Reports of Cases

JUDGMENT OF THE COURT (Fourth Chamber)

14 July 2022 *

(Reference for a preliminary ruling – Articles 49 and 56 TFEU – Purely internal situation – Services in the internal market – Directive 2006/123/EC – Scope – Article 2(2)(j) – Public procurement – Directive 2014/24/EU – Concept of a 'public contract' – Articles 74 to 77 – Provision of social services in the form of personal assistance – Contractual action agreements with private, social initiative entities – Exclusion of profit-making operators – Location of the entity as a selection criterion)

In Case C-436/20,

REQUEST for a preliminary ruling under Article 267 TFEU from the Tribunal Superior de Justicia de la Comunidad Valenciana (High Court of Justice of the Community of Valencia, Spain), made by decision of 3 September 2020, received at the Court on 16 September 2020, in the proceedings

Asociación Estatal de Entidades de Servicios de Atención a Domicilio (ASADE)

v

Consejería de Igualdad y Políticas Inclusivas,

THE COURT (Fourth Chamber),

composed of C. Lycourgos (Rapporteur), President of the Chamber, S. Rodin, J.-C. Bonichot, L.S. Rossi and O. Spineanu-Matei, Judges,

Advocate General: L. Medina,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

– the Asociación Estatal de Entidades de Servicios de Atención a Domicilio (ASADE), by A. Martínez Gradoli, procuradora, and Y. Puiggròs Jiménez de Anta, abogada,

– the Consejería de Igualdad y Políticas Inclusivas, by I. Sánchez Lázaro, abogada,

* Language of the case: Spanish.

– the Spanish Government, by S. Jiménez García and J. Rodríguez de la Rúa Puig, acting as Agents,

– the Italian Government, by G. Palmieri, acting as Agent, assisted by S.L. Vitale, avvocato dello Stato,

– the Netherlands Government, by M.K. Bulterman, M.H.S. Gijzen and J. Langer, acting as Agents,

– the European Commission, by L. Armati, M. Jáuregui Gómez, P. Ondrůšek, E. Sanfrutos Cano and G. Wils, acting as Agents,

– the Norwegian Government, by J.T. Kaasin and H. Røstum, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 3 February 2022,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Articles 49 and 56 TFEU, Articles 76 and 77 of Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC (OJ 2014 L 94, p. 65), read in conjunction with Article 74 thereof and Annex XIV thereto, and Article 15(2) of Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market (OJ 2006 L 376, p. 36).

2 The request has been made in proceedings brought by the Asociación Estatal de Entidades de Servicios de Atención a Domicilio (ASADE) (State Association of Domiciliary Care Providers, Spain) concerning the legality of Decreto 181/2017 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 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) of 17 November 2017 ('Decree 181/2017').

Legal framework

European Union law

Protocol No 26

3 Article 1 of Protocol (No 26) on services of general interest, annexed to the FEU Treaty ('Protocol No 26'), provides:

'The shared values of the Union in respect of services of general economic interest within the meaning of Article 14 of the Treaty on the Functioning of the European Union include in particular:

– the essential role and the wide discretion of national, regional and local authorities in providing, commissioning and organising services of general economic interest as closely as possible to the needs of the users;

– the diversity between various services of general economic interest and the differences in the needs and preferences of users that may result from different geographical, social or cultural situations;

– a high level of quality, safety and affordability, equal treatment and the promotion of universal access and of user rights.'

Directive 2014/24

4 Recitals 4, 6 and 114 of Directive 2014/24 state:

'(4) … Situations where all operators fulfilling certain conditions are entitled to perform a given task, without any selectivity, such as customer choice and service voucher systems, should not be understood as being procurement but simple authorisation schemes (for instance licences for medicines or medical services).

…

(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.

…

(114) Certain categories of services continue by their very nature to have a limited cross-border dimension, namely such services that are known as services to the person, such as certain social, health and educational services. Those services are provided within a particular context that varies widely amongst Member States, due to different cultural traditions. A specific regime should therefore be established for public contracts for those services, with a higher threshold than that which applies to other services.

Services to the person with values below that threshold will typically not be of interest to providers from other Member States, unless there are concrete indications to the contrary, such as Union financing for cross-border projects.

Contracts for services to the person above that threshold should be subject to Union-wide transparency. Given the importance of the cultural context and the sensitivity of these services, Member States should be given wide discretion to organise the choice of the service providers in the way they consider most appropriate. The rules of this Directive take account of that imperative, imposing only the observance of basic principles of transparency and equal treatment and making sure that contracting authorities are able to apply specific quality criteria for the choice of service providers, such as the criteria set out in the voluntary European Quality Framework for Social Services, published by the Social Protection Committee. When determining the procedures to be used for the award of contracts for services to the person, Member States should take Article 14 TFEU and Protocol No 26 into account. In so doing, Member States should also pursue the objectives of simplification and of alleviating the administrative burden for contracting authorities and economic operators; it should be clarified that so doing might also entail relying on rules applicable to service contracts not subject to the specific regime.

Member States and public authorities remain free to provide those services themselves or to organise social services in a way that does not entail the conclusion of public contracts, for example through the mere financing of such services or by granting licences or authorisations to all economic operators meeting the conditions established beforehand by the contracting authority, without any limits or quotas, provided that such a system ensures sufficient advertising and complies with the principles of transparency and non-discrimination.'

