a municipality which is in a different health district from that of the hospitals in Basurto and Galdakao. The municipality of Erandio is in the district covered by the Cruces public hospital, which is not involved in the contested calls for tenders.

60. To my mind, those arguments are not convincing.

61. With regard to the Departamento de Sanidad's argument concerning the territorial division of the public health service, it should be noted that, according to the settled case-law of the Court, Member States may not justify the restriction of a fundamental freedom by citing considerations of an administrative nature. [17]

62. In the case here at issue, the territorial division of the public health service established by the administration does not therefore constitute a sufficient justification for restrictions on the place of performance of the services which are the subject of the calls for tenders. Such justification must be based on evidence of genuine practical difficulties which require the service in question to be provided at health-care facilities located in Bilbao.

63. Likewise, I am not convinced by the Departamento de Sanidad's argument to the effect that, if the calls for tenders were to be extended to facilities located in other municipalities, it might prove unnecessary to conclude contracts with private entities, since the procedures in question could be carried out at a public hospital belonging to another health district, in particular at the Cruces Hospital, which is not involved in the contested calls for tenders.

64. EU law does not preclude the Departamento de Sanidad from having recourse to a public hospital located in another municipality in the province. A public authority has the possibility of performing the public interest tasks conferred on it by using its own resources, without being obliged to call on outside entities and may do so in cooperation with other public authorities. [18]

65. However, since that authority decided that it was necessary to enter into a contract with a private entity by way of a call for tenders, it may not exclude a tenderer by reference exclusively to the administrative division of the territory for the purpose of operating public hospitals.

66. Moreover, with regard to the considerations relating to reliability and high quality in the operation of the health-care system, invoked by the Spanish Government, it should be noted that those considerations undoubtedly constitute a criterion capable of justifying a restriction on the freedom to provide services.

67. In the light of the settled case-law of the Court, the objective of maintaining a high-quality balanced medical and hospital service open to all may fall within the derogations under Article 52 TFEU in so far as it contributes to the attainment of a high level of health protection. [19]

68. The location of a health-care facility in relation to the patient's place of residence is undoubtedly an important factor in the provision of health services. The need to travel involves additional costs and, in emergencies, even a risk to the patient's health, difficulties for the patient's family and friends and, in the case here at issue, also inconvenience arising from the need for medical staff employed at public hospitals to travel to the private hospital at which the procedure is to be carried out.

17 — See judgment in *Commission* v *Austria*, C-356/08, EU:C:2009:401, paragraph 46 and the case-law cited therein.

18 — Judgment in *Commission* v *Germany*, Case C-480/06, EU:C:2009:357, paragraph 45.

19 — See, inter alia, the judgments in *Kohll*, C-158/96, EU:C:1998:171, paragraphs 50 and 51, and in *Smits and Peerbooms*, C-157/99, EU:C:2001:404, paragraphs 73 and 74.

69. In my opinion, those circumstances may undoubtedly constitute grounds for restricting the geographical scope of the health service provision covered by the calls for tenders.

70. Nevertheless, a restriction relating to the place of performance of the services must remain compatible with the principle of proportionality and must therefore be appropriate for securing the attainment of the objective pursued and must also not go beyond what is necessary for attaining that objective. [20]

71. In order for the restriction relating to the location of facilities to be capable of attaining the objective of ensuring accessible and high-quality health care, it cannot be based exclusively on the administrative division of the territory, since that division does not generally take account of specific factors arising from the location of health-care facilities and patients' place of residence.

72. In order to select the place of performance of services, an objective assessment must be made of the inconvenience arising as a result of the distance of the health-care facility from the place where patients live.

73. It should also be pointed out that the distance from the health-care facility may be more or less significant depending on the type of services. There is no doubt that distance is of fundamental importance in the case of urgent operations. Nevertheless, in the case of planned procedures, practical difficulties connected with travel times are a less important factor in the provision of health services.

74. In my opinion, the contested requirement is disproportionate, since it prescribes that services be provided within the boundaries of the city of Bilbao, which were established for administrative reasons. That requirement is not based on any objective assessment of difficulties in travelling to the facility, nor does it take account of the nature of the health-care services covered by the calls for tenders.

75. Evidence of the disproportionate nature of that requirement can also be found in the fact that the target patients, as the referring court points out, do not live exclusively in Bilbao but also in other adjacent municipalities and, in the case of one of the contracts, the public hospital which will be supported by the private facilities is Galdakao Hospital, which is located outside the municipality of Bilbao.

76. The Departamento de Sanidad and the Spanish Government maintain that the selection of Bilbao as the place of performance of the services is based on the assumption that that city is a public transport hub and that it is therefore easy to travel to Bilbao from other towns in the province.

77. In my view, that argument is not sufficient to justify the claim that the requirement at issue in the main proceedings is proportionate.

78. First, it cannot be ruled out that travelling from the centre of Bilbao to a private hospital located within the boundaries of the city may give rise to inconvenience similar to that involved in travelling to a hospital located in an adjacent municipality.

79. Secondly, it is apparent from the order for reference that the travel time from the centre of Bilbao to the hospital owned by the applicant, which is located in an adjacent municipality, does not involve a great deal of difficulty. From the replies given by the parties at the hearing, it is also apparent that the subject-matter of the contracts consists of health services connected with planned procedures.

20 — Judgments in *Commission* v *Spain*, C-158/03, EU:C:2005:642, paragraph 70, and in *Contse and Others*, C-234/03, EU:C:2005:644, paragraph 41. It should be noted that the proportionality test plays a key role in the assessment of the legality of actions by Member States which restrict an internal market freedom; see A. Frąckowiak-Adamska, *Zasada proporcjonalności jako gwarancja swobód rynku wewnętrzego Wspólnoty Europejskiej*, Warsaw, Wolters Kluwer 2009, Section 3.1.1.

80. In addition, the referring court points out that public contracts for the provision of health services awarded by the Departamento de Sanidad in the past did not contain any similar requirement concerning the location of facilities, and that the contracting authority's legal department issued an opinion suggesting that that requirement should be removed as it was difficult to reconcile with the principle of equal treatment of tenderers.

81. It should be pointed out that it is for the referring court to establish the factual circumstances and to assess proportionality on the basis of those circumstances.

82. Nevertheless, the facts described in the order for reference indicate that travelling to a hospital located in the municipality of Erandio would not cause excessive difficulties for patients or medical staff. Those facts therefore tend to point to the conclusion that the contested requirement is not proportionate.

83. As the Commission correctly notes in its written observations, it is also necessary to consider whether there are other means of attaining the objective in question which are less restrictive of the freedom to provide services.

84. In the case at issue, it cannot be ruled out that the general interest cited by the Departamento de Sanidad and the Spanish Government could be safeguarded by less restrictive means, for example by a requirement that the services be performed at health-care facilities to which travel by public transport would not cause undue inconvenience to patients and medical staff. A technical specification defined to that effect could also contain an approximate travel time from the centre of Bilbao that the contracting authority considers to be reasonable.

VI – **Conclusion**

85. In the light of the foregoing considerations, I propose that the Court reply as follows to the question referred by the Juzgado de lo Contencioso-Administrativo No 6, Bilbao (Spain):

Articles 2 and 23(2) of Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts preclude the inclusion, in the technical specifications of a public contract for the provision of public health-care services, of a requirement that the services be provided exclusively at health-care facilities located within a given municipality, where that requirement is not based on an objective assessment of travel difficulties for patients, regard being had to the nature of the health-care services which are the subject of the public contract.