Reports of Cases

OPINION OF ADVOCATE GENERAL
MEDINA
delivered on 3 February 2022 [1]

Case C-436/20

Asociación Estatal de Entidades de Servicios de Atención a Domicilio (ASADE)
v
Consejería de Igualdad y Políticas Inclusivas

(Request for a preliminary ruling from the Tribunal Superior de Justicia de la Comunidad Valenciana (High Court of Justice of the Community of Valencia, Spain))

(Reference for a preliminary ruling – Public procurement – Articles 49 and 56 TFEU – Freedom of establishment and freedom to provide services – Economic activity – Directive 2014/24/EU – Article 1(2), Article 2(1) and Article 4(d) – Conditions of applicability – Article 20(1) and Article 77 – Reserved contracts – Articles 74 to 76 and Annex XIV – Provision of social services – Public procurement in the field of social services – Simplified regime – Contractual action agreements to provide such services – Exclusion of profit-making entities – Principles of transparency, equality and proportionality – Tender condition – Geographical limitation – Directive 2006/123/EC – Scope *ratione materiae* – Article 2(2)(j) – Exclusion of social services)

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[1] Original language: English.

1. The Asociación Estatal de Entidades de Servicios de Atención a Domicilio (State Association of Domiciliary Care Providers, 'ASADE', Spain) is a trade association for private undertakings. It is seeking before the referring court – the Tribunal Superior de Justicia de la Comunidad Valenciana (High Court of Justice of the Community of Valencia, Spain) – the annulment of Decree

181/2017 [2] adopted by the Comunitat Valenciana (Autonomous Community of Valencia, Spain), in so far as that decree prevents profit-making entities from entering into 'contractual action agreements' with public authorities. [3]

2. Under those agreements, public authorities entrust the management of certain social services to social initiative entities. In so doing, they are not required to follow the procedures laid down in EU public procurement legislation. However, because of Decree 181/2017, only private non-profit organisations may enter into those agreements in order to provide social services, which may include assistance to children, adolescents, young people, the elderly, the disabled, migrants, women in vulnerable situations, and members of the LGBTI [4] and Roma communities ('the services at issue'). [5]

3. It is in that context that the Court is being asked, in essence, to clarify whether EU law, and, in particular, Articles 49 and 56 TFEU, Articles 74, 76 and 77 of Directive 2014/24/EU, [6] and Article 15(2) of Directive 2006/123/EC [7] ('the Services Directive'), precludes national legislation that excludes profit-making entities from entering into contractual action agreements with public authorities in order to provide social services, whilst allowing non-profit organisations to conclude such agreements.

4. The complexity of the topic and the technical nature of the applicable rules, arising from various EU law instruments, should not conceal the undoubted importance of this question, since the Court is called upon to establish the relationship between economic activity and social matters, as well as that between EU law and national law.

5. In that regard, it is worth quoting Advocate General Tesauro, who more than 20 years ago stressed the fact that the social security sector does not constitute 'an island beyond the reach of [EU] law'. [8] That was true back then and it is all the more so now. While Member States remain autonomous as regards the organisation of their social security systems, that autonomy does not prevent the application of the fundamental freedoms laid down in the Treaties, [9] of which public procurement rules are parts and parcel. [10]

2 Decreto 181/2017, de 17 de noviembre, del Consell, por el que se desarrolla la acción concertada para la prestación de servicios sociales en el ámbito de la Comunitat Valenciana por entidades de iniciativa social (Decree 181/2017 of 17 November 2017 of the Council of the Community of Valencia making regulations governing public-private agreements for the provision of social services by social enterprises within the Community of Valencia (DOGV No 8197 of 23 December 2017, p. 48245) ('Decree 181/2017').

3 The national law refers to the term 'acuerdos de acción concertada'. See, to that effect, Articles 44*bis*, 53 and 56 and Title VI of Ley 5/1997, de 25 de junio, por la que se regula el Sistema de Servicios Sociales en el ámbito de la Comunidad Valenciana (Law 5/1997 of 25 June 1997 governing the Social Services System within the Community of Valencia) (BOE No 192 of 12 August 1997, p. 24405), as amended by Ley 13/2016, de 29 de diciembre, de medidas fiscales, de gestión administrativa y financiera, y de organización de la Generalitat (Law 13/2016 of 29 December 2016 on measures in respect of tax, administrative and financial management and the organisation of the Government of the Community of Valencia) (BOE No 34 of 9 February 2017, p. 8694), ('Law 5/1997').

4 Lesbian, gay, bisexual, transgender and intersex individuals.

5 That list was not in the preliminary reference referred to the Court. In its written observations, the Commission provides the Court with the link for the publication of Decree 181/2017 (see https://www.dogv.gva.es/datos/2017/12/23/pdf/2017_11941.pdf). Article 6(2) of the decree refers to the annex thereof, which includes the list of services at issue.

6 Directive of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC (OJ 2014 L 94, p. 65).

7 Directive of the European Parliament and of the Council of 12 December 2006 on services in the internal market (OJ 2006 L 376, p. 36).

8 Opinion in *Decker* (C-120/95 and C-158/96, EU:C:1997:399, point 17).

9 Judgments of 28 April 1998, *Kohll* (C-158/96, EU:C:1998:171, paragraph 21); of 12 July 2001, *Smits and Peerbooms* (C-157/99, EU:C:2001:404, paragraph 54); of 13 May 2003, *Müller-Fauré and van Riet* (C-385/99, EU:C:2003:270, paragraph 39); and of 23 October 2003, *Inizan* (C-56/01, EU:C:2003:578, paragraph 17).

10 Judgment of 8 February 2018, *Lloyd's of London* (C-144/17, EU:C:2018:78, paragraph 33).

I. Legal framework

A. European Union law

1. Directive 2014/24

6. Directive 2014/24 lays down rules that seek to coordinate national procedures for the award of public contracts above a certain threshold amount so that they may be consistent with the principle of the free movement of goods, freedom of establishment and freedom to provide services, as well as ensuring the implementation of principles, such as equal treatment, non-discrimination, proportionality and transparency. That directive is also intended to ensure effective competition in public procurement.

7. Recitals 1 and 6 of Directive 2014/24 state:

'(1) The award of public contracts by or on behalf of Member States' authorities has to comply with the principles of the Treaty on the Functioning of the European Union (TFEU), and in particular the free movement of goods, freedom of establishment and the freedom to provide services, as well as the principles deriving therefrom, such as equal treatment, non-discrimination, mutual recognition, proportionality and transparency. However, for public contracts above a certain value, provisions should be drawn up coordinating national procurement procedures so as to ensure that those principles are given practical effect and public procurement is opened up to competition.

…

(6) It is also appropriate to recall that this Directive should not affect the social security legislation of the Member States. Nor should it deal with the liberalisation of services of general economic interest, reserved to public or private entities, or with the privatisation of public entities providing services.

It should equally be recalled that Member States are free to organise the provision of compulsory social services or of other services such as postal services either as services of general economic interest or as non-economic services of general interest or as a mixture thereof. It is appropriate to clarify that non-economic services of general interest should not fall within the scope of this Directive.'

8. Recital 114 of that directive clarifies the reasons for a specific simplified regime regarding certain services to the person, such as certain social health and educational services, and recital 118 thereof explains the regime concerning reserved contracts for services listed in Article 77(1) of the same directive.

9. Under Title I of Directive 2014/24, entitled 'Scope, definitions and general principles', Article 1(1), (2), (4) and (5) provides:

'1. This Directive establishes rules on the procedures for procurement by contracting authorities with respect to public contracts as well as design contests, whose value is estimated to be not less than the thresholds laid down in Article 4.

2. Procurement within the meaning of this Directive is the acquisition by means of a public contract of … services by one or more contracting authorities from economic operators chosen by those contracting authorities, whether or not the … services are intended for a public purpose.

…

4. This Directive does not affect the freedom of Member States to define, in conformity with Union law, what they consider to be services of general economic interest, how those services should be organised and financed, in compliance with the State aid rules, and what specific obligations they should be subject to. Equally, this Directive does not affect the decision of public authorities whether, how and to what extent they wish to perform public functions themselves pursuant to Article 14 TFEU and Protocol No 26.

5. This Directive does not affect the way in which the Member States organise their social security systems.'

10. Article 2(1)(5) of Directive 2014/24 defines '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'.

11. Article 2(1)(10) of that directive 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'.

12. Article 4 of the same directive, headed 'Threshold amounts', provides:

'This Directive shall apply to procurements with a value net of value-added tax (VAT) estimated to be equal to or greater than the following thresholds:

…

(d) EUR 750 000 for public service contracts for social and other specific services listed in Annex XIV.'

13. 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.

…'

14. Title III of the directive, headed 'Particular Procurement Regimes', includes a Chapter I comprising Articles 74 to 77. Those articles contain provisions regarding the simplified regime, which is applicable to 'social and other specific services'.

15. Article 74 of Directive 2014/24, headed 'Award of contracts for social and other specific services', states:

'Public contracts for social and other specific services listed in Annex XIV shall be awarded in accordance with this Chapter, where the value of the contracts is equal to or greater than the threshold indicated in point (d) of Article 4.'

16. Article 75 of that directive, headed 'Publication of notices', provides for conditions concerning the publication of notices for the award of the public contracts referred to in Article 74.

17. Article 76 of Directive 2014/24, headed 'Principles of awarding contracts', provides:

'1. Member States shall put in place national rules for the award of contracts subject to this Chapter in order to ensure contracting authorities comply with the principles of transparency and equal treatment of economic operators. Member States are free to determine the procedural rules applicable as long as such rules allow contracting authorities to take into account the specificities of the services in question.

2. Member States shall ensure that contracting authorities may take into account the need to ensure quality, continuity, accessibility, affordability, availability and comprehensiveness of the services, the specific needs of different categories of users, including disadvantaged and vulnerable groups, the involvement and empowerment of users and innovation. Member States may also provide that the choice of the service provider shall be made on the basis of the tender presenting the best price-quality ratio, taking into account quality and sustainability criteria for social services.'

18. Article 77(1) of Directive 2014/24, headed 'Reserved contracts for certain services', states that Member States may provide that contracting authorities may reserve the right for organisations to participate in procedures for the award of public contracts exclusively for those health, social and cultural services referred to in Article 74 falling within the CPV codes listed in that article.[11] Article 77(2) of that directive sets out the conditions which those organisations must satisfy in order to participate in reserved contracts. Pursuant to Article 77(3) of Directive 2014/24, the maximum duration of the contract is not to be longer than three years.

19. Annex XIV to Directive 2014/24 contains a list of services referred to in Article 74.

2. The Services Directive

20. Recital 27 of the Services Directive is worded as follows:

'This Directive should not cover those social services in the areas of housing, childcare and support to families and persons in need which are provided by the State at national, regional or local level by providers mandated by the State or by charities recognised as such by the State with the objective of ensuring support for those who are permanently or temporarily in a particular state of need because of their insufficient family income or total or partial lack of independence

[11] The CPV establishes a single classification system for public procurement aimed at standardising the references used by contracting authorities and entities to describe the subject of procurement contracts. See https://simap.ted.europa.eu/cpv.

and for those who risk being marginalised. These services are essential in order to guarantee the fundamental right to human dignity and integrity and are a manifestation of the principles of social cohesion and solidarity and should not be affected by this Directive.'

21. Article 2 of that directive provides:

'1. This Directive shall apply to services supplied by providers established in a Member State.

2. This Directive shall not apply to the following activities:

…

(j) social services relating to social housing, childcare and support of families and persons permanently or temporarily in need which are provided by the State, by providers mandated by the State or by charities recognised as such by the State;

…'

B. Spanish law

22. By virtue of the powers conferred on it in respect of social services by the Spanish Constitution, the Community of Valencia passed Law 5/1997. Account must be taken of Articles 44*bis*, 53, 56, 62, 63, 64, 66, 67 and 68 of Law 5/1997.