5 Article 1 of that directive 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.

…

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

…'

6 Article 2 of that directive provides:

‘1. For the purposes of this Directive, the following definitions apply:

…

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

…

9. “public service contracts” means public contracts having as their object the provision of services other than those referred to in point 6;

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

…’

7 In accordance with Article 10 of Directive 2014/24, entitled ‘Specific exclusions for service contracts’:

‘This Directive shall not apply to public service contracts for:

…

(h) civil defence, civil protection, and danger prevention services that are provided by non-profit organisations or associations, and which are covered by CPV codes 75250000-3, 75251000-0, 75251100-1, 75251110-4, 75251120-7, 75252000-7, 75222000-8, 98113100-9 and 85143000-3 except patient transport ambulance services;

…’

8 Title III of that directive, entitled ‘Particular procurement regimes’, contains, inter alia, Chapter I, relating to ‘social and other specific services’, which includes Articles 74 to 77 of that directive.

9 Article 74 of Directive 2014/24 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.’

10 Article 75 of that directive provides:

‘1. Contracting authorities intending to award a public contract for the services referred to in Article 74 shall make known their intention by any of the following means:

(a) by means of a contract notice, which shall contain the information referred to in Annex V Part H, in accordance with the standard forms referred to in Article 51; or

(b) by means of a prior information notice, which shall be published continuously and contain the information set out in Annex V Part I. The prior information notice shall refer specifically to the types of services that will be the subject of the contracts to be awarded. It shall indicate that the contracts will be awarded without further publication and invite interested economic operators to express their interest in writing.

The first subparagraph shall, however, not apply where a negotiated procedure without prior publication could have been used in conformity with Article 32 for the award of a public service contract.

2. Contracting authorities that have awarded a public contract for the services referred to in Article 74 shall make known the results of the procurement procedure by means of a contract award notice, which shall contain the information referred to in Annex V Part J, in accordance with the standard forms referred to in Article 51. They may, however, group such notices on a quarterly basis. In that case, they shall send the grouped notices within 30 days of the end of each quarter.

3. The Commission shall establish the standard forms referred to in paragraphs 1 and 2 of this Article by means of implementing acts. Those implementing acts shall be adopted in accordance with the advisory procedure referred to in Article 89(2).

4. The notices referred to in this Article shall be published in accordance with Article 51.’

11 Article 76 of that directive 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.’

12 In accordance with Article 77 of that directive:

‘1. 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, which are covered by CPV codes 75121000-0, 75122000-7, 75123000-4, 79622000-0, 79624000-4, 79625000-1, 80110000-8, 80300000-7, 80420000-4, 80430000-7, 80511000-9, 80520000-5, 80590000-6, from 85000000-9 to 85323000-9, 92500000-6, 92600000-7, 98133000-4, 98133110-8.

2. An organisation referred to in paragraph 1 shall fulfil all of the following conditions:

(a) its objective is the pursuit of a public service mission linked to the delivery of the services referred to in paragraph 1;

(b) profits are reinvested with a view to achieving the organisation’s objective. Where profits are distributed or redistributed, this should be based on participatory considerations;

(c) the structures of management or ownership of the organisation performing the contract are based on employee ownership or participatory principles, or require the active participation of employees, users or stakeholders; and

(d) the organisation has not been awarded a contract for the services concerned by the contracting authority concerned pursuant to this Article within the past three years.

3. The maximum duration of the contract shall not be longer than three years.

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

5. Notwithstanding Article 92, the Commission shall assess the effects of this Article and report to the European Parliament and the Council by 18 April 2019.’

Directive 2006/123

13 Recital 27 of Directive 2006/123 states:

‘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 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.’

14 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:

(a) non-economic services of general interest;

…

(f) healthcare services whether or not they are provided via healthcare facilities, and regardless of the ways in which they are organised and financed at national level or whether they are public or private;

…

(i) activities which are connected with the exercise of official authority as set out in Article 45 of the Treaty;

(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;

…'

Spanish law

Organic Law 5/1982

15 Under Article 49(1)(24) of Ley Orgánica 5/1982, de Estatuto de Autonomía de la Comunidad Valenciana (Organic Law 5/1982 on the Statute of Autonomy of the Community of Valencia) of 1 July 1982 (BOE No 164 of 10 July 1982), in the version applicable to the facts in the main proceedings, the Community of Valencia has exclusive competence in respect of social services and public institutions for the protection and assistance of minors, young people, migrants, the elderly, the disabled and other groups or sectors in need of social protection.

Law 5/1997

16 The powers of the Valencian Community under Organic Law 5/1982 were implemented by Ley 5/1997 de la Generalitat Valenciana por la cual se regula el Sistema de Servicios Sociales en el ambito de la Comunidad Valenciana (Law 5/1997 of the Valencia Regional Government governing the Social Services System within the Territory of the Community of Valencia) of 26 June 1997 (BOE No 192 of 12 August 1997, p. 24405).

17 That law was amended by Ley 13/2016, de medidas fiscales, de gestión administrativa y financiera, y de organización de la Generalitat (Law 13/2016 of the Community of Valencia on measures in respect of tax, administrative and financial management and the organisation of the Government of the Community of Valencia) of 29 December 2016 (BOE No 34 of 9 February 2017, p. 8694), before being repealed by Ley 3/2019 de servicios sociales inclusivos de la Comunitat Valenciana (Law 3/2019 of the Community of Valencia on inclusive social services in the Community of Valencia) of 18 February 2019 (BOE No 61 of 12 March 2019, p. 23249) ('Law 3/2019').

18 Article 44 bis of Law 5/1997, as amended by Law 13/2016 ('Law 5/1997'), entitled 'Methods of providing the services of the public social services system', provides:

'1. The public administrations forming part of the public social services system shall provide persons with the services provided for by law or by the catalogue of social services using the following methods:

(a) Direct management or the use of own resources, which is the preferred method of supply.

(b) Indirect management in accordance with one of the formats established in the rules on public sector contracts.

