



Reports of Cases

OPINION OF ADVOCATE GENERAL

TANCHEV

delivered on 29 April 2021¹

Case C-598/19

Confederación Nacional de Centros Especiales de Empleo (CONACEE)

v

Diputación Foral de Guipúzcoa,

**Federación Empresarial Española de Asociaciones de Centros Especiales de Empleo
(Feacem)**

(Request for a preliminary ruling from the Tribunal Superior de Justicia del País Vasco (High Court of Justice of the Basque Country, Spain))

(Reference for a preliminary ruling – Public procurement – Directive 2014/24/EU – Articles 18 and 20 – 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)

1. This request for a preliminary ruling from the Tribunal Superior de Justicia del País Vasco (High Court of Justice of the Basque Country, Spain) ('the referring court') asks the Court to interpret, for the first time, Article 20 of Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement.²

2. The question referred asks the Court to clarify, in essence, whether the Member States, when making use of the option under Article 20 of Directive 2014/24 to reserve the right to participate in public procurement procedures to certain operators, must permit all economic operators that meet the criteria under that provision to participate in the procurement procedures, or whether the Member States, when making use of that option, may further restrict the circle of economic operators that may participate and place bids for the contracts in question.

3. I have concluded that the Member States may indeed define the circle of economic operators permitted to participate by imposing criteria that are narrower than the requirements imposed by Article 20 of Directive 2014/24, which, in my analysis, are minimum requirements. However, if a Member State chooses to do so, it must still comply with the provisions of the directive, including Article 18, 'Principles of procurement', as well as with generally applicable requirements of EU public procurement law.

¹ Original language: English.

² OJ 2014 L 94, p. 65.

I. Legal framework

A. EU law

4. Recital 1 to Directive 2014/24 states:

‘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.’

5. Recital 2 to Directive 2014/24 reads:

‘Public procurement plays a key role in the Europe 2020 strategy, set out in the Commission Communication of 3 March 2010 entitled ‘Europe 2020, a strategy for smart, sustainable and inclusive growth’ (‘Europe 2020 strategy for smart, sustainable and inclusive growth’), as one of the market-based instruments to be used to achieve smart, sustainable and inclusive growth while ensuring the most efficient use of public funds. For that purpose, the public procurement rules adopted pursuant to [Directive 2004/17³] and [Directive 2004/18⁴] should be revised and modernised in order to increase the efficiency of public spending, facilitating in particular the participation of small and medium-sized enterprises (SMEs) in public procurement, and to enable procurers to make better use of public procurement in support of common societal goals ...’

6. Recital 36 to Directive 2014/24 is worded as follows:

‘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.’

7. Article 2(1)(5) of Directive 2014/24 defines, for purposes of the directive, ‘public contracts’ as ‘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’.

³ Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors (OJ 2004 L 134, p. 1).

⁴ 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).

8. Article 2(1)(10) of Directive 2014/24 defines ‘economic operator’ as ‘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’.

9. Article 18 of Directive 2014/24, entitled ‘Principles of procurement’, provides:

‘1. 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.

...’

10. Article 20 of Directive 2014/24, entitled ‘Reserved contracts’, states:

‘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.

...’

B. Spanish law

11. Article 20 of Directive 2014/24 was transposed into Spanish law by the Fourth Additional Provision of Ley 9/2017 de contratos del sector público (Law 9/2017 on public sector contracts) (‘Law 9/2017’) of 8 November 2017, which 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, ..., which satisfy the eligibility criteria laid down in [the relevant] legislation, or a minimum percentage shall be set 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 contract notice shall make reference to this provision.

...’

12. The Fourteenth Final Provision of Law 9/2017 states:

‘...

4. Social initiative special employment centres are those which satisfy the criteria laid down in paragraphs 1 and 2 of the present Article, 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 ... 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.’

II. Facts, main proceedings and the question referred for a preliminary ruling

13. The dispute in the main proceedings arises from a decision of 15 May 2018 (‘the decision of 15 May 2018’), whereby the Consejo de Gobierno de la Diputación Foral de Guipúzcoa (Governing body of the Guipúzcoa Provincial Authority, Spain) approved instructions issued to that institution’s contracting authorities. Those instructions concern the reservation of the right to participate in procurement procedures, as provided for by the Spanish legislation implementing Directive 2014/24.

14. The action in the main proceedings was brought by the Confederación Nacional de Centros Especiales de Empleo (National Confederation of Special Employment Centres) (‘CONACEE’), which is an association representing Special Employment Centres in Spain. Its members include, among other categories, ‘entrepreneurial’ Special Employment Centres.

15. As is apparent from the file before the Court, prior Spanish law permitted Special Employment Centres in Spain to participate in public procurement procedures for ‘reserved contracts’ regardless of whether they were not-for-profit or entrepreneurial in nature.⁵ That situation changed with the introduction of Law 9/2017.

16. Law 9/2017 introduced a new category of so-called ‘Social Initiative Special Employment Centres’ and reserved participation in Article 20 reserved contract procurement procedures⁶ to those centres.

⁵ CONACEE refers to Ley estatal 31/2015 *por la que se modifica y actualiza la normativa en materia de autoempleo y se adoptan medidas de fomento y promoción del trabajo autónomo y de la economía social* (National law 31/2015 amending and updating the regulations on self-employment and adopting measures to promote and encourage independent work and the social economy) of 9 September 2015.

⁶ I shall for ease of reference refer to public procurement procedures for contracts that are reserved pursuant to Article 20 of Directive 2014/24 as ‘Article 20 reserved procurement procedures’.

17. In addition to the requirements that Special Employment Centres had to meet to qualify as such under prior law, Social Initiative Special Employment Centres must be organised as not-for-profit entities or satisfy certain ownership requirements, and must also reinvest their profits, either in their own operations or in similar Social Initiative Special Employment Centre operations.