23. Decree 181/2017 implements Law 5/1997 and is the subject of the main proceedings. Although Law 5/1997 was repealed by Law 3/2019,[12] under the latter law, Decree 181/2017 remains in force. Account must be taken of Articles 3, 6, 11, 13, 15, 17, 19, and 21 to 26 of Decree 181/2017, which implement the rules laid down by Law 5/1997.

II. Facts, procedure and the questions referred for a preliminary ruling

24. ASADE brought an action before the referring court seeking both the annulment of Decree 181/2017 and the setting aside of certain provisions of Law 5/1997.[13] In its view, Decree 181/2017 is unlawful as it excludes profit-making entities from providing public services under a public-private contractual action agreement, whilst allowing non-profit organisations – not solely voluntary associations –[14] to provide such services in return for payment without those organisations having to go through a transparent competitive process that ensures equal treatment.

25. ASADE argues that Decree 181/2017 and certain provisions of Law 5/1997 are contrary to, first, the freedom of establishment enshrined in Article 49 TFEU, second, Directive 2014/24, in that those norms do not respect the principle of equal treatment between economic operators, and, third, Article 15(2) of the Services Directive. Moreover, in its view, the restriction on

12 Ley 3/2019, de 18 de febrero, de servicios sociales inclusivos de la Comunitat Valenciana (Law 3/2019 of 18 February 2019 on inclusive social services in the Community of Valencia) (BOE No 61 of 12 March 2019, p. 23249).

13 In particular, Article 44*bis*(1)(c), Article 53, Article 56(2) and Title VI of Law 5/1997.

14 The reference to that term appears to derive from the judgments of 11 December 2014, *Azienda sanitaria locale n. 5 'Spezzino' and Others* (C-113/13, EU:C:2014:2440), and of 28 January 2016, *CASTA and Others* (C-50/14, EU:C:2016:56), which both dealt with voluntary associations in the context of public procurement contracts.

freedom of establishment brought about by the national legislation at issue is not justified on grounds of public interest. ASADE observes that the national legislation at issue is not confined to the areas of health and social security, but covers all types of social services and applies to all non-profit organisations and not solely to voluntary associations. [15] In its submission, this means that the exceptions to the application of EU public procurement rules that were established in the Court's case-law [16] are not applicable to the case at hand.

26. For its part, the defendant, the Consejería de Igualdad y Políticas Inclusivas de la Generalitat Valenciana (Department for Equality and Inclusive Policies of the Valencia Regional Government, Spain), considers that both Law 5/1997 and Decree 181/2017 comply with Directive 2014/24 and the Services Directive.

27. First, the defendant argues that the Court has already allowed exceptions to be made to the principle of free competition in the case of contracts concluded with non-profit organisations in relation to the social security system, given that social and health services display a number of characteristics that require them to be treated differently as regards public procurement rules. [17]

28. Second, the defendant contends that, in accordance with the principle of budgetary efficiency, contractual action agreements offer an alternative to the direct or indirect management of non-economic public services, which are provided by non-profit organisations which receive payment in the form of reimbursement of costs, which does not entail any business profit. It also considers that contractual action agreements do not infringe the Services Directive, since the latter does not apply to non-economic services of general interest or to social services relating to social housing, childcare and support to families and persons permanently or temporarily in need which are provided by the State or by charities recognised as such by the State.

29. Third, the defendant takes the view that the request for a preliminary ruling is baseless, since Law 5/1997 has been repealed by Law 3/2019.

30. The referring court's doubts derive in particular from two judgments of the Court, namely in *Ordine degli Ingegneri della Provincia di Lecce* and in *Piepenbrock*. [18] In those two judgments, the Court defined the concept of 'contract for pecuniary interest' as also including contracts for which the agreed remuneration is limited to reimbursement of the costs of providing the agreed service. The referring court therefore asks whether the recourse to contractual action agreements, as governed by Law 5/1997, as amended by Law 13/2016, [19] complies with Articles 49 and 56 TFEU, Articles 76 and 77 of Directive 2014/24, read in conjunction with Article 74 thereof and Annex XIV thereto and Article 15(2) of the Services Directive.

15 Ibid.

16 See, for example, judgments of 19 June 2014, *Centro Hospitalar de Setúbal and SUCH* (C-574/12, EU:C:2014:2004), and of 28 January 2016, *CASTA and Others* (C-50/14, EU:C:2016:56).

17 In this respect, it refers to recitals 6, 7 and 114 of Directive 2014/24, and also to Article 77 thereof.

18 Judgments of 19 December 2012, *Ordine degli Ingegneri della Provincia di Lecce and Others* (C-159/11, EU:C:2012:817), and of 13 June 2013, *Piepenbrock* (C-386/11, EU:C:2013:385).

19 Article 4*bis*(1)(c), Article 53, Article 56(2) and Title VI of Law 5/1997.

31. In those circumstances, the referring court decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'(1) Must Article 49 TFEU and Articles 76 and 77 of [Directive 2014/24] (as read with Article 74 [thereof] and Annex [XIV thereto]) be interpreted as precluding national legislation which permits contracting authorities to make use of agreements with private non-profit organisations – not solely voluntary associations – to provide all manner of social services to the person in return for reimbursement of costs without following the procedures in [Directive 2014/24] and irrespective of the estimated value, simply by classifying the arrangements in question as non-contractual?

(2) If the reply is in the negative, meaning that such arrangements are possible, must Article 49 TFEU and Articles 76 and 77 of [Directive 2014/24] (as read with Article 74 [thereof] and Annex [XIV thereto]) be interpreted as permitting contracting authorities to make use of agreements with private non-profit organisations (not solely voluntary associations) to provide all manner of social services to the person in return for reimbursement of costs without following the procedures in the directive and irrespective of the estimated value, simply by classifying the arrangements in question as non-contractual, where, moreover, the national legislation in question does not expressly include the requirements established in Article 77 of the directive, but refers to subsequent implementation through regulations without expressly stipulating, among the requirements to be satisfied by the implementing regulations, that they must explicitly include the conditions laid down in Article 77 of the directive?

(3) If the reply is, again, in the negative, meaning that such a situation is possible, must Articles 49 and 56 TFEU, Articles 76 and 77 of [Directive 2014/24] (as read with Article 74 [thereof] and Annex XIV [thereto]) and Article 15(2) of [the Services Directive] be interpreted as permitting contracting authorities, when selecting non-profit organisations (not solely voluntary associations) with which to enter into agreements to provide all manner of social services to the person, to include not only the selection criteria set out in Article 2(2)(j) of the said directive but also the criterion that the organisation be established in the place where the service is to be provided?'

32. Written observations were submitted by the applicant, the defendant, the Spanish, Italian and Norwegian Governments, as well as the European Commission. Having decided to give judgment without holding a hearing, the Court put a number of questions, to be answered in writing, to the parties and interested persons referred to in Article 23 of the Statute of the Court of Justice of the European Union, to which the applicant, the defendant, the Spanish and Netherlands Governments, as well as the Commission, replied.

III. Analysis

A. Preliminary remarks

33. At the outset, I take the view that the questions referred for a preliminary ruling, in so far as they relate to Law 5/1997, are admissible. The referring court has clearly stated that the lawfulness of Decree 181/2017 can be assessed only by examining the compatibility with EU law provisions of its legal basis, that is, Law 5/1997. It was asked to rule on the lawfulness of Decree 181/2017 at the

time when it was adopted. The national court states in its order for reference that at that time, Law 5/1997, as amended by Law 13/2016, was still in force. Therefore, the plea of inadmissibility put forward by the defendant should be rejected.

34. Second, I shall deal with the Italian Government's criticism that the request for a preliminary ruling does not specify the types of social services which may be the subject of contractual action agreements at issue in the national proceedings.

35. According to settled case-law, it is essential that the national court gives, at the very least, some explanation of the reasons for the choice of the EU law provisions which it seeks to have interpreted and some explanation of the link it establishes between those provisions and the national legislation applicable to the proceedings pending before it. [20]

36. I acknowledge that this request for a preliminary ruling does not list the specific social services in question and that it is unfortunate that such information is lacking. However, it is clear from the legal framework laid out in the order for reference and from the wording of the questions referred that, in essence, it may involve 'all manner of social services'. Therefore, in my view, the referring court has sufficiently explained the legislative context of its request for an interpretation of EU law.

37. Third, I take the view that, in so far as the questions referred for a preliminary ruling relate to Articles 49 and 56 TFEU, they must be held admissible. It is true that it is not apparent from the order for reference whether the dispute in the main proceedings has any cross-border dimension.

38. However, it seems to me that the reference at issue is in exactly the same situation as that in '*Libert and Others*', [21] to which the Court referred in paragraph 51 of the *Ullens de Schooten* judgment. [22] In that paragraph, the Court held that a reference for a preliminary ruling may be declared admissible in a purely internal situation where 'the referring court makes a request for a preliminary ruling in proceedings for the annulment of provisions which apply not only to its own nationals but also to those of other Member States'. [23] That appears to be the case in the main proceedings, given that ASADE brought an action seeking annulment of Decree 181/2017, which applies not only to nationals of its own country, but also to those of other Member States.

39. In my opinion, it follows that, to the extent that those questions relate to the abovementioned Treaty provisions, they should be declared admissible.

B. The first and the second questions

40. By its first two questions, which should be examined together as they concern the same issue, the referring court is asking, in essence, whether Article 49 TFEU and Articles 74, 76 and 77 of Directive 2014/24 are to be interpreted as allowing a public authority to conclude, without complying with the procedural requirements imposed by EU law, agreements solely with private

[20] See, for example, judgment of 10 March 2016, *Safe Interenvíos* (C-235/14, EU:C:2016:154, paragraph 115), and order of 12 May 2016, *Security Service and Others* (C-692/15 to C-694/15, EU:C:2016:344, paragraph 20).

[21] Judgment of 8 May 2013 (C-197/11 and C-203/11, EU:C:2013:288).

[22] Judgment of 15 November 2016 (C-268/15, EU:C:2016:874).

[23] See, to that effect, judgment of 8 May 2013, *Libert and Others* (C-197/11 and C-203/11, EU:C:2013:288, paragraph 35). See, more recently, judgment of 11 February 2021, *Katoen Natie Bulk Terminals and General Services Antwerp*, (C-407/19 and C-471/19, EU:C:2021:107, paragraph 53).

non-profit organisations, under which that authority entrusts those entities with certain social services in return for reimbursement of the costs incurred by those organisations in respect of the provision of those services.

41. Answering those questions is like venturing through a labyrinth of different legal problems. To make it easier, I will break it down into four separate issues. As a preliminary point, it is necessary to establish the nature of the social services at issue in the main proceedings in order to determine whether they are to be classified as 'economic activities' under the EU public procurement rules. Next, I shall analyse the conditions of applicability of Directive 2014/24. Then, I shall turn to examining the 'simplified regime' laid out in Articles 74 to 77 of that directive and, lastly, the rules of freedom of establishment enshrined in Article 49 TFEU.

42. However, before examining those questions, I would like to make the following two observations. First, by mentioning Article 49 TFEU in the questions referred, the national court considers that the current case comes within the scope of freedom of establishment rather than that of freedom to provide services.

43. In my opinion, that assumption is correct, since it is settled case-law that the provision of services is to be distinguished from establishment in that the latter involves an activity that is stable and permanent, whilst the former involves an activity of a temporary nature.[24] It seems to me that the provision of the social services at issue in the main proceedings requires such stability and that such activities may thus fall within the scope of freedom of establishment.

44. Second, since the referring court refers to Directive 2014/24, there appears to be an assumption that the contractual action agreements at issue are not concession contracts regulated by Directive 2014/23/EU.[25] A service concession is a contract of the same type as a public service contract except for the fact that the consideration for the provision of services consists either solely in the right to exploit the service or in that right together with payment. Service concession implies a transfer by the public authority to the concessionaire of an operating risk in exploiting those services.[26] While the national legislation at issue in the main proceedings does not preclude users from having to pay in part for the social services that are the subject of those agreements,[27] it does not appear that such a transfer took place under that legislation.[28] I therefore take the view that the contractual action agreements at issue do not fall within the scope of Directive 2014/23.