(c) Contractual action agreements concluded with private, social initiative entities.

2. The provision of social services by the centres or services of an administration other than the competent administration shall be carried out under any form of collaboration and cooperation between public administrations provided for by law'.

19 Article 53 of that law, entitled 'Conclusion of agreements with private social initiative entities', provides:

'1. Public administrations responsible for social services may entrust private social initiative entities with the provision of the services provided for in the catalogue of social services through the use of contractual action agreements, provided that those entities have the appropriate administrative accreditation and are entered as such in the corresponding register of entities, centres and social services.

2. Under the provisions of the law, the legal regime is established by regulation for each specific area of operation, by laying down the conditions for action by contracted private centres which participate in the social services system under public responsibility, by determining the conditions of access, the conditions of service, selection procedures, the maximum duration and grounds for terminating the agreement, as well as the obligations of the parties.

3. The agreement concluded between the administration and the private entity establishes the rights and obligations of each party in respect of its economic regime, duration, extension and termination and, where appropriate, the number and type of units agreed upon, and other legal conditions.

4. Access to places which are the subject of an agreement with private social initiative entities always takes place through the administration that awarded the contract.

5. Social initiative entities comprise foundations, associations, voluntary organisations and other non-profit entities carrying out social service activities. In particular, cooperative societies classified as non-profit entities in accordance with their specific legislation shall be regarded as social initiative entities.'

20 Article 56 of that law, entitled 'Agreements', provides, in paragraphs 1 and 2:

1. The Generalitat [(Valencia Regional Government)] shall contribute financially to developing and enhancing the skills of local entities and to supporting programmes with social content carried out by non-profit entities.

2. Similarly, the Generalitat shall allocate annually in the corresponding budgets the appropriations needed to finance the contractual action agreements concluded with private social initiative entities.'

21 Articles 62 to 66 of that law are contained in Title VI thereof, entitled 'Contractual action'.

22 Under Article 62 of Law 5/1997, entitled 'Concept, general regime and principles of contractual action':

'1. Contractual action agreements are organisational instruments that are not contractual in nature by means of which the competent administrations may organise the provision of social services to the person, the funding and monitoring of and access to which falls within their competence, in accordance with the procedure and requirements laid down in this law and the applicable sectoral rules.

2. Public administrations shall ensure that their contractual action with third parties for the purpose of providing social services to the person complies with the following principles:

(a) Principle of subsidiarity, under which contractual action concluded with private non-profit organisations is subject to the prior condition of optimal use of own resources.

(b) Principle of solidarity, by encouraging the involvement of entities in the third area of social action in the provision of social services to the person.

(c) Principle of equality, by ensuring that contractual action guarantees that users are given the same attention as that given to users supplied directly by the administration.

(d) Principle of publicity, by providing that calls for applications for contractual actions are to be published in the *Diari Oficial de la Generalitat Valenciana* [(Official Journal of the Valencia Regional Government)].

(e) Principle of transparency, by publishing on the transparency portal the contractual action agreements in force at any time.

(f) Principle of non-discrimination, by laying down the conditions for access to contractual action ensuring equality between entities which choose to participate.

(g) Principle of budgetary efficiency, by providing that the economic consideration which contracted entities may receive in accordance with the maximum rates or modules in force shall be capped at the variable, fixed and permanent costs of providing the service, without including any commercial profit.'

23 Article 63 of that law, entitled 'Substantive scope and preconditions for contractual action', provides:

'1. In the field of social services, services to the person which may be the subject of a contractual action shall be determined by regulation from among the services provided for in the catalogue of services.

2. The following may be the subject of a contractual action:

(a) The reservation and occupation of places for the purpose of their occupation by users of the public social services system, access to such places being authorised by the competent public administrations in accordance with the criteria established by the present law.

(b) The integral management of supplies, services or centres in accordance with provisions established by regulation.

3. Where the provision of the service involves processes requiring different types of intervention at different centres or services, the competent administration may conclude a single contractual action agreement imposing mandatory coordination and collaboration mechanisms.

4. Access to the contractual action regime is open to private social initiative entities providing social services which have an administrative accreditation and are entered in the corresponding register of entities, centres and social services.

5. The contractual action regime is incompatible with the grant of economic subsidies to finance activities or services covered by the contractual arrangement.'

24 In accordance with Article 64 of that law, entitled 'Procedure for contractual arrangements and preference criteria':

'1. Sectoral rules govern the procedures to ensure that entities meeting the established criteria can adhere to the contractual action regime in accordance with the general principles established in Article 62 of this law.

2. For the adoption of contractual action agreements, the sectoral rules establish the criteria for the selection of entities where such selection proves necessary on account of budgetary limits or the number and characteristics of the services which may be contracted.

3. The selection of entities may be based on the following criteria:

(a) establishment in the place where the service is provided;

…'

25 Article 65 of the same law, entitled 'Formalisation and effects of the contracted action', provides:

'1. Contractual action agreements shall be formalised in administrative agreement documents the content of which is established by the applicable sectoral rules.

2. Contractual agreements require the contracted entity to provide persons with social services under the conditions established by the applicable sectoral rules and by the contractual agreement adopted in accordance with the latter.

3. Apart from the fees provided for, no sums may be collected from users for contracted services.

4. The collection from users of any remuneration for the provision of additional services and the amount thereof shall be authorised in advance by the administration granting the contractual arrangement.'

26 Article 66 of Law 5/1997, entitled 'Financing of the contractual action', states:

'1. Each call for applications shall set the amount of the economic modules corresponding to each service which may be the subject of the contractual action.