18. According to CONACEE, these additional requirements exclude a large portion of Spanish Special Employment Centres from participating in Spanish reserved procurement procedures, even though they satisfy the requirements laid down in Article 20 of Directive 2014/24.

19. Against that background, CONACEE brought an action against the decision of 15 May 2018 before the Tribunal Superior de Justicia del País Vasco (High Court of Justice of the Basque Country) challenging the decision of 15 May 2018 and claiming, in essence, that the new Spanish regime is contrary to EU law.

20. The referring court has doubts as to whether the new regime is compatible with EU law and specifically with Article 20 of Directive 2014/24.

21. In those circumstances, the Tribunal Superior de Justicia del País Vasco (High Court of Justice of the Basque Country) stayed the proceedings and referred the following question to the Court of Justice for a preliminary ruling:

‘Must Article 20 of Directive 2014/24/EU on public procurement 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?’

22. Written observations were submitted by CONACEE, the Guipúzcoa Provincial Authority, the Kingdom of Spain and the Commission.

23. A hearing was requested, but none was held. The Court put two questions to the interested parties referred to in Article 23 of the Statute of the Court of Justice of the European Union for a written response. CONACEE, the Diputación Foral de Guipúzcoa, the Kingdom of Spain and the Commission submitted written responses.

III. Analysis

24. By its question, the referring court seeks, in essence, to clarify whether the provisions of that directive or other applicable rules of EU law governing public procurement prevent the Member States from imposing additional limits or requirements on the undertakings or economic operators that may participate in Article 20 reserved procurement procedures, other than the limitations that follow from that article. The referring court is especially, but not exclusively, concerned with ‘additional criteria related to the constitution, character and aims of those bodies [and] to their activities and investments’.

25. I have reached the conclusion that the better view is that Article 20 of Directive 2014/24 sets out minimum requirements that the Member States must ensure are met by the permitted participants,⁷ if the Member States choose to avail themselves of the option to reserve contracts pursuant to that article, and that that provision does not in and of itself prevent the Member States from placing further requirements or restrictions on the permitted participants, either on a general level or for specific public procurement procedures or for individual lots thereof. However, when making use of the option to reserve contracts as provided by Article 20, the Member States are still required to comply with the rules of Directive 2014/24 and the general rules of EU law applicable to public procurement; here, in particular Article 18 of the directive and the principles of equal treatment and proportionality.

A. Preliminary remarks

26. According to Article 4 of Directive 2014/24, that directive applies to procurements with an estimated value equal to or greater than certain thresholds set out in that article.⁸ Procurements that do not meet the thresholds are not subject to the provisions of that directive, however they must still comply with the principles of the Treaty on the Functioning of the European Union, and in particular with the rules on free movement as well as the principles deriving from those rules, including the principles of equal treatment, mutual recognition, non-discrimination and proportionality.⁹

27. The present case concerns only public procurement falling within the scope of application of Directive 2014/24. I should add that the facts of the case in the main proceedings appear to involve exclusively Spanish actors and that the facts in respect of which the referring court must give a decision do not appear to involve any cross-border element.

28. Pursuant to Article 20 of Directive 2014/24, the Member States may reserve the ‘right to participate in public procurement procedures’ to sheltered workshops and economic operators with certain specific ‘main aim[s]’ or may provide that the contracts in question are to be ‘performed in the context of sheltered employment programmes’. This option is subject to the proviso that ‘at least 30%’ of the employees of those workshops, economic operators or programmes are ‘disabled or disadvantaged workers’.

29. Spain has availed itself of this option, and has enacted legislation concerning its Special Employment Centres that imposes additional restrictions on the economic operators wishing to participate in the Spanish Article 20 reserved procurement procedures that CONACEE is contesting in the main proceedings. That legislation stipulates, in essence, that the entities or persons concerned must be not-for-profit and that they must undertake to reinvest any profits made, either in the Special Employment Centre itself or in another similar Special Employment Centre.

⁷ I shall refer to the undertakings and economic operators that a Member State permits to participate in its Article 20 reserved procurement procedures as ‘permitted participants’.

⁸ The threshold amounts are subject to biannual revisions in accordance with Article 6 of Directive 2014/24. Public contracts that are awarded by contracting authorities operating in the water, energy, transport and postal services sectors and that fall within the scope of those activities are covered by Directive 2014/25/EU and, generally, not by Directive 2014/24. Article 4(d) provides for a significantly higher threshold for public service contracts for certain listed ‘social and other specific services’. Those contracts are the subject of a particular procurement regime under Chapter I of Title III of Directive 2014/24.

⁹ See to that effect Recital 1 to Directive 2014/24.

30. Spain has also set an employment percentage requirement regarding disadvantaged persons in Special Employment Centres that is significantly higher (70%) than the minimum required by Article 20 of Directive 2014/24 (30%). This limit does not appear to be contested in the main case, possibly because CONACEE's members actually meet that criterion.

31. Other Member States have likewise enacted legislation in which the limitations in respect of the permitted participants in their Article 20 reserved public procurement procedures are stricter than the limitations that follow from the text of Directive 2014/24.¹⁰

B. The Member States' discretion

32. Article 20 of Directive 2014/24 lays down a number of criteria for the 'permitted participants' that must be satisfied, if a given Member State chooses to avail itself of the option to use Article 20 reserved contracts¹¹ in its procurement procedures. Article 20(1) requires that either (i) the permitted participants in those reserved public procurement procedures must belong to one of two different categories of participants, namely either 'sheltered workshops' or 'economic operators whose main aim is the social and professional integration of disabled or disadvantaged persons', or (ii) '[the] contracts [must] be performed in the context of sheltered employment programmes'. The case before the Court concerns only the category 'economic operators whose main aim is the social and professional integration of disabled or disadvantaged persons' and the possible imposition of additional requirements for participation on that group of economic operators apart from the requirements that are explicitly laid down in the directive.