45. Thus, on the basis of the questions referred, I shall address the questions by reference to Directive 2014/24 or the provisions on freedom of establishment contained in the FEU Treaty.

24 See, in particular, judgment of 30 November 1995, *Gebhard* (C-55/94, EU:C:1995:411, paragraph 25 et seq.). On the distinction between the freedom to provide services and the freedom of establishment, see also Opinion of Advocate General Cruz Villalón in *Yellow Cab Verkehrsbetrieb* (C-338/09, EU:C:2010:568, points 15 to 18).

25 Directive of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts (OJ 2014 L 94, p. 1).

26 Directive 2014/23 defines 'services concession' in its Article 5(1)(b), in essence, as a contract for pecuniary interest by means of which a contracting authority or entity entrusts the provision and the management of services to an economic operator. According to the case-law of the Court, the difference between a public service contract and a service concession lies, namely, in the risk taken in operating the services in question (see, to that effect, judgment of 10 March 2011, *Privater Rettungsdienst und Krankentransport Stadler*, C-274/09, EU:C:2011:130, paragraphs 24, 26, 37 and the case-law cited).

27 See Article 65(3) and (4) of Law 5/1997 which provides that 'in addition to the charges provided for, no sum may be charged to users for the provision of services which are subject of agreement' and that 'the collection from users of any form of payment for the provision of additional services and the amount thereof shall be authorised in advance'.

28 See Article 66(2) and Article 65(3) of Law 5/1997. In that regard, ASADE, in its answers to the written questions of the Court, submits that the legislation at issue does provide that *public authorities cover all losses regarding the costs of the services at issue*. The defendant submits that Article 11(1) of Decree 181/2017 provides for the beneficiaries of the services covered by the contractual action agreements to receive those services for free.

1. The nature of the social services at issue

46. At the outset, I would like to point out that the principal objective of the EU rules on public procurement, and notably Directive 2014/24, is the freedom of establishment and the freedom to provide services.[29] As that directive is designed to implement the provisions of the FEU Treaty relating to those freedoms,[30] the social services at issue in the main proceedings necessarily fall within the material scope of the same fundamental freedoms.

47. It follows that, if the social services that are the subject of the contractual action agreements at issue were to be regarded as non-economic activities within the meaning of those Treaty provisions, those agreements would also be excluded from the scope of Directive 2014/24, since the latter may not extend the scope of the fundamental freedoms that it seeks to implement.[31]

48. Moreover, it is apparent from the wording of Article 1(4) and of recital 6 of Directive 2014/24 that Member States are free to define their 'services of general economic interest' and that 'non-economic services of general interest' do not fall within the scope of that directive. At the same time, it should be noted that Directive 2014/24 does not specifically define the terms 'non-economic services' and 'services of general economic interest'.

49. I therefore take the view that, for the purposes of applying Directive 2014/24, the concepts of 'economic activity' and 'non-economic services of general interest' set out therein must be interpreted in the light of the case-law of the Court concerning freedom of establishment and free movement of services as provided for by the FEU Treaty.[32]

50. While the first two questions referred mention only Article 49 TFEU – and not Article 56 TFEU – the concepts of 'services' and 'economic activity' are largely defined by the latter Treaty provision. There exists no simple criterion for distinguishing between the two freedoms, although the distinction appears to lie in the temporary nature of the activities.[33] On account of the grey area between these two freedoms and as together they form the basis of Directive 2014/24, in the analysis of the first and second questions, reference is made in the present Opinion not only to freedom of establishment, but also to freedom to provide services.

51. In that context, the concepts of 'economic activity' and 'non-economic services of general interest' each determine whether a particular activity falls within or outside the scope of EU legislation.[34] It should also be pointed out that such a determination is not an exact science. Nevertheless, there is a common starting point for defining those concepts. Indeed, as the concept of 'economic activity' defines the scope of the fundamental freedoms laid down in the FEU Treaty, it is not to be interpreted restrictively.[35]

29 The legal basis for adoption of Directive 2014/24 are, in particular, Article 53(1) and Article 62 TFEU, which are contained in Title IV on 'Free movement of persons, services and capital', in Chapter 2 on 'Rights of Establishment' (Article 53) and Chapter 3 on 'Services' (Article 62).

30 See Opinion of Advocate General Stix-Hackl in *Sintesi* (C-247/02, EU:C:2004:399, point 27).

31 See, by analogy, judgment of 29 April 2010, *Commission v Germany*, C-160/08 (EU:C:2010:230, paragraphs 73 and 74).

32 See, inter alia, judgments of 21 July 2005, *Coname* (C-231/03, EU:C:2005:487); of 11 December 2014, *Azienda sanitaria locale n. 5 'Spezzino' and Others* (C-113/13, EU:C:2014:2440); and of 28 January 2016, *CASTA and Others* (C-50/14, EU:C:2016:56).

33 See, in particular, judgment of 30 November 1995, *Gebhard* (C-55/94, EU:C:1995:411, paragraph 25 et seq.). On the distinction between the freedom to provide services and the freedom of establishment, see also Opinion of Advocate General Cruz Villalón in *Yellow Cab Verkehrsbetrieb* (C-338/09, EU:C:2010:568, points 15 to 18).

34 According to settled case-law in the field of social security, EU law does not, in principle, detract from the powers of the Member States to organise their social security systems (see, most recently, judgment of 11 June 2020, *Commission and Slovak Republic* v *Dôvera zdravotná poist'ovňa* (C-262/18 P and C-271/18 P, EU:C:2020:450, paragraph 30 and the case-law cited)).

35 Judgment of 13 April 2000, *Lehtonen and Castors Braine* (C-176/96, EU:C:2000:201, paragraph 42 and the case-law cited).

52. As public procurement rules under EU law were initially developed in the context of fundamental freedoms, and while I acknowledge that there is some overlap between those freedoms and other areas of law – namely competition law or State aid –[36] the concepts of 'services of general interest' and 'economic activity' used in the context of fundamental freedoms tend to vary from the ones developed in competition law.[37] Thus, according to the case-law concerning freedom of establishment, it is the provision of services for remuneration that must be regarded as an economic activity.[38]

53. Moreover, the essential characteristic of remuneration lies in the fact that it constitutes consideration for the service in question,[39] that is to say, 'the activity must not be provided for nothing'.[40] Therefore, I stress that the decisive factor, which brings an activity within the scope of the FEU Treaty relating to fundamental freedoms, is its *economic character*, irrespective of who pays for the service – whether it is the user or the Member State.[41] The Court has held, for example, that the fact that the State is involved in financing medical benefits does not mean that a medical activity is not to be classified as a service.[42]

54. Taking into account the broad definition of the concept of 'economic activity' under fundamental freedoms, the Court did not hesitate, for example, in classifying as services, within the meaning of Directive 2004/18/EC,[43] contractual agreements relating to medical transport, even where the contracting authority concluded those agreements with voluntary associations, and those agreements were based on the principle of solidarity.[44] Moreover, the fact that the activity is carried out on a non-profit basis by a private partner such as a social solidarity institution does not prevent it from being classified as an economic activity.[45]

55. In the present case, the Annex to Decree 181/2017 lists the services that can be the subject of the contractual action agreements at issue.[46] As mentioned earlier in this Opinion, the services at issue may include services to children, adolescents, young people, the elderly, the disabled, migrants, women in distress and for persons falling under the 'Equality in diversity' category (LGBTI and Roma).[47]

36 Sanchez-Graells, A., 'State Aid and EU Public Procurement: More Interactions, Fuzzier Boundaries' (8 October 2019), Hancher, L., and Piernas López, J.J., (eds), *Research Handbook on European State Aid Law*, 2nd edn, Edward Elgar, 2020, available at SSRN: https://ssrn.com/abstract= 3466288.

37 Regarding that distinction, see, in particular, Opinion of Advocate General Poiares Maduro in *FENIN* v *Commission* (C-205/03 P, EU:C:2005:666, point 51). See also Wauters, K., Bleux, S., 'A new generation of public procurement Directives: background, objectives and results', in Marique, Y., Wauters, K., (eds), *EU Directive 2014/24 on public procurement. A new turn for competition in public markets*?, Larcier, Brussels, 2016, p. 9.

38 Judgment of 1 February 2017, *Commission* v *Hungary* (C-392/15, EU:C:2017:73, paragraph 100). I should add that, as regards workers, the Court has added that the provision of services for remuneration must be regarded as an economic activity 'provided that the work performed is genuine and effective and not such as to be regarded as purely marginal and ancillary' (judgment of 20 November 2001, *Jany and Others*, C-268/99, EU:C:2001:616, paragraph 33 and the case-law cited). However, the latter criteria, which relate to a working relationship, do not seem relevant in the present case.

39 See, inter alia, judgment of 18 December 2007, *Jundt* (C-281/06, EU:C:2007:816, paragraphs 28 and 29 and the case-law cited).

40 See, to that effect, judgment of 23 February 2016, *Commission* v *Hungary* (C-179/14, EU:C:2016:108, paragraph 154).

41 Ibid., paragraph 157 and the case-law cited.

42 Judgment of 12 July 2001, *Smits and Peerbooms*, C-157/99, EU:C:2001:404, paragraph 58).

43 Directive 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).

44 See, to that effect, judgments of 29 November 2007, *Commission v Italy* (C-119/06, not published, EU:C:2007:729, paragraphs 36 to 41); of 11 December 2014, *Azienda sanitaria locale n. 5 'Spezzino' and Others* (C-113/13, EU:C:2014:2440, paragraphs 32 to 43); and of 28 January 2016, *CASTA and Others* (C-50/14, EU:C:2016:56, paragraphs 26 and 33 to 41).

45 See, to that effect, judgment of 19 June 2014, *Centro Hospitalar de Setúbal and SUCH* (C-574/12, EU:C:2014:2004, paragraph 40).

46 See footnote 5 to this Opinion.

47 See point 2 of this Opinion.

56. In terms of the content of the services at issue, it must be borne in mind that the activities provided under contractual action agreements include a broad range of different activities,[48] comprising, for example, housing services, day-centres, residential care and receiving persons, supporting persons in difficulty, providing financial support and even programmes which consist in executing judicial measures. To name but a few examples, the services include providing facilities for the reception of minors who are under the care or guardianship of regional authorities; centres for the enforcement of judicial measures regarding minors; support for the emancipation and personal autonomy of young people who were under guardianship and have reached their majority; programmes of judicial measures for minors; places for family meetings; interventions in host families for minors; measures intended for adoption and adoptive families, day centres for minors in vulnerable situations; housing and subsistence services for young people; occupational centres for young people; residential care and day-centres for the elderly; social housing for the elderly; and centres for women exposed to the risk of social exclusion and reception centres for female victims of violence.

57. However, it is for the referring court to verify whether the services at issue are offered in return for remuneration, and thus constitute an 'economic activity' within the meaning of the case-law cited above.

58. In that regard, it seems to me that the beneficiaries of the services which are the subject of the contractual action agreements do not usually pay for the provision of those services, except in exceptional cases in which they may be required to pay a fee previously approved by the contracting authority.[49] Nevertheless, as the economic nature of an activity does not depend on whether the service is paid for by the users or by the contracting authority,[50] and as, under the national legislation at issue, such payment takes place,[51] those services can be regarded as an 'economic activity' under Article 49 TFEU. It also follows that the legal nature and the solidarity mechanism implemented by the entities providing the services at issue are immaterial.[52]

59. I shall therefore proceed on the basis that at least some of the services that are the subject of the contractual action agreements at issue could be regarded as constituting an 'economic activity' if these services were in fact to be offered in return for *remuneration*, even if that remuneration is not paid directly by the users of the service, but by the public authorities.