2. Maximum tariffs or economic modules compensate the maximum variable, fixed and permanent costs of providing services, guaranteeing economic neutrality for the entity providing the services, without including any commercial profit.

3. The amounts resulting from the contractual action shall be paid after the relevant invoice has been produced by the contracted entity, by deduction using the budget heading intended for the financing of the administration's current expenditure.'

27 In accordance with Article 67 of that law, entitled 'Duration of contractual agreements':

'The duration of contractual agreements may not exceed four years. Where they are expressly provided for in the contractual agreement, any extensions may increase the total duration of the contractual agreement to 10 years. At the end of that period, the competent administration may conclude a new contractual agreement.'

Decree 181/2017

28 The objective of Decree 181/2017, which was adopted in implementation of Law 5/1997, is, in accordance with Article 1 thereof, to regulate the requirements, the selection procedures, the content and the basic conditions for the establishment, performance and development of contractual agreements, as a method of managing social services using private social initiative entities in order to provide persons with the social services provided for by law and by the catalogue of social services, or by their implementing acts.

29 Article 3(e) of that decree recognises as private social initiative entities 'foundations, associations, voluntary organisations and other non-profit entities carrying out social service activities', as well as cooperative societies classified as non-profit entities in accordance with their specific legislation.

30 Despite the repeal of Law 5/1997 by Law 3/2019, Decree 181/2017 remains in force, in accordance with the single repealing provision of the latter law.

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

31 ASADE has brought before the Tribunal Superior de Justicia de la Comunidad Valenciana (High Court of Justice of the Community of Valencia, Spain) an action for annulment of Decree 181/2017, in support of which it submits that Article 44 bis(1)(c), Article 53, Article 56(2) and Title VI of Law 5/1997, which are implemented by that decree, are contrary to EU law on the ground that they exclude profit-making entities from the possibility of providing certain social services in the form of personal assistance under a contractual action agreement, while allowing all non-profit-making entities, and not solely voluntary organisations, to provide such services in return for payment without having to go through a transparent competitive process that ensures equal treatment between interested economic operators.

32 The referring court questions whether the use of contractual action agreements, as governed by Law 5/1997, is compatible with Articles 49 and 56 TFEU, Articles 76 and 77 of Directive 2014/24 and Article 15(2) of Directive 2006/123. It points out that an interpretation of those provisions of EU law remains necessary despite the repeal of Law 5/1997 by Law 3/2019, since the latter law did not alter the arrangements for public-private agreements for the provision of social services. Moreover, it states that, in order to assess the lawfulness of that decree, it is necessary to ascertain whether Law 5/1997, which implemented that decree, is compatible with EU law.

33 In those circumstances, the Tribunal Superior de Justicia de la Comunidad Valenciana (High Court of Justice of the Community of Valencia) decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

‘(1) Must Article 49 TFEU and Articles 76 and 77 of Directive [2014/24] (as read with Article 74 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 [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 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 and Annex XIV thereto) and Article 15(2) of Directive [2006/123] 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 [Directive 2006/123] but also the criterion that the organisation be established in the place where the service is to be provided?'

The questions referred for a preliminary ruling

Admissibility

34 As a preliminary point, it must be recalled that, according to settled case-law, questions relating to EU law enjoy a presumption of relevance. The Court may refuse to rule on a question referred by a national court for a preliminary ruling only where it is quite obvious that the interpretation of EU law that is sought bears no relation to the actual facts of the main action or its purpose, where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it (judgments of 15 December 1995, *Bosman*, C-415/93, EU:C:1995:463, paragraphs 59 and 61, and of 25 November 2021, *État luxembourgeois (Information on a group of taxpayers)*, C-437/19, EU:C:2021:953, paragraph 81).

35 The need to provide an interpretation of EU law which will be of use to the national court makes it necessary for that court to define the factual and legal context of the questions it is asking or, at the very least, to explain the factual circumstances on which those questions are based. The order for reference must also set out the precise reasons why the national court is unsure as to the interpretation of EU law and considers it necessary to refer a question to the Court for a preliminary ruling (judgment of 10 March 2022, *Commissioners for Her Majesty's Revenue and Customs (Comprehensive sickness insurance cover)*, C-247/20, EU:C:2022:177, paragraph 75 and the case-law cited).

36 It is in the light of those preliminary observations that the admissibility of the questions referred for a preliminary ruling must be assessed.

Repeal of Law 5/1997

37 The defendant in the main proceedings points out that the questions referred for a preliminary ruling are inadmissible on the ground that Law 5/1997, the conformity of which with EU law is challenged indirectly in the action in the main proceedings, was repealed by Law 3/2019.

38 In that regard, it is clear from the request for a preliminary ruling that the referring court is called upon to rule on the lawfulness of Decree 181/2017 on the date of its adoption. On that date, it is established that Law 5/1997, which is implemented by that decree, was still in force. Moreover, it is not disputed that that law, first, denied profit-making entities the possibility of concluding a contractual action agreement and, second, allowed the criterion of local establishment to be used in the context of the conclusion of such an agreement.

39 In those circumstances, the questions referred for a preliminary ruling retain a connection with the subject matter of the dispute in the main proceedings.

Directive 2014/24

40 The Spanish, Italian and Netherlands Governments express doubts as to the applicability of Directive 2014/24 to contractual action agreements provided for by the national legislation at issue in the main proceedings.

41 In that regard, it must be recalled that, where, as in the present case, it is not obvious that the interpretation of an EU provision bears no relation to the facts of the main action or its purpose, the objection alleging the inapplicability of that provision to the case in the main action does not relate to the admissibility of the request for a preliminary ruling, but concerns the substance of the questions (judgments of 12 December 2019, *Slovenské elektrárne*, C-376/18, EU:C:2019:1068, paragraph 29, and of 28 October 2021, *Komisia za protivodeystvie na koruptsiyata i za otnemane na nezakonno pridobitoto imushtestvo*, C-319/19, EU:C:2021:883, paragraph 25).