33. Article 20(1) of Directive 2014/24 further imposes a requirement that at least 30% of the employees of the permitted participants must be disabled or disadvantaged workers.

34. Finally, Article 20(2) of Directive 2014/24 requires the Member States, when availing themselves of the option provided by Article 20, to make explicit reference to that article in the call for competition. That requirement is not at issue in the present case.

35. CONACEE argues, in essence, that the wording of Article 20 of Directive 2014/24 exhaustively describes the requirements that economic operators must meet in order to qualify for participation in public procurement procedures reserved under that provision, and that economic operators that satisfy those criteria therefore cannot be excluded from participation due to additional requirements such as the non-profit requirement and the reinvestment-of-profit requirement imposed by the Spanish legislation in question.

36. The Commission argues, in essence, that the Member States enjoy a broad discretion when defining in their national legislation what is to be understood by the expression 'economic operators whose main aim is the social and professional integration of disabled or disadvantaged persons'.¹²

¹⁰ The Commission, in paragraph 16 of its observations, states, as examples, that France, the Czech Republic and Croatia all have stricter requirements concerning the percentage of disabled or disadvantaged employees, and that the Czech Republic in this respect only counts disabled persons, and not other disadvantaged persons.

¹¹ I shall for ease of reference refer to contracts obtained by bidders in Article 20 reserved procurement procedures as 'Article 20 reserved contracts'.

¹² Paragraph 14 of the Commission's observations: '... [L]es États membres sont en droit de préciser dans leur législation ce qu'il convient d'entendre par «opérateurs économiques dont l'objet principal est l'intégration sociale et professionnelle de personnes handicapées ou défavorisées» ('Member States are entitled to state in their legislation what is to be understood by the expression 'economic operators whose *main aim* is the social and professional integration of disabled or disadvantaged persons').

37. I cannot share the Commission's analysis. It is settled case-law that it follows from the need for a uniform application of EU law and from the principle of equality that the terms of a provision of EU law which makes no express reference to the law of the Member States for the purpose of determining its meaning and scope must normally be given an independent and uniform interpretation throughout the European Union. That interpretation must take into account, not only its terms, but also its context and the objective pursued by the relevant legislation.¹³

38. Therefore, I do not consider that the Member States enjoy a broad discretion to define the meaning of the terms of Article 20 of Directive 2014/24. In my view, those terms must be given a uniform interpretation. Thus, any discretion that the Member States may enjoy when implementing Article 20 of Directive 2014/24 does not stem from a discretion for them each to apply their own meaning to the terms of the directive.

39. Rather, the requirements under Article 20 of Directive 2014/24 can be understood either as *minimum requirements* that the Member State must impose on the permitted participants in order for the Member State's use of Article 20 reserved procurement procedures to be lawful, or, as CONACEE argues, as an *exhaustive definition* of the criteria determining which economic operators are to be accepted by the Member States as permitted participants, if the Member States choose to make use of Article 20 reserved procurement procedures.

40. As I shall explain, in my view, the requirements under Article 20 of Directive 2014/24 are best understood as minimum requirements, which leave the Member States free to impose additional limitations, narrowing the circle of permitted participants in their Article 20 reserved procurement procedures, subject to the limitations imposed by other provisions of Directive 2014/24 and other applicable provisions of EU procurement law. It is therefore not Article 20 of Directive 2014/24 that may limit the Member States' ability to impose additional requirements on the permitted participants, but Article 18 of that directive and the principles of equal treatment and proportionality, as well as the prohibition on artificially narrowing competition.

41. First, nothing in the text of Article 20 of Directive 2014/24 requires that all economic operators satisfying the requirements of that article be admitted to any given public procurement procedure held by a Member State for Article 20 reserved contracts.

42. On the contrary, Article 20 of Directive 2014/24 provides the Member States with an option – of which they may choose to avail themselves or not – and sets out the conditions that the Member States must comply with if they choose to take up the option under that article. Those conditions specify in broad and unspecific terms the kinds of undertakings or economic operators to which the Member States may reserve procurement procedures, and set out a minimum percentage in relation to the disabled or disadvantaged workers employed at those undertakings or economic operators.

43. Second, as described in recital 36 to Directive 2014/24 and recital 28 to Directive 2004/18, the rationale for the inclusion of Article 20 of Directive 2014/24 and its predecessor provision, Article 19 of Directive 2004/18, in these two directives must be understood in the context of 'guaranteeing equal opportunities for all', employment and occupation being 'key elements' of that

¹³ Judgment of 4 June 2020, *Remondis* (C-429/19, EU:C:2020:436, paragraph 24).

objective. Article 20 of Directive 2014/24 (and its predecessor provision, Article 19 of Directive 2004/18) thus allow the Member States to pursue social and employment policy aims through instruments of public procurement.

44. It should be recalled in that regard that the Member States enjoy broad discretion in their choice, not only to pursue a particular aim in the field of social and employment policy,¹⁴ but also in the definition of measures capable of achieving it.¹⁵ Taking the rationale for Article 20 of Directive 2014/24 into account, it is my view that the definition of the permitted participants is a matter first and foremost of social and employment policy where the Member States enjoy a broad discretion.