60. For the sake of completeness, one should examine whether the services at issue fall within the scope of the concept of 'exercise of official authority' within the meaning of Article 51 TFEU, as that constitutes a derogation from Article 49 TFEU. Although, in the questions referred, the national court has not expressly inquired about the exception provided for in the first paragraph of Article 51 TFEU, it cannot be ruled out that some of these activities may fall within the scope of the concept of 'exercise of official authority' within the meaning of that provision. For example, it appears that the Annex to Decree 181/2017 contains certain activities, such as the enforcement of court judgments by the social initiative entities under contractual action agreements.

48 For the full list, see the reference in point 2 of this Opinion.

49 See Article 65(3) and (4) of Law 5/1997 and Article 11(1)(c) of Decree 181/2017.

50 See point 53 above.

51 See Article 22 of Decree 181/2017.

52 Ibid.

61. The concept of 'exercise of official authority' is to be interpreted restrictively, since it is an exception to freedom of establishment.[53] That exception is restricted to activities which in themselves are directly and specifically connected with the exercise of official authority.[54] Moreover, it does not extend to certain activities that are ancillary or preparatory to the exercise of official authority,[55] or to certain activities whose exercise, although involving contacts, even regular and organic, with the administrative or judicial authorities, or indeed cooperation, even compulsory, in their functioning, leaves their discretionary and decision-making powers intact.[56] Neither does it cover certain activities, which do not involve the exercise of decision-making powers,[57] powers of enforcement[58] or powers of coercion.[59]

62. In any case, it is for the referring court, and not for the Court, to ascertain the specific nature of the activities entrusted to such entities by way of contractual action agreements, and to determine whether some of those activities might involve a direct and specific connection with the exercise of official authority. If that is the case, those activities are not of an economic nature.

63. Once it is established, taking the nature of the activities at issue into account, that a specific activity constitutes an 'economic activity' within the meaning of Article 49 TFEU and Directive 2014/24, the next step is to determine whether the *lex specialis* of public procurement rules – Directive 2014/24 – is applicable to the national legislation at issue.

2. The conditions of applicability of Directive 2014/24

64. The application of Directive 2014/24 is subject to a number of conditions. First, the process established by national legislation must fall within the scope of the concept of 'procurement' for the purposes of Article 1(2) of Directive 2014/24. Second, the contractual action agreements at issue have to fall within the scope of the concept of 'public contract' defined in Article 2(1)(5) of that directive. Third, those agreements have to be equal or to exceed the threshold value laid out in Article 4(d) of that directive. I shall address each of those conditions in turn.

(a) The concept of 'procurement'

65. According to Article 1(2) of Directive 2014/24, that directive applies to 'procurement', which is defined as the acquisition by means of a public contract, inter alia, of services by one or more contracting authorities from economic operators chosen by those contracting authorities, whether or not the services are intended for a public purpose.

53 See, to that effect, judgment of 1 December 2011, *Commission* v *Netherlands* (C-157/09, not published, EU:C:2011:794, paragraph 57 and the case-law cited).

54 See, in particular, judgment of 1 December 2011, *Commission* v *Netherlands* C-157/09, not published, EU:C:2011:794, paragraph 58 and the case-law cited).

55 See, to that effect, judgments of 13 July 1993, *Thijssen* (C-42/92, EU:C:1993:304, paragraph 22); of 30 March 2006, *Servizi Ausiliari Dottori Commercialisti* (C-451/03, EU:C:2006:208, paragraph 47); and of 22 October 2009, *Commission* v *Portugal* (C-438/08, EU:C:2009:651, paragraph 36).

56 See, to that effect, judgment of 21 June 1974, *Reyners* (C-2/74, EU:C:1974:68, paragraphs 51 and 53).

57 See, to that effect, judgments of 13 July 1993, *Thijssen* (C-42/92, EU:C:1993:304, paragraphs 21 and 22); of 29 November 2007, *Commission* v *Austria* (C-393/05, EU:C:2007:722, paragraphs 36 and 42); of 29 November 2007, *Commission* v *Germany* (C-404/05, EU:C:2007:723, paragraphs 38 and 44); and of 22 October 2009, *Commission* v *Portugal* (C-438/08, EU:C:2009:651, paragraphs 36 and 41).

58 See, to that effect, inter alia, judgment of 29 October 1998, *Commission* v *Spain* (C-114/97, EU:C:1998:519, paragraph 37).

59 See, to that effect, judgment of 30 September 2003, *Anker and Others* (C-47/02, EU:C:2003:516, paragraph 61), and of 22 October 2009, *Commission* v *Portugal* (C-438/08, EU:C:2009:651, paragraph 44).

66. It follows from that definition that procurement entails, inter alia, a *choice* of one or more economic operators by one or more contracting authorities. Conversely, the mere fact of financing social services or granting licences or authorisations to all economic operators fulfilling the conditions predefined by the contracting authority, without setting limits or quotas, does not constitute procurement within the meaning of Article 1(2) of that directive. [60]

67. The issue of choice was first addressed in *Falk Pharma*. [61] In that case concerning Directive 2004/18, the Court ruled that where the contracting authority does not designate an economic operator to whom contractual exclusivity is to be awarded, this means that there is no need to control the action of that contracting authority so that it complies with the detailed rules laid down in that directive. [62] The Court therefore emphasised that the *choice* of a tender and, thus, of a successful tenderer, is intrinsically linked to the regulation of public contracts by that directive. [63]

68. Following that judgment, the Court held in *Tirkkonen* [64] that, when the contracting authority has not referred to any award criteria for the purpose of comparing and classifying admissible tenders, there cannot be a public contract within the meaning of that directive. [65] It was held that 'a farm advisory scheme … through which a public entity accepts all the economic operators who meet the suitability requirements set out in the invitation to tender and who pass the examination referred to in that invitation to tender, even if no new operator can be admitted during the limited validity period of that scheme, does not constitute a public contract within the meaning of that directive'. [66]

69. That being said, it seems to me that the criterion of choice as defined in the aforementioned judgments in *Falk Pharma* and *Tirkkonen* may lead to a dubious situation where the Member States can exclude certain procedures from the application of Directive 2014/24 by eliminating 'choice' as defined in those judgments. As some critics have pointed out – and I tend to agree with them – the restrictive approach adopted by the Court in those judgments could, inter alia, discourage Member States from applying Directive 2014/24 and jeopardise the effectiveness of rules of EU public procurement law. [67] For example, a contracting authority need only include in the tender a tailor-made clause that can be met only by a number of specific operators and to provide that all the economic operators that comply with that clause will be chosen, in order to undermine the effectiveness of those rules.

70. I should also add that those judgments blur the line between, on the one hand, the criterion of choice within the meaning of Article 1(2) of Directive 2014/24, and, on the other, the selection and award criteria provided for in the same directive. [68] On the face of it, I find it doubtful that a single element is both a criterion of applicability of Directive 2014/24 and a condition that must be met

60 See recital 114 of Directive 2014/24.

61 Judgment of 2 June 2016 (C-410/14, EU:C:2016:399).

62 Ibid., paragraph 37.

63 Ibid., paragraph 38.

64 Judgment of 1 March 2018, *Tirkkonen* (C-9/17, EU:C:2018:142).

65 Ibid., paragraph 35.

66 Ibid., paragraph 41.

67 See Turudić, M., 'Article 76 Principles Of Awarding Contracts' in *European Public Procurement: Commentary on Directive 2014/24/EU*, edited by Caranta, R., and Sanchez-Graells, A., 2021, Edward Elgar Publishing Limited, page 863. See also, Sanchez-Graells, A., https://www.howtocrackanut.com/blog/2018/3/5/the-end-of-procurement-as-we-knew-it-cjeu-consolidates-falk-pharma-approach-to-definition-of-procurement-c-917.

68 See, in particular, Articles 58 and 67 of Directive 2014/24.

by tenderers under that directive.[69] I therefore advise the Court not to follow that line of case-law. Instead, the Court should give the term 'procurement' a broader definition encompassing procedures which involve awarding contracts to certain service providers, whilst excluding others for a certain period of time.

71. Should the Court decide, however, to follow that line of case-law, it is unclear, in the present case, whether, in a similar vein to the aforementioned judgments, the national legislation at issue provides for a system whereby the contracting authorities grant an 'authorisation' and users of the relevant services choose between the entities providing such services, or whether the choice ultimately lies with the contracting authorities.[70]

72. Decree 181/2017 appears to provide for a call for tenders that must establish a minimum score and the criteria for selecting entities for the adoption of the contractual action agreements;[71] tenders are to be examined by the evaluation committee.[72] The decision concerning successful social entities,[73] who can then conclude binding agreements for the provision of social services, is published in the *Diari Oficial de la Generalitat Valenciana*.[74] However, it is not clear to me whether there is a limited number of successful entities who are awarded an 'authorisation', in the sense of *Falk Pharma*, or whether there is a limited number of entities *actually* chosen by the contracting authorities. Moreover, the criteria for selection laid down in Article 64(2) and (3) of Law 5/1997 would appear to come within the scope of the concept of choice, and thus constitute 'procurement' within the meaning of Article 1(2) of Directive 2014/24. In any case, it is for the national court to determine whether the actual choice has been shifted to users of the services at issue or whether it is made by the contracting authorities themselves. Nevertheless, for the reasons set out in this Opinion,[75] I consider that the applicability of Directive 2014/24 should not be made contingent on the way in which Member States choose successful entities, but rather on the subject matter of contracts.

73. Nonetheless, I must stress once again that it is for the referring court to establish whether the contractual action agreements at issue are subject to choice per se within the meaning of Article 1(2) of Directive 2014/24.

(b) The characteristics of a public contract

74. The existence of a public contract is a substantive condition for the applicability of Directive 2014/24. Under Article 2(1)(5) of that directive, a 'public contract' is a contract for pecuniary interest concluded in writing between an economic operator and one or more contracting authorities and having as its object the execution of works, the supply of products or the provision of services.

69 See, by analogy, Opinion of Advocate General Cosmas in Joined Cases *Hernández Vidal and Others* (C-127/96, C-229/96 and C-74/97, EU:C:1998:426, point 80), in which he characterises the situation where the result achieved by applying a directive becomes a condition determining whether it is to apply as an absurd conclusion, or a vicious circle.

70 In the judgment of 2 June 2016, *Falk Pharma* (C-410/14, EU:C:2016:399), the choice was deferred to the patient, and, in the judgment of 1 March 2018, *Tirkkonen* (C-9/17, EU:C:2018:142), to the beneficiary of the aid at issue.

71 Article 9(1) and (2) of Decree 181/2017.

72 Article 17 of Decree 181/2017.

73 Article 19 of Decree 181/2017.

74 Article 19(1) of Decree 181/2017.

75 See points 69 and 70 above.

75. Based on that definition, apart from the obvious requirement that such a contract be in written format, which clearly is not an issue in the present case,[76] the main characteristics of a public contract are as follows: the existence of a contract for pecuniary interest, concluded between an economic operator and one or more contracting authorities, the object of which is the provision of services.

(1) A contract concluded for pecuniary interest

76. At the outset, it should be borne in mind that the definition of a public contract is a matter of EU law and that, for the purposes of determining the scope of Directive 2014/24, the decisive factor is neither how the contract at issue is classified under national legislation, nor the intentions of the national legislature, nor those of the parties. The classification of the agreements at issue is governed by the rules set out in that directive.[77] It is therefore irrelevant, in my opinion, that Article 62(1) of Law 5/1997 and Article 3(c) of Decree 181/2017 classify the contractual action agreement as 'non-contractual'.[78]

77. As to the meaning of the phrase 'for pecuniary interest', the Court has already held that it designates a contract under which each of the parties undertakes to provide one form of consideration in exchange for another.[79] As the provision of a service may be compensated by different forms of consideration, such as reimbursement of the expenditure incurred in providing the agreed service,[80] the fact remains that the reciprocal nature of a public contract necessarily results in the creation of legally binding obligations on both parties to the contract, the performance of which must be legally enforceable. The synallagmatic nature of the contract is thus an essential element of a public contract.[81]

78. In the present case, first, as regards the reciprocal nature of the public contract, it follows from the definitions set out in Article 3 and Articles 21 to 26 of Decree 181/2017 that the documents that can be adopted by the parties may constitute formal agreements. Moreover, it can be inferred from Article 65(2) of Law 5/1997 that the contractual action agreements give rise to obligations for the entities providing the services in question, which are specifically defined in Titles IV and V of that decree. Article 66(2) of that law and Article 22(1) of Decree 181/2017 establish the rates and the reimbursement mechanisms of those entities. Article 26 of Decree 181/2017 provides for a system of judicial remedies, and Title V thereof includes a list of obligations concerning the execution of the services. Based on those elements, I am inclined to take the view that the contractual action agreements establish a relationship of a synallagmatic nature.[82]

76 Article 3(d) and Article 21(1) of Decree 181/2017 provide a definition for 'social agreements', which refer to 'documents' formalising the agreement between the administration and social entities.