Directive 2006/123

42 Under Article 2(2)(j) of Directive 2006/123, that directive does not apply to 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.

43 First, as the Advocate General stated in essence in points 145 to 150 of her Opinion, the file before the Court does not make it possible to ensure that the social services in the form of personal assistance concerned by the national legislation at issue in the main proceedings are not among the services excluded from the scope of Directive 2006/123 under Article 2(2)(j) thereof, as interpreted by the Court in paragraphs 42 to 49 of the judgment of 11 July 2013, *Femarbel* (C-57/12, EU:C:2013:517).

44 Second, the absence of any clarification in that regard in the order for reference also does not enable the Court to determine whether, even if certain social services in the form of personal assistance covered by the national legislation at issue in the main proceedings fall outside the exclusion provided for in Article 2(2)(j) of that directive, they are included within the scope of another of the exclusions provided for in Article 2(2) of that directive, and in particular points (f) and (i) thereof.

45 In those circumstances, since the referring court has not put the Court in a position to satisfy itself that the factual premiss on which the third question referred is based does indeed fall within the scope of Directive 2006/123, that question is inadmissible in so far as it concerns the interpretation of Article 15(2) thereof.

Articles 49 and 56 TFEU

46 Lastly, it must be observed that, although all the elements of the dispute in the main proceedings are confined to a single Member State, the questions referred for a preliminary ruling concern, inter alia, the interpretation of Articles 49 and 56 TFEU.

47 In such a context, it is for the referring court to indicate to the Court, in accordance with the requirements of Article 94 of the Rules of Procedure of the Court, in what way the dispute pending before it, despite its purely domestic character, has a connecting factor with the

provisions of EU law on the fundamental freedoms that makes the preliminary ruling on interpretation necessary for it to give judgment in that dispute (judgment of 15 November 2016, *Ullens de Schooten*, C-268/15, EU:C:2016:874, paragraph 55, and order of 6 May 2021, *Ministero dell'Istruzione, dell'Università e della Ricerca and Others*, C-571/20, not published, EU:C:2021:364, paragraph 23).

48 The referring court fails to explain how, despite the purely internal nature of the dispute pending before it, an interpretation of Articles 49 and 56 TFEU is necessary. More specifically, that court does not expressly state that it is in one of the situations referred to in paragraphs 50 to 53 of the judgment of 15 November 2016, *Ullens de Schooten* (C-268/15, EU:C:2016:874).

49 Moreover, although, in accordance with the Court's settled case-law, the award of contracts which, in view of their value fall outside the scope of the directives on public procurement, is nonetheless subject to the fundamental rules and the general principles of the FEU Treaty, in particular, the principles of equal treatment and of non-discrimination on grounds of nationality and the consequent obligation of transparency, provided that those contracts are of certain cross-border interest, the referring court may not merely submit to the Court of Justice evidence showing that such an interest cannot be ruled out but must, on the contrary provide information capable of proving that it exists (see, to that effect, order of 12 November 2020, *Novart Engineering*, C-170/20, not published, EU:C:2020:908, paragraphs 33 and 35). In the present case, the referring court has failed to provide the Court with such information.

50 Therefore, the questions referred for a preliminary ruling are inadmissible, in so far as they concern the interpretation of Articles 49 and 56 TFEU.

51 It follows from all the foregoing considerations that the questions referred for a preliminary ruling are admissible except in so far as they concern the interpretation of Articles 49 and 56 TFEU and Article 15(2) of Directive 2006/123.

The first and second questions

52 By its first two questions, which it is appropriate to examine together, the referring court asks, essentially, whether Articles 76 and 77 of Directive 2014/24 must be interpreted as precluding national legislation which reserves the right for private non-profit organisations to conclude agreements under which those organisations provide social services in the form of personal assistance in return for reimbursement of the costs which they incur, irrespective of the estimated value of those services, and without that legislation imposing any obligation on those entities to comply with the requirements laid down in Article 77.

The applicability of Directive 2014/24

53 In order to answer those questions, it is necessary, as a preliminary point, to determine whether agreements such as those at issue in the main proceedings are public contracts covered by Directive 2014/24.

54 In that regard, in accordance with Article 1 thereof, Directive 2014/24 establishes rules on the procurement procedures 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 thereof. Article 2(1)(5) of that directive defines public contracts for the purposes of that directive

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.

55 From that perspective, it must be observed, in the first place, that, since the concept of 'public contract' is a concept of EU law, the classification given to contractual action agreements by Spanish law is irrelevant (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).

56 Thus, the clarification in Article 62(1) of Law 5/1997, that such agreements constitute 'organisational instruments that are not contractual in nature', is not sufficient to exclude them from the scope of Directive 2014/24.

57 Moreover, contrary to the submissions of the Netherlands Government, it is not apparent from the request for a preliminary ruling that those contractual action agreements should, in practice, be treated in the same way as unilateral administrative measures which, by the mere will of the contracting authorities, are binding on the private non-profit-making entities which are the contracting parties thereof (see, in that regard, judgments of 19 April 2007, *Asemfo*, C-295/05, EU:C:2007:227, paragraphs 52 to 55, and of 18 December 2007, *Asociación Profesional de Empresas de Reparto y Manipulado de Correspondencia*, C-220/06, EU:C:2007:815, paragraphs 51 to 55).