45. I should also point out that whereas Article 20, as an exception to the general regime for public procurement procedures under Directive 2014/24, should be given a strict interpretation, this principle of interpretation, in my view, would logically apply to the *size of the carve-out* from ordinary procurement procedures in terms of the part of the market covered (not at issue in the present case and not subject, in any event, to any explicit limitations in Directive 2014/24 to which a strict or narrow interpretation of the carve-out could apply) and to the *depth* of the carve-out in terms of the scope of the rules from which the carved-out procurement procedures are exempted. It should not apply in such a way as to require the widest possible circle of permitted participants for any given Article 20 reserved procurement procedure. Once a portion of the public procurement market has been segregated from the normal market and set aside for economic operators which are presumed to be uncompetitive due to the significant societal benefits they provide, I see no real benefit to the principles of market economy, competition or equal treatment from an insistence that the circle of permitted participants (presumed to be uncompetitive) be defined as broadly as possible. From a market economy perspective, it is – in my view – the size of the carve-out that matters, whereas the delineation of the circle of beneficiaries should be seen as an issue – and an instrument – of social and employment policy that is subject to the Member States' broad discretion.

46. Therefore, in my opinion, a literal and teleological interpretation of Article 20 of Directive 2014/24 supports the conclusion that the Member States are *not* required by that article to accept the participation of any given economic operator satisfying the criteria set out in that article in their Article 20 reserved procurement procedures. However, any additional restrictions must satisfy the requirements of Article 18 of Directive 2014/24 and any other applicable provisions or principles of EU public procurement law.

47. This conclusion is also supported by the origins of Article 20 of Directive 2014/24 and its predecessor provision, Article 19 of Directive 2004/18, which introduced the concept of 'reserved contracts' into the public procurement directives.¹⁶

¹⁴ This corresponds with the EU legislature's choice to make the use of Article 20 reserved procurement procedures optional for the Member States.

¹⁵ Judgment of 19 September 2018, *Bedi* (C-312/17, EU:C:2018:734, paragraph 59 and the case-law cited).

¹⁶ Directive 2014/24 was enacted together with 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) and Directive 2014/25/EU of the European Parliament and of the Council of 26 February 2014 on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC (OJ 2014 L 94, p. 243), Article 24 and Article 38 of which, respectively, are almost ad verbatim identical to Article 20 of Directive 2014/24. Directive 2004/18 was enacted together with Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors (OJ 2004 L 134, p. 1), Article 28 of which is almost ad verbatim identical to Article 19 of Directive 2004/18.

48. Article 20 of Directive 2014/24 and its predecessor provision permits or permitted the Member States to reserve the right to participate in award procedures for public contracts or certain lots thereof, because the workshops or social businesses concerned may not be able to obtain contracts under normal conditions of competition, the underlying premiss being that the employment of the ultimate intended beneficiaries of the Article 20 reserved procurement procedures, namely disabled or disadvantaged persons, whose social and professional integration must be the main aim of the economic operators that the Member State in question accepts as permitted participants, is or may be economically disadvantageous to the economic operators in question to the extent where they cannot be expected to be able to compete on ordinary market terms. Therefore, the Member States may, subject to certain safeguards and limitations, create what amounts to a protected space for public procurement contracts where such operators compete only with other operators in comparable circumstances.

49. It is apparent, when considering Article 20 of Directive 2014/24 in isolation, that a true or even only approximate level playing field between those actors can be achieved only by adding detail to the rough outline provided by that provision of the directive. Accepting the notion that those economic operators may not be able to compete on normal market terms because of their significant societal contributions, it must equally be acknowledged that the terms ‘disabled or disadvantaged’ cover very diverse groups of people and that within each subset of those groups, individuals will vary greatly in their abilities and potential productivity. Thus, an economic operator seeking to aid the integration of, merely as an example, someone suffering long-term unemployment faces very different challenges compared to an economic operator seeking to aid the integration of a person who is permanently handicapped by, again merely as an example, blindness. Keeping this and the aim mentioned in recital 36 of Directive 2014/24 of ‘guaranteeing equal opportunities for all’ in mind, I consider that the purpose of Article 20 of Directive 2014/24 is best served by allowing the Member States to impose more detailed requirements for participation in their Article 20 reserved procurement procedures.

50. This becomes even clearer if Article 20 of Directive 2014/24 is analysed in the context of its predecessor provision, Article 19 of Directive 2004/18. Article 19 of Directive 2004/18 imposed considerably stricter requirements concerning the employees of the permitted participants in reserved procurement procedures, requiring that most of the employees were ‘handicapped persons who, by reason of the nature or the seriousness of their disabilities [could not] carry on occupations under normal conditions’, thus setting the bar significantly higher both with respect to the minimum percentage of disadvantaged employees and with respect to the severity and nature of their disadvantage.

51. When the scope of application, *ratione personae*, for Article 20 reserved contracts was broadened in Directive 2014/24, the intention of the EU legislature clearly was not to create a ‘race to the bottom’ where social businesses employing a lower percentage of less affected persons – as per the new, relaxed requirements – would out-compete social businesses meeting the tougher requirements in place under previous legislation for Article 20 reserved procurement procedures. However, taking into account the premiss of recital 36 of Directive 2014/24 and recital 28 of Directive 2004/18, which describes the rationale for reserving contracts, namely that the operators in question may be unable to compete under normal market conditions, the result to be expected, if any economic operator employing only 30% of less affected persons were to be permitted to compete on an equal footing with operators meeting the earlier, much stricter requirements, would be exactly that: the economic operators satisfying the earlier, stricter requirements would be forced to dismiss their least productive and presumably most needy

employees down to the 30% mark, or face the prospect of losing the reserved procurement procedures intended for their benefit to economic operators shouldering only much lighter social responsibilities.

52. It should be emphasised that this analysis does not permit the Member States to exclude economic operators at will from their Article 20 procurement procedures, and does not prejudice whether the exclusion of ‘entrepreneurial’ Special Employment Centres *en bloc* from the Spanish Article 20 procurement procedures is lawful. Rather, this issue should be determined mainly according to the standards and principles set out in Article 18 of Directive 2014/24.