77 See, to that effect, judgment of 18 January 2007, *Auroux and Others* (C-220/05, EU:C:2007:31, paragraph 40 and the case-law cited).

78 See, to that effect, judgments of 20 October 2005, *Commission* v *France*, C-264/03, EU:C:2005:620, paragraph 36), and of 22 April 2021, *Commission* v *Austria (Lease of a building not yet constructed)* (C-537/19, EU:C:2021:319, paragraph 43).

79 See, to that effect, judgment of 18 October 2018, *IBA Molecular Italy* (C-606/17, EU:C:2018:843, paragraph 28).

80 In that regard, it should be borne in mind that, according to the settled case-law of the Court, only a contract concluded for pecuniary interest may constitute a public contract falling within the scope of Directive 2004/18 (see judgments of 25 March 2010, *Helmut Müller* (C-451/08, EU:C:2010:168, paragraph 47), and of 21 December 2016, *Remondis* (C-51/15, EU:C:2016:985, paragraph 43). While Directive 2014/24 repealed Directive 2004/18, that condition is laid down in similar terms in both directives. That case-law can therefore be applied to the new directive.

81 Judgment of 10 September 2020, *Tax-Fin-Lex* (C-367/19, EU:C:2020:685, paragraphs 25 and 26 and the case-law cited).

82 See, to that effect, judgment of 25 March 2010, *Helmut Müller* (C-451/08, EU:C:2010:168, paragraphs 60 to 62).

79. Second, as regards the concept of pecuniary interest, Article 22(2) of Decree 181/2017 provides that the contracting authority is to pay, at the most, the variable, fixed and permanent costs of the services at issue, without including any commercial profit for that entity. Although the users of the services at issue do not usually pay for the provision of those services, except in exceptional cases where they may be required to pay a fee previously authorised,[83] the entities in question are reimbursed for the costs of the services. In that regard, the Court has already stated that a contract cannot fall outside the scope of that concept merely because the remuneration remains limited to reimbursement of the expenditure incurred in providing the service. In other words, a mere cost-covering remuneration fulfils the 'pecuniary interest' criterion for the purposes of the public procurement directives.[84] It follows that the role of the national court is simply to ensure that a value is provided, but not to consider the adequacy of the consideration. The lack of profit for the entities providing the services is thus irrelevant for the purposes of establishing the existence of pecuniary interest.

80. It follows that, in the present case, there is a quid pro quo under the contractual action agreements at issue since, on the one hand, the entities provide social services to individuals under the conditions defined by the public authority and, on the other hand, those entities receive remuneration in return in the form of a reimbursement of costs by the public authority. I conclude that the criterion of the existence of a contract for pecuniary interest is fulfilled in the present case.

(2) A contract concluded between an economic operator and one or more contracting authorities

81. It is important to emphasise that the concepts of 'economic operator' and 'contracting authorities' are both very broad under Directive 2014/24 and in the case-law relating to public procurement rules. In my opinion, the latter concept is clearly not an issue in the present case, since the contractual action agreements are concluded by the authorities of the Valencia Region.[85]

82. As regards the concept of 'economic operator', under Article 2(1)(10) of Directive 2014/24, it encompasses any entity, regardless of its nature, offering, inter alia, the provision of services on the market. That definition reflects the case-law whereby, for the purposes of EU public procurement rules, it is irrelevant what the entity is, the emphasis being instead on what it does.[86]

83. In the present case, the national legislation at issue applies to 'social initiative entities', which are defined in Article 3(e) of Decree 181/2017 as foundations, associations, voluntary organisations and other non-profit entities carrying out social service activities. This definition

83 See Article 11(1)(c) of Decree 181/2017.

84 See judgments of 12 July 2001, *Ordine degli Architetti and Others* (C-399/98, EU:C:2001:401, paragraph 77), and of 18 January 2007, *Auroux and Others* (C-220/05, EU:C:2007:31, paragraph 45). It is worthwhile noting that, in her Opinion in *Ordine degli Ingegneri della Provincia di Lecce and Others* (C-159/11, EU:C:2012:303, point 32), Advocate General Trstenjak states that 'the view can be taken that only a broad understanding of the notion of "pecuniary interest" is consistent with the purpose of the procurement directives, which is to open up the markets to genuine competition'.

85 See Article 2(1) and (2) of Decree 181/2017.

86 See judgments of 29 November 2007, *Commission* v *Italy* (C-119/06, not published, EU:C:2007:729, paragraphs 37 to 41); of 23 December 2009, *CoNISMa* (C-305/08, EU:C:2009:807, paragraphs 30 and 45); and of 19 December 2012, *Ordine degli Ingegneri della Provincia di Lecce and Others* (C-159/11, EU:C:2012:817, paragraph 26). See, also, Opinion of Advocate General Wahl in *Azienda sanitaria locale n. 5 'Spezzino' and Others* (C-113/13, EU:C:2014:291, point 24 and the case-law cited).

also covers cooperative societies classified as non-profit-making organisations in accordance with the specific legislation thereon.[87] According to settled case-law, the fact that the contracting partner of the contracting authority is a non-profit association, is not an issue.[88]

84. Accordingly, I conclude that the condition relating to a contract between an economic operator and one or more contracting authorities is met.

(3) A contract for the provision of services

85. The condition relating to the 'contract for the provision of services' relates to the *ratione materiae* of the contract and requires the identification of its purpose.

86. Article 6(2) of Decree 181/2017 defines the services that can be provided under the terms of the contractual action agreements at issue, which are listed in annex to that decree. As mentioned in point 57 above, the referring court must first verify whether those services involve an 'economic activity' and fall accordingly within the scope of the fundamental freedoms and that of Directive 2014/24.[89]

87. The defendant and the Spanish Government have placed considerable emphasis on the fact that Article 1(5) of Directive 2014/24 expressly states that that directive does not affect the way in which the Member States organise their social security systems, and that recital 6 of the same directive states that 'non-economic services of general interest should not fall within the scope' of that directive. However, I take the view that, in the present case, the freedom of the Member States to decide how public funds are to be allocated is not directly called into question. When a public authority decides to conduct a procurement procedure within in the meaning of Article 1(2) of Directive 2014/24, and conclude a public contract within the meaning of Article 2(1)(5) thereof, the latter falls within the scope of that directive, and, the public procurement rules laid down in that directive must therefore be applied.

88. If that is the case, Directive 2014/24 contains specific provisions relating to social and other specific services, which are listed in Annex XIV to that directive. That list includes several CPV codes, which come under the simplified regime laid down in Articles 74 to 76 of Directive 2014/24. That annex specifies in a footnote that compulsory social security services, under CPV 75300000-9, 'are not covered by that directive where they are organised as non-economic services of general interest'.[90]

89. From the information before the Court, it is not clear whether the services at issue are on that list or amongst the compulsory social services that the Member States can exclude from the scope of Directive 2014/24. The written questions put to the parties did not resolve this conundrum.

87 The fact that Decree 181/2017 excludes profit-making entities from the provision of the social services at issue will be dealt with under Section III.B.3 of the Opinion.

88 See case-law cited in footnote 86.

89 See Section III.B.1 of this Opinion.

90 ASADE submits that the services at issue do not fall within the scope of the services excluded from the directive under recital 6 and Annex XIV (CPV code 75300000-9) and, in its written answer to the questions put by the Court, it seems to indicate that the services at issue fall under the CPV codes ranging from 85000000-9 to 85321000-5. That submission must be examined by the referring court, which has sole jurisdiction to interpret the national legislation at issue.

90. I therefore take the view that the referring court has to carry out the necessary checks and compare the list annexed to Decree 181/2017 and the list contained in Annex XIV to Directive 2014/24.[91] If the services listed in the Annex to Decree 181/2017 are covered by the CPV codes contained in Annex XIV to that directive, with the exception of the abovementioned compulsory social security services, those listed services fall under the scope of the 'simplified regime' laid down in Articles 74 to 76 of Directive 2014/24. In the analysis that follows, I shall assume that some of the services at issue are covered by that regime. Since the procedures, parties and the subject matter have been defined, I shall turn to an examination of whether the contractual action agreements at issue exceed the amount of the thresholds set out in Directive 2014/24.

(c) The threshold criteria

91. The threshold for service contracts relating to social services and other specific services listed in Annex XIV to Directive 2014/24 that are subject to the 'simplified regime' laid down in Articles 74 to 76 of the same directive is set out in Article 4(d) of that directive. It states that Directive 2014/24 applies to procurements with a value estimated to be equal to or greater than EUR 750,000.[92]

92. In that regard, it is important to emphasise that, under recital 114 of Directive 2014/24, certain categories of services, inter alia, certain social services, have a limited cross-border dimension and therefore come under a specific regime with a higher threshold than that which applies to other services.[93]

93. Accordingly, the rules laid down in Directive 2014/24 do not apply to procurements with a value below that threshold set by Article 4(d) of that directive.[94] Such procurements must nonetheless comply with the rules on free movement as well as the principles of equal treatment, mutual recognition, non-discrimination and proportionality.[95]

94. In the present case, the national legislation at issue does not appear to provide any information on the economic value of the services which are the subject of the contractual action agreements. Given that the threshold in Article 4(d) of Directive 2014/24 is considerable, it cannot be ruled out that, in some cases, the value exceeds that threshold; whereas, in other cases, it may remain lower than that threshold. Therefore, it is for the referring court to verify whether that condition of Directive 2014/24 is met by the contractual action agreements at issue.

95. If all the aforementioned conditions of Article 1(2), Article 2(1)(5) and Article 4(d) of Directive 2014/24 are satisfied, then the contractual action agreements at issue fall within the scope of that directive. In particular, in response to the questions of the referring court, I take the view that the mere fact that those agreements are based on the principle of solidarity does not mean that the latter are to be excluded from the concept of public contracts within the meaning of Article 2(1)(5) of Directive 2014/24. Moreover, the facts that the services at issue are reimbursed for by public authorities, that they do not entail profit for the entities providing them or that they

91 See, by analogy, judgment of 21 March 2019, *Falck Rettungsdienste and Falck* (C-465/17, EU:C:2019:234, paragraph 37).

92 The provision specifies that it is the value net of value added tax.

93 I must point out, however, that some contracts may have a cross-border dimension even though their value is below the abovementioned threshold, for instance, if the procurement procedure is taking place in areas near the borders of other EU Member States (see, to that effect, judgments of 15 May 2008, *SECAP and Santorso* (C-147/06 and C-148/06, EU:C:2008:277, paragraph 31), and of 17 November 2015, *RegioPost* (C-115/14, EU:C:2015:760, paragraph 51)). That extension does not seem to apply in the present case.

94 See, by analogy, order of 7 July 2016, *Sá Machado & Filhos* (C-214/15, not published, EU:C:2016:548, paragraph 29).

95 See, to that effect, recital 1 of Directive 2014/24.

are provided free of charge to users, are immaterial for the purposes of determining whether there is such a public contract. However, as regards the conditions set out in Article 1(2) and Article 4(d) concerning the procurement and the threshold, respectively, it is for the referring court to ascertain whether the procedure and the value of the contracts satisfy the necessary conditions.

96. That being said, I turn now to the crux of the question: can profit-making entities be excluded from concluding public contracts under the specific provisions of Directive 2014/24?