58 In the second place, in order to fall within the scope of Directive 2014/24, the contractual action agreements at issue in the main proceedings must consist of public service contracts within the meaning of Article 2(1)(9) thereof.

59 In that regard, first, the concept of 'services', within the meaning of that provision, must be interpreted in the light of the freedom to provide services enshrined in Article 56 TFEU, the scope of which is limited to economic activities (see, to that effect, judgments of 29 April 2010, *Commission* v *Germany*, C-160/08, EU:C:2010:230, paragraphs 73 and 74, and of 23 February 2016, *Commission* v *Hungary*, C-179/14, EU:C:2016:108, paragraph 154).

60 More specifically, it must be observed that services normally provided for remuneration constitute economic activities, since the essential characteristic of remuneration resides in the fact that it constitutes financial consideration for the service in question, without however having to be paid for by the recipient of that service (judgment of 23 February 2016, *Commission* v *Hungary*, C-179/14, EU:C:2016:108, paragraphs 153 to 155). Furthermore, it follows from Article 62 TFEU, read together with Article 51 of that Treaty, that the freedom to provide services does not extend to activities which in a Member State are connected, even occasionally, with the exercise of official authority.

61 As confirmed in recital 6 of Directive 2014/24, only activities of an economic nature, in accordance with the preceding paragraph, may, therefore, be the subject of a public service contract, within the meaning of Article 2(1)(9) thereof. Moreover, such an interpretation is supported by Article 2(1)(10) of that directive, under which an economic operator, within the meaning of that directive, is characterised by the fact that it offers the execution of works or a work, the supply of products or the provision of services on the market.

62 That said, the fact that the contract is concluded with a non-profit-making entity does not preclude that entity from being able to carry out an economic activity, within the meaning of Directive 2014/24, with the result that that factor is irrelevant as regards the application of the rules of EU law on public contracts (see, to that effect, judgments of 19 June 2014, *Centro Hospitalar de Setúbal and SUCH*, C-574/12, EU:C:2014:2004, paragraph 33 and the case-law cited, and of 28 January 2016, *CASTA and Others*, C-50/14, EU:C:2016:56, paragraph 52).

63 Furthermore, services provided for remuneration which, without falling within the exercise of public powers, are carried out in the public interest and without a profit motive and are in competition with those offered by operators pursuing a profit motive, may be regarded as economic activities (see, by analogy, judgment of 6 September 2011, *Scattolon*, C-108/10, EU:C:2011:542, paragraph 44 and the case-law cited).

64 Second, with regard, more specifically, to the provision of services which, as in the present case, have a social purpose, it is true that Article 1(5) of Directive 2014/24 states that that directive does not affect the way in which the Member States organise their social security systems. Moreover, according to the Court's settled case-law, the activities of bodies managing a social security scheme do not, in principle, constitute economic activities where they are based on the principle of solidarity and those activities are subject to State supervision (see, to that effect, judgment of 11 June 2020, *Commission and Slovak Republic* v *Dôvera zdravotná poisťovňa*, C-262/18 P and C-271/18 P, EU:C:2020:450, paragraph 31 and the case-law cited).

65 That said, that is not necessarily the case with specific social services which are provided by private operators, the cost of which is borne by either the State itself, or by those social security bodies. The Court has also held that the pursuit of a social objective or the taking into account of the principle of solidarity in the context of the provision of services does not, as such, prevent the provision of these services from being regarded as an economic activity (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, and of 12 September 2000, *Pavlov and Others*, C-180/98 to C-184/98, EU:C:2000:428, paragraph 118).

66 In the present case, as the Advocate General noted in points 55 to 61 of her Opinion, it would appear that, at the very least, certain social services in the form of personal assistance, falling within the scope of the national legislation at issue in the main proceedings, are provided in return for remuneration and do not fall within the exercise of official authority, with the result that such activities may be regarded as being of an economic nature and, therefore, as constituting services within the meaning of Directive 2014/24.

67 In the third place, the pecuniary nature of a public contract presupposes that each of the parties undertakes to provide one form of consideration in exchange for another, although that does not mean that the consideration given by the contracting authority consists solely in the reimbursement of the expenditure incurred in providing the agreed service (see, to that effect, judgment of 10 September 2020, *Tax-Fin-Lex*, C-367/19, EU:C:2020:685, paragraphs 25 and 26 and the case-law cited). Accordingly, a contract cannot fall outside the concept of a 'public service contract' merely because, as appears to be the case here, the remuneration is limited to reimbursement of the expenditure incurred to provide the agreed service (judgment of 28 January 2016, *CASTA and Others*, C-50/14, EU:C:2016:56, paragraph 52).

68 In the fourth place, as confirmed by recital 4 and the final paragraph of recital 114 of Directive 2014/24, procedures, whereby the contracting authority refrains from comparing and classifying admissible tenders or designating one or more economic operators to whom contractual exclusivity is awarded, do not fall within the scope of that directive (see, to that effect, judgments of 2 June 2016, *Falk Pharma*, C-410/14, EU:C:2016:399, paragraphs 37 to 42, and of 1 March 2018, *Tirkkonen*, C-9/17, EU:C:2018:142, paragraphs 29 to 35).

69 That said, it is apparent from replies of ASADE, the Spanish Government and the defendant in the main proceedings to the questions put by the Court that the award of a contractual action agreement is, in practice, preceded by a selection of the private non-profit organisations which have expressed an interest in providing the social services in the form of personal assistance which are the subject matter of that agreement, which, however, is a matter for the referring court to verify.