C. Limits on the Member States’ discretion

1. Applicability of Article 18 of Directive 2014/24

53. The Member States are not free to impose requirements at their leisure on permitted participants in their Article 20 reserved procurement procedures. On the contrary, the Article 20 reserved procurement procedures remain subject to the provisions of Directive 2014/24, including Article 18, and any additional requirements imposed must therefore comply with Article 18 and the principles therein.

54. This conclusion is supported by the text of Article 20 of Directive 2014/24, which does not include any indication that the reserved contracts should be exempt from the remaining provisions of the directive, and by the placement of that article in Chapter II, ‘General rules’, of Title I, and not in Section 3, ‘Exclusions’, of Chapter I of Title I, which would be the natural place for a provision setting out an exemption from the application of the directive.

55. It is, further, clear from the legislative history of the predecessor provision to Article 20 of Directive 2014/24, namely Article 19 of Directive 2004/18, that the reserved procurement procedures were not intended to be exempt from the application of the other provisions of that directive.

56. Article 19 of Directive 2004/18, which together with Article 28 of Directive 2004/17 introduced the concept of ‘reserved contracts’ into EU procurement law, was not included in the Commission’s original draft for that directive. It has its origin in Amendment 9 of the Opinion of the European Parliament’s Committee on Industry, External Trade, Research and Energy of 29 June 2001 on the proposed directive, which would, as originally drafted, have excluded ‘public supply, service or works contracts’ awarded to ‘sheltered employment schemes’ from the application of Directive 2004/18 altogether.¹⁷

57. That proposed amendment was the subject of several changes, and various justifications were offered for the different proposed versions of the provision before it found its final form, in particular as Article 19 of Directive 2004/18. The Commission’s comment on the version of the proposed provision in the ‘Amended proposal’ submitted on 6 May 2002¹⁸ clarifies that the

¹⁷ Opinion of the Committee on Legal Affairs and the Internal Market on the proposal for a European Parliament and Council regulation on the coordination of procedures for the award of public supply contracts, public service contracts and public works contracts (COM(2000) 275 – C5-0367/2000 – 2000/0115(COD)), accessible at <https://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+REPORT+A5-2001-0378+0+DOC+XML+V0//EN> (last accessed on 23 March 2021).

¹⁸ Amended proposal for a European Parliament and Council directive concerning the co-ordination of procedures for the award of public supply contracts, public service contracts and public works contracts, COM(2002) 236 final – 2000/0115(COD), amendment 36.

‘reservation does not imply exemption from the application of all other provisions of the Directive applicable to public contracts’. This is also reflected in the text of Directive 2004/18 as adopted, which does not exempt the contracts in question from the application of Directive 2004/18 (as did the original proposed amendment), but merely provides that participation in the public procurement procedures for those contracts may be reserved for those workshops. The various stages in the legislative process leading to the final version of Article 19 of Directive 2004/18 further shows a clear legislative intent that the ‘reserved contracts’ should remain subject to Union-wide competition in accordance with the remaining provisions of Directive 2004/18 and the ‘relevant rules of the Treaty’.¹⁹

58. The various justifications provided for the introduction of this new provision at different stages of the legislative process, and recital 28 to the final directive, make clear that the *raison d’être* for Article 18 of Directive 2004/18 was that the workshops and employment programmes in question might not be able to ‘obtain contracts on normal conditions of competition’. Those workshops and employment programmes, the recital considers, ‘contribute efficiently towards the integration or reintegration of people with disabilities in the labour market’. The recital also states in that context that ‘employment and occupation are key elements in guaranteeing equal opportunities for all’.

59. The legislative history of Article 19 of Directive 2004/18 and recital 28 to that directive thus makes it clear that the purpose of the provision was to allow the Member States to use reserved contract procurement procedures to provide certain permitted participants with contracts they would not have been able to achieve under normal market conditions, and that the justification for this preferential treatment was the efficient contribution towards integration or reintegration of the ultimate intended beneficiaries of the scheme, namely, as regards Article 19 of Directive 2004/18, ‘handicapped persons who, by reason of the nature or the seriousness of their disabilities, cannot carry on occupations under normal conditions’. This objective was part of a higher-level goal of ‘guaranteeing equal opportunities for all’. The use of reserved contracts was to take place under observance of all the other provisions of Directive 2004/18, cross-border competition for the reserved contracts being specifically contemplated.²⁰

60. Directive 2014/24 introduced several changes to the regime for ‘reserved contracts’.²¹ Article 20 of Directive 2014/24 thus restates and expands the option initially granted to the Member States by Article 19 of Directive 2004/18 to reserve to certain operators the right to participate in public contract award procedures. Compared with Article 19 of Directive 2004/18, Article 20 of Directive 2014/24 substantially widens the circle of operators that can be accepted as permitted participants in public procurement procedures for reserved contracts. Nothing in those changes, however, indicates any intention on the part of the EU legislature to exempt the

¹⁹ See, for example, the original Amendment 9 and the later Justification to the Compromise Amendment 29 by A. P. Vallelersundi, cited in footnote 20, below. A compilation of the legislative history of Article 19 of Directive 2004/18 can be found in Hebly, Jan M., *European Public Procurement – Legislative History of the ‘Classic’ Directive 2004/18/EC*, p. 603 et seq.