3. Reserved contracts and the simplified regime under Directive 2014/24

97. Assuming that, at the very least, some of the contractual action agreements at issue in the main proceedings fall within the scope of Directive 2014/24, the referring court seeks to determine whether the 'simplified regime' to which those agreements are subject allows the Member States to exclude profit-making entities from any possibility of concluding such agreements.

98. First, the specific provisions of Directive 2014/24 do not identify whether public contracts in the field of social services are to be reserved for non-profit-making entities. However, Article 20 and Article 77(1) of Directive 2014/24 expressly allow the Member States to determine the type of organisations that may participate in the procedures for the award of public contracts in relation to certain social services.[96] Public contracts relating to social services included in Article 74 that do not fall within the scope of Article 20 and Article 77(1) of Directive 2014/24 come under the simplified regime of Articles 74 to 76 of that directive which, in my view, must be examined in the second place.

(a) Reserved contracts

99. Since Article 20 and Article 77(1) of Directive 2014/24 constitute a derogation from the general rules set out in that directive, I believe that the scope of those provisions is to be interpreted narrowly. This means, in particular, that those provisions contain an exhaustive list of cases that may be the subject of reserved contracts.

(1) Reserved contracts under Article 20 of Directive 2014/24

100. Article 20 of Directive 2014/24 deals with two alternative situations: (i) the possibility for contracting authorities of reserving contracts for either sheltered workshops or economic operators whose aim is the social and occupational integration of disabled or disadvantaged persons, or (ii) the possibility of providing for those contracts to be performed under sheltered programmes.[97]

101. While it is for the referring court to establish the applicability of that provision to the services at issue, I take the view that, in the present case, the application of that provision cannot be ruled out. Indeed, Section IV of the Annex to Decree 181/2017 includes persons with

[96] It is settled case-law that the only permitted exceptions to the application of Directive 2014/24 are those which are expressly mentioned therein (see judgment of 18 January 2007, *Auroux and Others* (C-220/05, EU:C:2007:31, paragraph 59 and the case-law cited).

[97] On the legislative history of reserved contracts under Article 20, see Opinion of Advocate General Tanchev in *Conacee* (C-598/19, EU:C:2021:349, point 60).

'functional diversity' and, in particular, point 2 of that annex deals with their social integration. Therefore, in so far as the contractual action agreements at issue concern services provided to recipients who are those persons, Article 20 of Directive 2014/24 may be applicable.

102. That article allows – but does not compel – contracting authorities to reserve contracts to sheltered workshops and economic operators pursuing social initiatives or to provide for those contracts to be performed under sheltered programmes. The question whether Member States could, under that provision, impose additional limitations narrowing the circle of permitted participants and, thus, reserving procurements, was recently examined by the Court in *Conacee*. [98]

103. In that case, the Court pointed out that it follows from the wording of Article 20(1) of Directive 2014/24 and from the objectives pursued by the latter that it does not contain an exhaustive list of conditions under which a contracting authority may limit the type of economic operator with which it may enter into a reserved contract. Instead, that directive leaves it to Member States to adopt additional criteria defining those conditions, if those additional criteria contribute to ensuring the social and employment policy objectives pursued by Article 20 of Directive 2014/24. Following the Advocate General Tanchev's view that the requirements under that provision are regarded as minimum requirements, [99] the Court ruled that Member States are free to narrow the circle of permitted participants when having recourse to the reserved contracts under Article 20 of Directive 2014/24. [100]

104. It follows from the foregoing that Member States can add criteria, such as the criterion of excluding profit-making entities laid out in the national legislation, in so far as such exclusion 'contributes to ensuring the social and employment policy objectives pursued by that provision'. [101] However, it should be noted that, in the present case, the Court has not been provided with any information regarding the reasons behind such exclusion by the national legislature. One could argue that non-profit-making entities have a more social dimension than profit-making entities and are, therefore, better suited to pursuing such objectives. Conversely, it could be submitted that profit-making entities can provide high-quality services with low costs and, therefore, be able to pursue those objectives. That said, it is entirely for the referring court to assess whether the exclusion at issue contributes to 'ensuring … social and employment policy objectives'.

105. Here, I must stress that there are two limits to the option laid out in Article 20(1) of Directive 2014/24.

106. First, Article 20(2) of that directive 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 tenders, in the absence of which such contracts cannot be reserved. In the present case, the referring court must ascertain whether that requirement has been met.

107. Secondly, when the Member States make use of the option provided for in Article 20 of Directive 2014/24, they must respect, inter alia, freedom of establishment, as well as the principles deriving from that freedom, such as the principles of equal treatment and proportionality. [102] As to the social services at issue in the main proceedings whose users are

98 Judgment of 6 October 2021, *Conacee* (C-598/19, EU:C:2021:810).

99 Opinion of Advocate General Tanchev in *Conacee* (C-598/19, EU:C:2021:349, point 40).

100 Judgment of 6 October 2021, *Conacee* (C-598/19, EU:C:2021:810, paragraphs 24 to 28).

101 Judgment of 6 October 2021, *Conacee* (C-598/19, EU:C:2021:810, paragraph 28).

102 Judgment of 6 October 2021, *Conacee* (C-598/19, EU:C:2021:810, paragraph 33 and the case-law cited).

persons with functional diversity, it is for the referring court to determine whether the conditions set out in the national legislation are necessary and appropriate for ensuring the integration of those persons, as required by Article 20(1) of Directive 2014/24. Moreover, it is worth noting that the Court has already held that when the Member States limit reserved contracts to voluntary associations, the principle of equality is not, in essence, infringed. [103]

(2) Reserved contracts under Article 77 of Directive 2014/24

108. Article 77(1) of Directive 2014/24 applies to certain specific social services. While it seems possible that some of the services referred to in the Annex to Decree 181/2017 fall within the scope of Article 77, it is clear to me that neither the entities nor the contractual action agreements in question satisfy the conditions set out in Article 77(2) and (3) of Directive 2014/24.

109. The wording and general scheme of Article 77 of that directive do not provide much guidance on how to interpret it. [104] However, recital 118 of Directive 2014/24 explains the purpose of the procurement procedures that can be reserved for specific entities under Article 77 of that directive. That recital states that, in order to ensure the continuity of public services, that directive should allow that participation in procurement procedures for certain services in the field of social services could be reserved for certain organisations – such as organisations based on employee ownership or active employee participation in their governance, and cooperatives. Member States can therefore narrow the circle of participants to such organisations that participate in delivering these services to end users. It follows from those explanations that procurement procedures under Article 77 of Directive 2014/24 are merely a subset of the procurements which come under the simplified regime, and the conditions set out in that provision are therefore to be interpreted restrictively. [105]

110. First, Article 77(2) of that directive contains a list of four cumulative conditions. The first three concern the governance of the entities providing the services, whereas the fourth deals with the limitation set on successive repeat contracts. In the present case, as regards the national legislation at issue, it is the third and the fourth of those conditions that appear challenging. On the one hand, the national legislation at issue does not appear to be aimed at entities the economic governance of which entails employee ownership or participatory principles. [106] Thus, it is highly unlikely that the entities that are parties to the contractual action agreements at issue satisfy the condition set out in Article 77(2)(c) of Directive 2014/24. On the other hand, when examining the national legislation at issue, I did not come across a 'no-repeat' clause such as the one included in Article 77(2)(d) of Directive 2014/24. On the contrary, the final sentence of

[103] As regards Directive 2004/18, the Court held that where public contracts for medical transport could be included among the service contracts covered by Annex II B to that directive and, therefore, were not subject to all of its provisions, those contracts could be reserved for voluntary associations without thereby infringing the principle of equal treatment (judgment of 11 December 2014, *Azienda sanitaria locale n. 5 'Spezzino' and Others* (C-113/13, EU:C:2014:2440, paragraph 59).

[104] Legislative drafting history regarding Article 77 does not provide much guidance as to its interpretation, since that provision was not initially in the Commission's proposed legislation (see Proposal for a Directive of the European Parliament and of the Council on public procurement (COM(2011) 0896 final) – 2011/0438 (COD)), and it was added at the later stage of the legislative procedure (see Position of the European Parliament adopted at first reading on 15 January 2014 with a view to the adoption Directive 2014/…/EU of the European Parliament and of the Council on public procurement and repealing Directive 2004/18/EC(EP-PE_TC1-COD(2011)0438)).

[105] According to some authors, that provision was introduced in order to take into account the specific needs of the United Kingdom. It is only applicable to a certain subset of the services of the simplified regime (see Turudić, page 867, cited in footnote 67 above and the literature cited by that author). That approach is confirmed by the last two sentences of recital 118 of Directive 2014/24, which implies that certain services covered by the simplified regime can be subject to the regime laid down by Article 77 of that directive.

[106] As explained by the Norwegian Government, Article 77 of Directive 2014/24 deals with the possibility of reserving contracts to certain newly established companies by persons previously employed in the public sector. It is not restricted to non-profit organisations, but covers commercial entities as well.

Article 23 of Decree 181/2017 seems to allow a renewal of a contract, even after the 10-year extension provided for in that article. Therefore, the national legislation at issue does not seem to fulfil the criteria of Article 77(2) of Directive 2014/24.

111. Neither do the contractual action agreements at issue satisfy the condition set out in Article 77(3) of Directive 2014/24, according to which the maximum duration of the contract must not exceed three years. Under Article 23 of Decree 181/2017, those agreements may be concluded for a maximum period of 4 years and, where appropriate, be extended up to 10 years (with the possibility of concluding another agreement immediately afterwards).

112. In the light of the foregoing, I conclude that Article 77 of Directive 2014/24 is not applicable to the present case.

113. I shall proceed on the basis that, as regards the contractual action agreements that fall within the scope of Directive 2014/24, except for the ones that come under Article 20 thereof, the remainder of those agreements must fulfil the criteria of the simplified regime laid down in Articles 75 and 76 of that directive.

(b) The rules under Articles 75 and 76 of Directive 2014/24

114. The referring court is asking, in essence, whether the public authorities can conclude contractual action agreements solely with private non-profit entities, under which those authorities entrust those entities with certain social services referred to in Article 74 of Directive 2014/24. To answer that question, I must turn to the rules laid down in Articles 75 and 76 of that directive, which deal, inter alia, with the obligation to publish notices and the principle of equality, respectively.

115. First, Article 75 of Directive 2014/24, concerning the publication of notices, requires contracting authorities to announce their intention to award a contract to the Publications Office of the European Union [107] by means of a contract notice or a prior information notice. Article 74 of Directive 2014/24 introduces a special procurement regime dedicated to public contracts for social and other specific services when they are equal to or greater than the threshold mentioned in Article 4(d) thereof. For its part, Article 75 of that directive emphasises the fact that public authorities still have to comply with rules on publication of the tender notices concerning those public procurements. In doing so, that requirement is an expression of the principle of transparency, as laid down in Section 2 and Article 76(1) of that directive.

116. In the present case, according to Article 13(2) of Decree 181/2017, the relevant contract notices are published by the *Diari Oficial de la Generalitat Valenciana* (Official Journal of the Valencia Regional Government). However, as regards the contract notices, that form of publicity, limited to the Community of Valencia, does not suffice, to my mind, to meet the requirements of Article 75(1) of Directive 2014/24, which specifically refer to the procedure set out in Article 51 when the contracting authorities choose to issue a contract notice. Consequently, the national legislation at issue does not appear to comply with the transparency rules laid down in Article 75(1) of Directive 2014/24.

[107] See Articles 48 to 51 of Directive 2014/24.

117. Second, according to Article 76(1) of that directive, even under the simplified regime, Member States must observe, inter alia, the principle of equality of economic operators. It should be recalled that Directive 2014/24 seeks to ensure freedom of establishment, as well as the principles stemming from the fundamental freedoms, such as equal treatment, non-discrimination, mutual recognition, proportionality and transparency. [108]

118. Accordingly, the referring court will have to examine whether the national legislation at issue in the main proceedings, allowing the de facto exclusion of profit-making entities from the provision of certain social services pursuant to contractual action agreements under Decree 181/2017, [109] is consistent with those principles.