70 In the fifth place, it is expressly stated in the first question referred that the national legislation at issue in the main proceedings applies to all contractual action agreements, irrespective of their estimated value. It follows that it is possible that that legislation whose conformity with EU law must be reviewed by the referring court, may concern contractual action agreements the estimated value of which is equal to or greater than the thresholds laid down in Article 4 of Directive 2014/24.

71 In the light of the foregoing, the legislation at issue in the main proceedings appears to govern, at least in part, the award of public contracts subject to Directive 2014/24.

72 Finally, it is important to add, while it is regrettable that the request for a preliminary ruling failed to list the specific categories of social services in the form of personal assistance covered by the national legislation at issue in the main proceedings, that did not prevent the Court, contrary to what the Italian Government appears to argue, from satisfying itself that the interpretation of Directive 2014/24 is related to the subject of the dispute in the main proceedings.

73 First, it is clear from the documents before the Court that at least some of the social services in the form of personal assistance that may be the subject of a contractual action agreement fall within the scope of the services listed in Annex XIV to Directive 2014/24 and, second, the questions referred concern the interpretation, not of the provisions of that directive, which are generally applicable to procedures for the award of public contracts, but solely Articles 74 to 77 thereof, which specifically establish a simplified regime for the award of public contracts for services covered by that annex.

74 Accordingly, those questions must be examined solely in the light of Articles 74 to 77 of Directive 2014/24.

The requirements deriving from Directive 2014/24

75 In order to determine whether Articles 74 to 77 of Directive 2014/24 preclude legislation such as that at issue in the main proceedings, it must be observed, in the first place, that the simplified regime for the award of public contracts laid down in those articles is justified, as stated in recital 114 of Directive 2014/24, by the limited cross-border dimension of the services referred to in Annex XIV thereto, and by the fact that those services are provided within a particular context that varies widely amongst Member States due to different cultural traditions.

76 In the second place, Article 77 of Directive 2014/24 provides that, for some of the services referred to in Annex XIV thereto, the Member States may allow contracting authorities to reserve the right for 'organisations', such as those defined in paragraph 2 of that article, to participate in procedures for the award of public contracts, the object of which is the provision of such services.

77 Article 77(2) of Directive 2014/24 sets out the strict conditions under which an economic operator may be regarded as an 'organisation' within the meaning of that article. Accordingly, it is essential that the aim of that economic operator is the pursuit of a public service mission linked to the delivery of the social or special services referred to in that article, that the profits of that economic operator are reinvested with a view to achieving such an objective and that, where those profits are distributed or redistributed, such an operation is based on participatory considerations. Moreover, the structures of management or ownership of that economic operator must be based on employee ownership or participatory principles or require the active participation of employees, users or stakeholders.

78 Moreover, it follows from Article 77(2)(d) and (3) of Directive 2014/24 that a contracting authority may award a public contract to an 'organisation' on the basis of the procedure laid down in that article only for a period not exceeding three years and only provided that that contracting authority has not already awarded that 'organisation' a contract for the services referred to in that article during the preceding three years.

79 In the present case, as confirmed by the wording of the first question referred for a preliminary ruling, the national legislation at issue in the main proceedings stipulates that the right to take part in procedures for the award of contractual action agreements is reserved for private non-profit organisations, without requiring those entities to comply with all of the conditions laid down in Article 77 of Directive 2014/24.

80 That said, it cannot be concluded from that factor that such legislation is necessarily incompatible with the simplified regime provided for in Articles 74 to 77 of Directive 2014/24.

81 Article 77 of that directive has a very specific scope since it expressly guarantees that Member States may, for some of the services covered by that simplified regime, allow contracting authorities to reserve the right to participate in procedures for the award of public contracts relating to such services, by operation of law, solely for economic operators meeting all the conditions laid down in that article.

82 Thus, having regard to the specific features of the legal regime which it establishes, and in the light of the wording of Articles 74 to 77 of Directive 2014/24, Article 77 thereof cannot be regarded as covering, in an exhaustive manner, the cases in which public contracts for the provision of a service referred to in Annex XIV to that directive may be reserved for certain categories of economic operators.

83 In the third place, it must be observed that Article 76 of Directive 2014/24 lays down the rules, derogating from ordinary law, which are applicable to the award of all public contracts relating to social services and other specific services listed in Annex XIV to that directive.

84 Article 76 obliges Member States, first, to put in place procurement rules requiring contracting authorities to comply with the principles of transparency and equal treatment of economic operators and, second, to ensure that those rules allow contracting authorities to take into account the specificities of the services covered by such procurement procedures. In the latter

regard, Member States must allow contracting authorities to take into account the need to ensure the quality, continuity, accessibility, affordability, availability and comprehensiveness of those services, the specific needs of different categories of users, the involvement and empowerment of users and innovation.

85 As confirmed by recital 114 of Directive 2014/24, the legal regime established by that directive in Article 76 is characterised by the broad discretion enjoyed by the Member States to organise, in the way they consider most appropriate, the choice of the providers of the services listed in Annex XIV to that directive. It also follows from that recital that the Member States must also take account of Protocol No 26, which provides, inter alia, for the broad discretion of national authorities to commission services of general economic interest as closely as possible to the needs of the users.

86 It is therefore necessary to examine whether the principles of equal treatment and transparency, as referred to in Article 76 of Directive 2014/24, preclude national legislation which reserves the right to participate in procedures for the award of public contracts for the provision of social services in the form of personal assistance, covered by Annex XIV thereto, for private non-profit organisations, even where they do not fulfil the conditions laid down in Article 77 thereof.