²⁰ See the Justification to the Compromise Amendment 29 by A. P. Vallelersundi, where the proposed text changes from exempting contracts awarded to sheltered workplaces and schemes to the concept of reserving contracts for them: ‘It is also necessary to ensure that contracts of this kind ... can be awarded to such workshops anywhere in the [Union] and do not turn into another means of giving preference to regional or local tenderers’. The view is implicitly preserved in the Commission’s comment on Amendment 36 in the Amended proposal for a European Parliament and Council Directive concerning the co-ordination of procedures for the award of public supply contracts, public service contracts and public works contracts (COM(2002) 236 final – 2000/0115(COD), OJ 2002 C 203E, p. 210): ‘Th[e] amendment can be accepted if modified in order further to clarify that reservation does not imply exemption from the application of all other provisions of the Directive applicable to public contracts’.

²¹ Directive 2014/24, in addition to the changes included in Article 20, introduced in Chapter I, ‘Social and other specific services’ (Articles 74-77) of Title III, ‘Particular procurement regimes’, a different type of reserved contracts for certain health, social and cultural services. That regime is distinct and separate from the provisions at issue in the present case, but it is possible that the Spanish legislator may have looked to Article 77(2)(b) as a model for the ‘reinvestment of profits’ requirement of the Spanish rules.

Article 20 reserved procurement procedures from the application of the remainder of Directive 2014/24 or any intention to lower the amount of social responsibility borne by the individual permitted participants. Rather, the application of the provision, *ratione personae*, is simply expanded by allowing more operators to qualify as permitted participants, presumably with a view to expanding the use of this social and employment policy tool with the aim of benefitting a larger, more broadly defined and more numerous group of ultimate beneficiaries (employed disabled or disadvantaged persons).

61. The legislative history of Directive 2014/24 itself provides relatively little guidance as to the interpretation of Article 20. The European Economic and Social Committee, in its Opinion on the ‘Proposal for a Directive of the European Parliament and of the Council on public procurement’ (COM(2011) 896 final), suggested certain changes that were not adopted, including a requirement that ‘the sheltered workshops and economic operators whose main aim is the social and professional integration of disabled or disadvantaged workers “should be promoted and controlled primarily by non-profit entities”’ which, in its view, would further justify such preferential access to government support.²²

2. General remarks on Article 18 of Directive 2014/24

62. Article 18 of Directive 2014/24, entitled ‘Principles of procurement’, provides, in the first subparagraph of paragraph 1, that the contracting authorities must treat economic operators equally and without discrimination, and that they must act in a ‘proportionate manner’. This is, in essence, a reiteration of the principles of equal treatment and proportionality, which would be applicable even without the abovementioned provision.²³ The second subparagraph of Article 18(1) provides that ‘the design of the procurement shall not be made with the intention 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’. Though the facts of the main proceedings appear to exclusively concern Spanish actors, it should be borne in mind that Directive 2014/24 extends the principles of equal treatment of tenderers, proportionality and non-distorted competition to internal situations.²⁴

63. In the case in the main proceedings, Spain has enacted legislation that appears to exclude *en bloc* a large part of a particular sector, namely the entrepreneurial Special Employment Centres, from that Member State’s Article 20 reserved procurement procedures. That legislation further reserves those contracts exclusively to another subset of Special Employment Centres, namely the ‘Social Initiative Special Employment Centres’, and sets aside what appears to be a significant body of public procurement contracts for Article 20 reserved procurement procedures.

64. This raises fairly obvious issues in terms of conformity with the principles of equal treatment and proportionality, and the prohibition on artificially narrowed competition.

²² Points 4.10 and 4.11 of the Opinion of the European Economic and Social Committee on the ‘Proposal for a Directive of the European Parliament and of the Council on procurement by entities operating in the water, energy, transport and postal services sectors’ (COM(2011) 895 final – 2011/0439 (COD)); the ‘Proposal for a Directive of the European Parliament and of the Council on public procurement’ (COM(2011) 896 final – 2011/0438 (COD)); and the ‘Proposal for a Directive of the European Parliament and of the Council on the award of concession contracts’ (COM(2011) 897 final – 2011/0437 (COD)) (OJ 2012 C 191, p. 84).

²³ This provision is an expansion on its predecessor provision, Article 2 of Directive 2004/18, which only required equal and non-discriminatory treatment of the economic operators as well as transparency, but which did not mention proportionality.

²⁴ See, in that regard, Advocate General Szpunar’s Opinion in *Grupo Hospitalario Quirón* (C-552/13, EU:C:2015:394, point 40 et seq.) regarding Article 23(2) of Directive 2004/18 concerning equal access for tenderers and the absence of unjustified obstacles to competition in the context of technical specifications.

3. Article 18 of Directive 2014/24 and the principle of equal treatment

65. Under settled case-law, the principle of equal treatment is one of the fundamental principles of EU law,²⁵ which the Member States must observe when they act within the scope of EU law. That principle, which is one of the fundamental rights whose observance the Court ensures,²⁶ requires that similar or comparable situations must not be treated differently unless the difference in treatment is objectively justified.²⁷ As a general principle of EU law, the principle of equal treatment must be observed by Member States when they implement EU rules. Consequently, Member States must, as far as possible, apply those rules in accordance with the requirements flowing from the protection of fundamental rights in the EU legal order.²⁸

66. In the field of EU public procurement law, the principle of equal treatment has found a particular expression in the principle of equal treatment of tenderers, which requires that they be afforded equality of opportunity when formulating their tenders.²⁹ As pointed out by Advocate General Bot in his Opinion in *Wall*,³⁰ the aim of the principle of equal treatment as between tenderers is to promote the development of healthy and effective competition between applicant undertakings. Observance of that principle must make it possible to ensure an objective comparison of the tenders and is required at every stage of the procedure. In other words, the rules of the game must be known to all potential tenderers and must apply to them all in the same way.