119. It should be recalled that, according to settled case-law, the principle of equality requires that comparable situations must not be treated differently, and that different situations must not be treated in the same way, unless such treatment is objectively justified. [110] The comparability of situations must be assessed in the light of the subject matter and purpose of the EU measure, which makes the distinction in question. [111]

120. Thus, in the present case, the referring court will have to determine whether the 'social initiative entities', as defined in Article 3(e) of Decree 181/2017, are in the same situation as profit-making entities as regards the objective pursued by the simplified regime under Articles 74 to 76 of Directive 2014/24. [112]

121. As regards those objectives, recital 114 of that directive explains that the simplified regime concerning, in particular, certain social services is to be established in the light of the cultural context and sensitivity of those services. Therefore, and taking into account the wording of Article 1(5) of Directive 2014/24, the Member States should be given wide discretion to organise the choice of the service providers in the way they consider most appropriate. That recital adds the objectives of simplification and of alleviating the administrative burden for contracting authorities and economic operators.

122. In my opinion, that recital is to be read in conjunction with Article 76(2) of Directive 2014/24, which refers to the quality, continuity, accessibility, affordability, availability and comprehensiveness of the services, as well as the specific needs of different categories of users. It seems, therefore, that it is the specific nature of the social services in question that justifies the existence of the simplified regime. Accordingly, it seems to me that the relevant criterion should be the nature of the social services in question provided by the two categories of entity. [113]

123. In the present case, the defendant and the Spanish Government have not explained why profit-making entities are automatically excluded from the scope of Decree 181/2017. While it could be argued that the 'social initiative entities', as defined in Article 3(e) of Decree 181/2017, and profit-making entities have different legal natures and function differently, the two categories of entity may also be called on to perform similar social services, and provide services

108 Recital 1 of Directive 2014/24. See also judgment of 3 October 2019, *Irgita* (C-285/18, EU:C:2019:829, paragraph 48 and the case-law cited).

109 See point 83 above.

110 See, inter alia, judgment of 14 December 2004, *Swedish Match* (C-210/03, EU:C:2004:802, paragraph 70 and the case-law cited).

111 See, inter alia, judgment of 1 March 2011, *Association belge des Consommateurs Test-Achats and Others* (C-236/09, EU:C:2011:100, paragraph 29).

112 See, by way of analogy, judgment of 6 October 2021, *Conacee* (C-598/19, EU:C:2021:810, paragraph 38).

113 The defendant itself places considerable weight on that aspect when it points out that Directive 2014/24 aims to take into account the specific characteristics of services to persons (see point 17 of the defendant's observations).

with the same level of quality at similar costs. It follows that, subject to the findings of the referring court, those two categories of entity may be in a comparable situation as regards the objective of the regime under Articles 74 to 76 of Directive 2014/24.

124. Moreover, according to settled case-law, as regards the principle of proportionality, which is a general principle of EU law, the rules laid down by the Member States in implementing the provisions of Directive 2014/24 must not go beyond what is necessary to achieve the objectives of that directive. [114] In that connection, it is clear to me that the case-law of the Court cannot be interpreted as allowing certain entities to be excluded from the application of the simplified regime owing solely to the fact that they are profit-making. [115]

125. In particular, I do not see how the automatic exclusion of profit-making entities from the scope of national legislation ensures that the services at issue are provided in an appropriate way, while simplifying and alleviating the administrative burden as mentioned in recital 114 of Directive 2014/24. Moreover, such automatic exclusion does not appear to contribute to the quality, continuity, affordability, availability and comprehensiveness of those services, as required by Article 76(2) of Directive 2014/24. In implementing the simplified regime, it would appear more appropriate to focus on the ability to provide cost-effective, quality social services, rather than on the nature of the entity providing those services. [116]

126. Consequently, it is inconceivable, in my view, that such an exclusion is either justified or proportionate; it is therefore contrary to the principle of equal treatment.

4. Freedom of establishment

127. If the contractual action agreements at issue do not fall within the scope of Directive 2014/24, [117] which is for the referring court to ascertain, that does not mean, however, that those agreements are necessarily excluded from the scope of EU law. It follows from the settled case-law of the Court that the contractual action agreements at issue may nonetheless be subject to the fundamental freedoms and general principles of EU law, in particular the principles of equal treatment and non-discrimination on grounds of nationality and the corollary obligation of transparency, provided that those agreements have a certain cross-border dimension. [118] Moreover, subject to that proviso, those fundamental freedoms and principles apply if there is no choice between the interested operators. Indeed, the Court has already held that, unlike Directive 2014/24, freedom of establishment and the principle of equal treatment apply to different licencing systems where there is no choice. [119]

114 See, to that effect, judgment of 6 October 2021, *Conacee* (C-598/19, EU:C:2021:810, paragraphs 42 to 44 and the case-law cited). See, by way of analogy, judgments of 23 November 2017, *Di Maura* (C-246/16, EU:C:2017:887, paragraph 25), and of 26 April 2012, *Commission* v *Netherlands* (C-508/10, EU:C:2012:243, paragraph 75).

115 See, to that effect, judgment of 6 October 2021, *Conacee* (C-598/19, EU:C:2021:810, paragraph 42 and the case-law cited).

116 See point 122 above.

117 For example, if the value of the public procurement does not attain the threshold set out in Article 4(d) of Directive 2014/24, it is not subject to the provisions of that directive.

118 See, to that effect, judgments of 15 May 2008, *SECAP and Santorso* (C-147/06 and C-148/06, EU:C:2008:277, paragraphs 20 and 21); of 11 December 2014, *Azienda sanitaria locale n. 5 'Spezzino' and Others* (C-113/13, EU:C:2014:2440, paragraphs 45 and 46); of 18 December 2014, *Generali-Providencia Biztosító* (C-470/13, EU:C:2014:2469, paragraph 32); and of 16 April 2015, *Enterprise Focused Solutions* (C-278/14, EU:C:2015:228, paragraph 16).

119 See judgment of 16 February 2012, *Costa and Cifone* (C-72/10 and C-77/10, EU:C:2012:80, paragraphs 70 to 73 and the case-law cited).

128. In the present case, as mentioned above, since the Court has no information before it on the value of the contractual action agreements in question, I assume that, in some cases, the value of those agreements is above the threshold set in Article 4(d) of Directive 2014/24, while, in other cases, it may remain lower than that threshold, [120] which is for the referring court to verify. [121] In the latter cases, I would point out that the Court has already ruled that because of the 'modest economic interest at stake', it could reasonably be maintained that an undertaking located in a Member State other than the one where the contract is awarded would have no interest in the contract at issue, with the effect that the application of rules enshrined in primary EU law is not justified. [122]

129. Therefore, provided that the social services that are the subject of the contractual action agreements at issue consist in an economic activity and have a cross-border dimension, the referring court should examine whether or not the absence of sufficient publication of the invitation to tender and the de facto exclusion of profit-making entities constitutes an obstacle to freedom of establishment under Article 49 TFEU and an infringement of the corollary principles of equal treatment and the obligation of transparency. [123]

130. First, as regards freedom of establishment and the principle of equal treatment, the Court has already held that a requirement that persons wishing to carry out an economic activity adopt a specific legal form is a restriction on their freedom of establishment within the meaning of Article 49 TFEU. Indeed, such a requirement prevents economic operators located in the home Member State and of a different legal form from setting up a secondary establishment in the host Member State. [124]

131. However, since that restriction does not give rise to direct discrimination on grounds of nationality, it may also pursue any objective recognised as legitimate under EU law. In that regard, I believe that the reasoning set out in points 122 to 125 of this Opinion regarding justifications and the proportionality of the national legislation applies *mutatis mutandis*. In the absence of any justification put forward by the Spanish authorities concerning the exclusion of profit-making entities from the contractual action agreements at issue, the national legislation appears to be contrary to freedom of establishment and the principle of equal treatment. In any event, the automatic exclusion of profit-making entities from the scope of national legislation does not appear to be appropriate, since it is not focused on the nature and quality of the services provided, but rather on the legal form of the entity. That said, it is for the national court to determine whether the national legislation pursues a legitimate objective recognised by EU law and, if so, to assess whether that legislation complies with the principle of proportionality.

132. Second, as to the obligation of transparency under Article 49 TFEU, it is worth pointing out that, unlike the specific requirements stemming from Directive 2014/24, that obligation does not require an invitation to tender to be published in the *Official Journal of the European Union*.

120 See point 94 above.

121 As opposed to the cases where the Court has declared the case inadmissible, as the referring court has submitted no evidence providing the Court with information on the existence of a cross-border dimension (see, inter alia, judgment of 6 October 2016, *Tecnoedi Costruzioni* (C-318/15, EU:C:2016:747), in the present case, the main proceedings involve an action for annulment, which means that paragraph 51 of the judgment of 15 November 2016, *Ullens de Schooten* (C-268/15, EU:C:2016:874) applies (see point 38 above). Therefore, such dimension is presumed.

122 See, to that effect, judgment of 21 July 2005, *Coname* (C-231/03, EU:C:2005:487, paragraph 20).

123 In the judgment of 11 December 2014, *Azienda sanitaria locale n. 5 'Spezzino' and Others* (C-113/13, EU:C:2014:2440, paragraph 50), the Court held that the general principles of transparency and equal treatment 'flow' from Articles 49 and 56 TFEU.

124 See, to that effect, judgments of 12 July 1984, *Klopp* (107/83, EU:C:1984:270, paragraph 19); of 7 July 1988, *Stanton and L'Étoile 1905* (143/87, EU:C:1988:378, paragraph 11); of 29 April 2004, *Commission* v *Portugal* (C-171/02, EU:C:2004:270, paragraph 42); and of 9 September 2010, *Engelmann* (C-64/08, EU:C:2010:506, paragraph 28).

Instead, that obligation is limited to requiring a degree of advertising that is sufficient to ensure, first, the opening-up to competition and, second, the review of the impartiality of the procurement procedure. [125]

133. In the present case, as the *Diari Oficial de la Generalitat Valenciana* is the Official Journal of the Valencia Regional Government and is thus the ordinary means of publication in the field of public procurement, it seems to me that the national legislation at issue fulfils the aforementioned criteria concerning publicity.

134. If the conditions of application of Directive 2014/24 are satisfied, I therefore take the view that Articles 74 to 76 of that directive must be interpreted as not precluding national legislation, which allows a public authority to conclude, without complying with the procedural requirements imposed by EU law, a public contract under which that authority entrusts only non-profit entities with the provision of certain social services in return for reimbursement of the costs incurred by those entities, provided that that legislative measure complies with the principles of equal treatment and proportionality, which is for the referring court to ascertain. Article 75 of Directive 2014/24 has to be interpreted as precluding national legislation which provides that contract notices are to be published only in the regional official journal.

135. As regards the services for which the estimated value is below the threshold laid down in Article 4(d) of Directive 2014/24 and procedures that do not entail a choice within the meaning of Article 1(2) of that directive, the freedom of establishment enshrined in Article 49 TFEU must be interpreted as not precluding such national legislation, provided that that legislative measure pursues a legitimate objective recognised by EU law, and complies with the principles of equal treatment and proportionality, which is for the national court to ascertain.

C. The third question

136. If the first two questions are answered in the negative, by its third question, the referring court is asking, in essence, whether Articles 49 and 56 TFEU, Article 76 of Directive 2014/24 and Article 15(2) of the Services Directive must be interpreted as precluding national legislation, which provides for a selection criterion for the conclusion of the contractual action agreements at issue, according to which the contracting authorities may give weight to the fact that the potential tenderers for the provision of the social services in question are established in the place where such services are to be provided.

137. In order to answer that question, I shall analyse the compatibility of the selection criterion at issue with Directive 2014/24, the Services Directive and then with the fundamental freedoms.