67. An exclusion of one group of potential tenderers from a Member State's Article 20 reserved procurement procedures to the benefit of another group of tenderers, such as the Spanish exclusion of the entrepreneurial Special Employment Centres to the benefit of the Social Initiative Special Employment Centres, is therefore only permissible if those two groups of potential tenderers are not in similar or comparable situations or if the difference in treatment is objectively justified.

68. It is for the referring court, which alone has jurisdiction to rule on the facts of the main proceedings, to verify whether the 'entrepreneurial' Special Employment Centres and the Social Initiative Special Employment Centres are in similar or comparable situations and/or whether the difference in treatment is objectively justified. The 'entrepreneurial' Special Employment Centres appear to have previously fulfilled, and to be currently fulfilling, the same societal functions as those required of the Social Initiative Special Employment Centres. Therefore, *prima facie*, it does not seem unreasonable to consider that those two groups of Special Employment Centres are in a similar or comparable situation as far as their ability to fulfil the function of aiding the social and professional integration of disabled or disadvantaged persons is concerned. At the same time, there are differences in the organisation of the 'entrepreneurial' Special Employment Centres and the Social Initiative Special Employment Centres, notably concerning the not-for-profit nature of the latter and the reinvestment of profits requirement, that could

²⁵ Judgments of 19 October 1977, *Ruckdeschel and Others* (117/76 and 16/77, EU:C:1977:160, paragraph 7); of 16 December 2008, *Arcelor Atlantique et Lorraine and Others* (C-127/07, EU:C:2008:728, paragraph 23); and of 17 December 2020, *Centraal Israëlitisch Consistorie van België and Others* (C-336/19, EU:C:2020:1031, paragraph 85).

²⁶ Judgments of 12 December 2002, *Rodríguez Caballero* (C-442/00, EU:C:2002:752, paragraph 32), and of 17 January 2008, *Velasco Navarro* (C-246/06, EU:C:2008:19, paragraph 32).

²⁷ Judgments of 25 November 1986, *Klensch and Others* (201/85 and 202/85, EU:C:1986:439, paragraph 9); of 12 December 2002, *Rodríguez Caballero* (C-442/00, EU:C:2002:752, paragraph 32 and the case-law cited); and of 17 December 2020, *Centraal Israëlitisch Consistorie van België and Others* (C-336/19, EU:C:2020:1031, paragraph 85).

²⁸ Judgment of 12 December 2002, *Rodríguez Caballero* (C-442/00, EU:C:2002:752, paragraph 30). See also Opinion of Advocate General Bot in *Wall* (C-91/08, EU:C:2009/659, points 35 and 36).

²⁹ Judgment of 2 June 2016, *Pizzo* (C-27/15, EU:C:2016:404, paragraph 36).

³⁰ C-91/08, EU:C:2009/659, point 38.

arguably support the conclusion that the two groups of entities are not in similar or comparable situations or that any difference in treatment is objectively justified. Ultimately, this is a determination that involves an interpretation of the applicable Spanish law, which it is for the referring court to carry out.

4. Article 18 of Directive 2014/24 and the principle of proportionality

69. As the Court has stated in its case-law, the purpose of national legislation relating to public procurement procedures is, in general, to safeguard the equal treatment of tenderers. Therefore, in accordance with the principle of proportionality, such legislation must not go beyond what is necessary to achieve that intended objective.³¹

70. When Member States enact national legislation implementing Article 20 of Directive 2014/24 and setting aside ‘reserved contracts’ in public procurement procedures for the benefit of providers of sheltered employment, the purpose of that legislation is at least two-fold: the equal treatment of tenderers mentioned in the previous paragraph and the social and employment policy of making reserved contracts available to providers of sheltered employment.

71. As is the case with regard to the principle of equal treatment, it is for the referring court, which alone has jurisdiction to rule on the facts of the main proceedings, to verify whether the imposition of the additional requirements are indeed appropriate means of achieving the legitimate objectives pursued by the Member State in relation to maximising the social objectives of integration or reintegration of disabled or disadvantaged persons, and if so, whether those requirements go beyond what is necessary to achieve those objectives.

72. In my view, requirements that the participants in an Article 20 reserved procurement procedure must be organised as, or owned by, a not-for-profit entity and that they must reinvest profits earned from Article 20 reserved contracts may well be considered appropriate means of furthering the legitimate objective of social and professional integration of disabled or disadvantaged persons. Neither of those requirements are unrelated to the proviso under Article 20(1) that the ‘main aim’ of the admitted economic operators (other than ‘sheltered workshops’) must be ‘the social and professional integration of disabled or disadvantaged persons’. A for-profit entity generally has as one of its ‘aims’ the generation of profits for its owners. It is not an inherently unreasonable view to hold that this detracts from the focus on the social aim. Thus, the requirement concerning not-for-profit status or ultimate ownership of the permitted participant by a not-for-profit entity does appear to serve a legitimate purpose. The requirement that profits are reinvested in the same or similar social enterprises whose aim is the social and professional integration of disabled or disadvantaged persons even more clearly serves that purpose, and given the inherent transfer of public funds that is foreseeable in Article 20 reserved procurement procedures (the very rationale of the provision being that the permitted participants may not be able to compete on normal price/quality terms implies that the contracting authorities are likely to overpay on purchases made under Article 20 reserved procurement procedures), the reinvestment of related profits for the ultimate benefit of the relevant social goals appears particularly appropriate.

³¹ See, to that effect, judgments of 8 February 2018, *Lloyd’s of London* (C-144/17, EU:C:2018:78, paragraph 32); of 2 May 2019, *Lavorigna* (C-309/18, EU:C:2019:350, paragraph 24 and the case-law cited); of 30 January 2020, *Tim* (C-395/18, EU:C:2020:58, paragraph 45); and of 14 May 2020, *T-Systems Magyarország* (C-263/19, EU:C:2020:373, paragraph 71).