1. The compatibility of the selection criterion at issue with Directive 2014/24

138. As regards the compatibility of the selection criterion at issue with Directive 2014/24, the issue of a geographical criterion has already been examined in *Grupo Hospitalario Quirón*, [126] which concerned tenders in the field of medical services. [127] In particular, the Court was called upon to assess the compatibility with Directive 2004/18 of a tender requirement according to

[125] See, inter alia, judgment of 13 November 2008, *Coditel Brabant* (C-324/07, EU:C:2008:621, paragraph 25 and the case-law cited).

[126] Judgment of 22 October 2015 (C-552/13, EU:C:2015:713).

[127] The case dealt with public contracts in the health sector falling within the scope of Annex II B to Directive 2004/18.

which a tenderer was to be located in the municipality where the medical services in question were to be provided. The Court stated that such a requirement constituted a 'territorial constraint on performance'.[128] That requirement did not ensure equal and non-discriminatory access to the contracts at issue by all tenderers, since it rendered those contracts accessible only to those tenderers who were able to provide the services in question in an establishment situated within the municipality designated by the contracting authorities.[129]

139. In the present case, it is apparent from Article 15(1)(a) of Decree 181/2017 that, in order to select the social initiative entities which will be responsible for providing the social services at issue, the contracting authorities may, inter alia, give weight to the fact that those entities are located in the area in which a given service is to be provided.[130] Thus, I believe that the geographical criterion at issue in the present case is similar to that which was at issue in *Grupo Hospitalario Quirón*. That criterion constitutes a 'territorial constraint on performance',[131] since it has the effect of putting at the disadvantage those tenderers who cannot provide the services in question in an establishment situated within a given municipality, despite the fact that they may satisfy the other conditions laid down in the contract documents and technical specifications of the contracts under consideration.

140. I therefore take the view that the selection criterion at issue in the main proceedings gives rise to a difference in treatment between the entities that meet that requirement and those that do not. Unless those two categories of potential tenderers are not in an objectively comparable situation or that difference in treatment is objectively justified, that requirement is contrary to the principle of equal treatment to which the award of public service contracts is subject under Article 76 of Directive 2014/24.

141. As to the question whether those two groups of potential tenderers are in an objectively comparable situation, it seems to me that that is the case, provided that their ability to provide the social services at issue is the same in terms of quality and cost. Therefore, subject to that proviso which is for the referring court to verify, I take the view that such a requirement treats objectively comparable situations differently.

142. As regards justification, there is nothing in either the national legislation at issue or the file provided to the Court that would suggest any justification for the selection criterion at issue. However, it is ultimately for the referring court to ascertain whether that is actually the case.

2. Compatibility of the selection criterion with the Services Directive

143. The Court is being asked whether the selection criterion for the conclusion of the contractual action agreements at issue is compatible with the Services Directive.

144. At the outset, it must be determined whether the social services at issue fall within the scope of that directive.

128 Judgment of 22 October 2015, *Grupo Hospitalario Quirón* (C-552/13, EU:C:2015:713, paragraph 28).

129 Ibid., paragraphs 29 to 33.

130 A similar criteria is provided for in Article 64(3)(a) of Law 5/1997.

131 Judgment of 22 October 2015 (C-552/13, EU:C:2015:713, paragraph 29).

145. In that regard, Article 2(2)(j) of the Services Directive, read in conjunction with recital 27 thereof, expressly excludes from the scope of that directive 'social services relating to social housing, childcare and support of families and persons permanently or temporarily in need which are provided by the State, by providers mandated by the State or by charities recognised as such by the State'.

146. Recital 27 explains that the objective of such exclusion is to ensure 'support for those who are permanently or temporarily in a particular state of need because of their insufficient family income or total or partial lack of independence and for those who risk being marginalised'. That recital adds that those 'services are essential in order to guarantee the fundamental right to human dignity and integrity and are a manifestation of the principles of social cohesion and solidarity and should not be affected by [the Services Directive]'.

147. I must point out that the Court has given the concept of 'social services' in Article 2(2)(j) of the Services Directive a two-fold definition. In its judgment in *Femarbel*, the Court held that only services which meet two cumulative conditions fall within the scope of the exclusion laid down in that provision. The first relates to the nature of the activities, whilst the second one concerns the status of the service provider. [132]

148. In order to satisfy the first condition, the activities at issue must be 'essential in order to guarantee the fundamental right to human dignity and integrity' and 'a manifestation of the principles of social cohesion and solidarity'. [133] In that case, the Court ruled that the national court had to ascertain whether the activities at issue are of a genuinely social nature, in that they are intended to provide the persons concerned with 'assistance and care appropriate to their loss of independence' accompanied by a specific programme of events, or the necessary care 'which cannot be provided by their close relatives on a continuous basis'.

149. In the present case, as mentioned earlier in this Opinion, the Annex to Decree 181/2017 lists a broad range of social services, which may vary according to their nature and the groups of persons using those services. [134] However, all those services appear to have the common objective of assisting persons in need and providing them with care. Therefore, I take the view that those services appear to satisfy the first condition put forward by the Court in *Femarbel*. [135]

150. As regards the second condition, the Court held in *Femarbel* that social services can be carried out by the State itself, a charity recognised as such by the State, or a private service provider mandated by the State. [136] In view of such a broad definition *ratione personae* given by the Court, the entities providing the services under the contractual action agreements at issue, which are non-profit associations, may fall within the scope of Article 2(2)(j) of the Services Directive, which is for the national court to ascertain.

132 Judgment of 11 July 2013 (C-57/12, EU:C:2013:517, paragraph 42).

133 Ibid., paragraph 43, which refers to the *Handbook on the implementation of the Services Directive*, Office for Official Publications of the European Communities, 2007.

134 See point 56 above.

135 Judgment of 11 July 2013 (C-57/12, EU:C:2013:517).

136 Ibid., paragraph 44. In that regard, the Court ruled that the national court had to determine whether there was an act of public authority conferring, in a clear and transparent manner, on the operators of day-care centres and night-care centres at issue a genuine obligation to provide such services under specific conditions, and whether such an approval may therefore be considered as a mandating act for the purposes of Article 2(2)(j) of the Services Directive (judgment of 11 July 2013, *Femarbel*, C-57/12, EU:C:2013:517, paragraph 52).

151. Consequently, I take the view that the Services Directive is not applicable to the social services provided for in Decree 181/2017, since those services are, pursuant to Article 2(2)(j) of that directive, expressly excluded from the scope of that directive.

3. Compatibility of the selection criterion with the fundamental freedoms

152. As regards the compatibility of the selection criterion at issue with the fundamental freedoms, as I have already explained in this Opinion, on the one hand, the contractual action agreements at issue appear to fall within the scope of freedom of establishment enshrined in Article 49 TFEU rather than that of freedom to provide services laid down in Article 56 TFEU.[137] Therefore, notwithstanding the fact that the third question referred by the national court relates to both of those freedoms, I consider that the answer given should be limited to the former. On the other hand, it is worth recalling that it is only if those contractual action agreements have a cross-border dimension that Article 49 TFEU may apply.[138]

153. As regards freedom of establishment, a selection criterion, such as that laid down in Article 15(1)(a) of Decree 181/2017, may hinder or render less attractive the exercise of freedom of establishment.[139] In that regard, I should point out that the Court has ruled that national legislation that precludes entities from being able to pursue an independent economic activity on the premises of their choice constitutes a restriction.[140] In the present case, the fact of establishing themselves in the Community of Valencia may entail financial consequences for and administrative burdens on the entities that have exercised that fundamental freedom.[141] That would be the case, for example, for an entity, established in a Member State other than Spain, which has set up a secondary establishment in that Member State but outside the Community of Valencia. Consequently, I take the view that the requirement at issue constitutes a restriction on freedom of establishment within the meaning of Article 49 TFEU.

154. However, it may still be justified if it pursues objectives recognised as legitimate by EU law and complies with the principle of proportionality.[142]

155. In the present case, I take the view that my findings set out in point 142 of the present Opinion concerning the justifications for the infringement of the principle of equal treatment under Article 76 of Directive 2014/24 apply *mutatis mutandis*. However, it is for the national court to carry out an assessment as to whether the criterion at issue pursues a legitimate objective recognised by EU law, is suitable to ensure the attainment of that objective and does not go beyond what is necessary to attain it.

137 See points 42 and 43 above.

138 See point 128 above.

139 See, for example, judgments of 5 February 2015, *Commission* v *Belgium* (C-317/14, EU:C:2015:63, paragraph 22), and of 20 December 2017, *Simma Federspiel* (C-419/16, EU:C:2017:997, paragraph 35 and the case-law cited).

140 See, to that effect, judgment of 1 June 2010, *Blanco Pérez and Chao Gómez* (C-570/07 and C-571/07, EU:C:2010:300, paragraph 53 and the case-law cited).

141 See, by way of analogy, judgment of 27 February 2020, *Commission* v *Belgium (Accountants)* (C-384/18, EU:C:2020:124, paragraph 76).

142 Judgments of 27 October 2005, *Commission* v *Spain* (C-158/03, not published, EU:C:2005:642, paragraph 70), and of 27 October 2005, *Contse and Others* (C-234/03, EU:C:2005:644, paragraph 41). More specifically, the Court held that fundamental freedoms preclude a selection criterion which rewards, by awarding extra points, the proximity of the installation to the place where the services are provided, in so far as that criterion is applied in a discriminatory manner, is not justified by imperative requirements in the general interest, is not suitable for securing the attainment of the objective which it pursues or goes beyond what is necessary to attain it, which is a matter for the national court to determine (judgment of 27 October 2005, *Contse and Others* (C-234/03, EU:C:2005:644, paragraph 79).

156. Lastly, for the sake of completeness and contrary to the submissions of the defendant and the Spanish Government, I should stress that the wording of the second indent of Article 1 of Protocol No 26 to the TFEU has no bearing on the question whether the selection criterion laid down in Article 15(1)(a) of Decree 181/2017 is compatible with freedom of establishment. That is because the values which that protocol seeks to protect are not reflected in the selection criterion at issue. Such a criterion, which is purely geographical, cannot be explained by the need to ensure 'diversity between various services of general economic interest and the differences in the needs and preferences of users that may result from a different geographical, social or cultural situation'. I consider, therefore, that the second indent of Article 1 of Protocol No 26 to the TFEU cannot be relied upon in order to justify geographical restrictions to the fundamental freedoms.

157. In conclusion, if the existence of any cross-border dimension were to be established in relation to the contractual action agreements at issue, Article 76 of Directive 2014/24 and Article 49 TFEU preclude a selection criterion for the conclusion of the contractual action agreements at issue whereby the contracting authorities may give weight to the fact that the potential tenderers for the provision of the social services in question are established in the place where such services are to be provided, unless that criterion pursues a legitimate objective recognised by EU law, is suitable to ensure the attainment of that objective and does not go beyond what is necessary to attain it, which is for the referring court to ascertain.

IV. Conclusion

158. I propose that the Court reply as follows to the questions referred by the Tribunal Superior de Justicia de la Comunidad Valenciana (High Court of Justice of the Community of Valencia, Spain) for a preliminary ruling:

Articles 74 to 76 of Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC, and Article 49 TFEU must be interpreted as not precluding national legislation, which allows a public authority to conclude, without complying with the procedural requirements imposed by EU law, a public contract under which that authority entrusts only non-profit entities with the provision of certain social services in return for reimbursement of the costs incurred by those entities, provided that such legislation complies with the principles of equal treatment and proportionality, which is for the referring court to ascertain.

Article 75(1) of Directive 2014/24 must be interpreted as precluding national legislation that requires that contract notices be published only in the regional official journal.

Article 76 of Directive 2014/24 and Article 49 TFEU preclude a national legislation which provides for a selection criterion for the conclusion of contractual action agreements whereby the contracting authorities may give weight to the fact that the potential tenderers for the provision of the social services in question are established in the place where such services are to be provided, unless that criterion pursues a legitimate objective recognised by EU law, is suitable to ensure the attainment of that objective and does not go beyond what is necessary to attain it, which is for the referring court to ascertain.