73. The 70% employment requirement set out in the Spanish legislation obviously also contributes to achieving the ultimate goal of the Article 20 reserved procurement procedures, namely the ‘social and professional integration or reintegration of disabled or disadvantaged persons’.³²

74. Therefore, in my view, these requirements appear to be suitable to achieve the desired end. However, the requirement that the Special Employment Centres must take the particular legal form of a not-for-profit entity or satisfy the ownership requirements in question would, in my view, appear to go further than what is necessary in order to achieve those objectives. It is difficult to see how the exclusion of a large subset of economic operators that have previously been serving, are currently serving, and intend to serve in the future exactly those social aims and that population segment, merely because of the legal form in which those economic operators are constituted or because of the legal form of their ultimate owners, would not go beyond what is necessary to ensure the attainment of the legitimate objective of social and professional integration or reintegration of disabled or disadvantaged persons. This applies *a fortiori* if the reinvestment of profits requirement is upheld.

75. Subject to verification by the referring court, it is therefore my opinion that requirements as to the legal form or ownership of the economic operators, which are accepted as permitted participants in a Member State’s Article 20 reserved procurement procedures, such as the Spanish requirements at issue in the main case, are inconsistent with the principle of proportionality.

5. Article 18 of Directive 2014/24 and the prohibition on artificially narrowing competition

76. As provided by the second subparagraph of Article 18(1) of Directive 2014/24, the design of a procurement shall not be made with the intention of artificially narrowing competition. Competition is to 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.

77. It is clear that the Social Initiative Special Employment Centres are favoured by the Spanish legislation at issue and that the entrepreneurial Special Employment Centres are disadvantaged. It also appears obvious that this is intentional. However, the second subparagraph of Article 18(1) of Directive 2014/24 does not prohibit any and all intentional favouring or disadvantaging. The prohibition applies only where the intention is to ‘unduly’ favour or disadvantage certain economic operators.

78. The Court has not yet clarified the meaning of ‘unduly’ (or ‘artificial’) in the context of Article 18 of Directive 2014/24. Some guidance for the interpretation of those concepts may, however, be gleaned from the principles of equal treatment and proportionality. Although the concepts of equal treatment and ‘non-artificially narrowed competition’ are obviously distinct, a ‘favouring’ or ‘disadvantaging’ of some economic operator(s) over other(s) implies a difference in treatment. It is difficult to think of a ‘favouring’ or ‘disadvantaging’ that is ‘unduly’ and at the same time ‘objectively justified’ or vice versa, and so it would appear that there must be some overlap of those two distinct concepts. Likewise, as regards the relationship between artificially narrowed competition and proportionality, it is hard to think of a favouring or disadvantaging of some

³² Recital 36 to Directive 2014/24.

economic operator(s) over other(s) that ‘duly’ goes further than necessary to attain the legitimate objectives sought. Artificially narrowed competition would thus also seem to have a certain overlap with infringement of proportionality.

79. It may seem tempting to define ‘artificial narrowing of competition’ solely by reference to the two principles mentioned in the previous point. However, the inclusion of the prohibition on artificially narrowing competition in the second subparagraph of Article 18(1) would be superfluous if it only covered behaviour already prohibited by the principles of equal treatment and proportionality. Therefore, in my view, the prohibition on artificially narrowing competition should be given a broader scope than that.

80. As already discussed in the context of the proportionality analysis in point 74, above, the narrowing of competition that follows from the exclusion of the entrepreneurial Special Employment Centres from the Spanish Article 20 reserved procurement procedures does not appear to be proportionate to a legitimate purpose in so far as the requirement that the economic operators in question take the form of not-for-profit entities or are ultimately owned or partially owned by not-for-profit entities is concerned. Regardless of the exact scope of the prohibition on artificially narrowing competition, this requirement would, in my view, appear to infringe it. It is, however, ultimately for the referring court to decide whether, in the case before it, there is an intention to unduly favour and/or disadvantage.

81. As far as the reinvestment of profits requirement is concerned, this could, in my view, conceivably be regarded as artificially narrowing competition, even if my analysis that this requirement may meet the standards of equal treatment and proportionality is accepted. If the requirement is imposed not only to serve the legitimate purpose of furthering the social and professional integration of disabled or disadvantaged persons, but also at the same time is intentionally designed so as to benefit one group of potential tenderers over another for reasons unrelated to the legitimate purpose pursued,³³ in my view, this should be regarded as unduly favouring and disadvantaging the respective groups and as artificially narrowing competition. It is for the referring court to determine whether this may be the case.

IV. Conclusion

82. In the light of the foregoing considerations, I suggest that the Court of Justice should reply to the referring court in the following terms:

Article 20 of Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement does not preclude national legislation under which the right to participate in public procurement procedures for contracts reserved pursuant to that article is made subject to conditions which are in addition to those specified in that article.

However, such additional conditions must comply with all applicable requirements of EU law, including Article 18 of Directive 2014/24 and the principles of equal treatment and proportionality, and those conditions must not artificially narrow competition.

³³ Such reasons could, merely as an example, stem from ideologically or politically motivated desires to further one group or one form of undertakings over another.

In that respect, a condition that only economic operators that are not-for-profit entities, or owned or partially owned by not-for-profit entities, may participate in procurement procedures for reserved contracts would appear, *prima facie*, to go beyond what is necessary in order to obtain the legitimate objective of furthering the social and professional integration of disabled and disadvantaged persons.

An intentional exclusion of a large segment of economic operators for reasons unrelated to the legitimate objective of furthering the social and professional integration of disabled and disadvantaged persons would appear, *prima facie*, to artificially narrow competition.