87 As regards, first, the principle of equal treatment of economic operators, the fact that profit-making entities are deprived of the possibility of participating in such procedures for the award of public contracts constitutes a difference in treatment between economic operators which is contrary to that principle, unless that difference is justified by objective considerations (see, by analogy, judgments of 11 December 2014, *Azienda sanitaria locale n. 5 'Spezzino' and Others*, C-113/13, EU:C:2014:2440, paragraph 52, and of 28 January 2016, *CASTA and Others*, C-50/14, EU:C:2016:56, paragraph 56).

88 In that regard, it is important to recall that a Member State may, in the exercise of the powers it retains to organise its social security system, consider that a social welfare system necessarily implies, with a view to attaining its objectives, that the admission of private operators to that system as providers of social welfare services is to be made subject to the condition that they are non-profit-making (judgments of 17 June 1997, *Sodemare and Others*, C-70/95, EU:C:1997:301, paragraph 32, and of 11 December 2014, *Azienda sanitaria locale n. 5 'Spezzino' and Others*, C-113/13, EU:C:2014:2440, paragraph 58).

89 In the present case, it is clear from the national legislation at issue in the main proceedings and from the replies to the questions put by the Court that the contractual action agreements provided for by that legislation must comply, inter alia, with the principles of the good of the community and budgetary efficiency. In particular, first, the social services in the form of personal assistance which may be the subject of such agreements must be offered to everyone, in principle free of charge, and the amount of any additional charge which may be levied on users depends on their financial capacity. Second, the private non-profit organisations concerned by those agreements may obtain reimbursement only for the variable, fixed and permanent costs incurred providing the social services in the form of personal assistance which are the subject of those agreements since obtaining a commercial profit is expressly excluded.

90 Thus, the exclusive recourse to private non-profit organisations in order to ensure the provision of such social services is likely to be grounded both in the principles of universality and solidarity, which are inherent in a social welfare system, and in reasons of economic efficiency and suitability, in so far as it allows those services of general interest to be provided in an

economically balanced manner for budgetary purposes, by entities constituted, essentially, for the purpose of public service and whose decisions are not guided, as the Spanish Government observes, by purely commercial considerations (see, by analogy, judgment of 28 January 2016, *CASTA and Others*, C-50/14, EU:C:2016:56, paragraph 57).

91 Where it is motivated by such considerations, the exclusion of private profit-making entities from the procedures for the award of public contracts for the provision of such social services is not contrary to the principle of equality, provided that such exclusion actually contributes to the social purpose and the pursuit of the objectives of the good of the community and budgetary efficiency on which that system is based (see, by analogy, judgments of 11 December 2014, *Azienda sanitaria locale n. 5 'Spezzino' and Others*, C-113/13, EU:C:2014:2440, paragraph 60, and of 28 January 2016, *CASTA and Others*, C-50/14, EU:C:2016:56, paragraph 63).

92 In that regard, first, the Court has had occasion to state, with regard to public contracts to which Directive 2014/24 was not yet applicable, that, in order to meet those requirements, the private entities for which, under the legislation of the Member State concerned, such contracts are reserved may not pursue any objectives other than those mentioned in the previous paragraph nor make any profit, even indirectly, as a result of their services, apart from the reimbursement of the variable, fixed and permanent costs necessary to provide them. Nor may they procure any profit for their members. Moreover, the application of that legislation cannot be extended to cover the wrongful practices of those entities or their members. Thus, those entities must have recourse to a workforce only within the limits necessary for their proper functioning and in compliance with the requirements imposed on them by national legislation, since volunteers may be reimbursed only for expenditure actually incurred for the activity performed, within the limits laid down in advance by the private entities themselves (see, to that effect, judgments of 11 December 2014, *Azienda sanitaria locale n. 5 'Spezzino' and Others*, C-113/13, EU:C:2014:2440, paragraphs 61 and 62, and of 28 January 2016, *CASTA and Others*, C-50/14, EU:C:2016:56, paragraphs 64 and 65).

93 Second, it is also clear from the Court's case-law that the principle of equal treatment, which applies in connection with the freedom of establishment enshrined in Articles 49 to 55 TFEU, does not preclude a Member State from reserving the status of providers of social welfare services to non-profit-making private operators, including those which are not strictly voluntary (see, to that effect, judgment of 17 June 1997, *Sodemare and Others*, C-70/95, EU:C:1997:301, paragraphs 32 to 34).

94 That case-law remains relevant for the purposes of interpreting Article 76 of Directive 2014/24 which now expressly provides for a simplified regime for social public procurement.

95 It follows that the principle of equal treatment of economic operators, as now enshrined in Article 76 of Directive 2014/24, authorises Member States to reserve the right to participate in the procedure for the award of public contracts for the provision of social services in the form of personal assistance for private non-profit organisations, including those which are not strictly voluntary, provided that, first, any profits resulting from the performance of those contracts are reinvested by those entities with a view to achieving the social objective of general interest which they pursue and, second, all of the conditions recalled in paragraphs 90 and 91 of the present judgment are satisfied.

96 It should also be added, however, that Article 76 of Directive 2014/24 precludes such public contracts from being awarded directly, without being put out to competitive tender, to a not-for-profit entity, other than a voluntary entity (see, in the latter respect, judgment of 28 January 2016, *CASTA and Others*, C-50/14, EU:C:2016:56, paragraph 70). To the contrary, that article requires that, before making such an award, the contracting authority must compare and rank the respective tenders of the various non-profit organisations which have expressed an interest, having regard in particular to the price of those tenders, even if that price is constituted, as in the present case, by the total costs which the contracting authority will have to reimburse.

97 Second, as regards the principle of transparency, that principle requires the contracting authority to provide an adequate degree of publicity allowing (i) the opening-up to competition and (ii) the review of the impartiality of the procurement procedure to enable any interested operator to take the decision to tender on the basis of all the relevant information, and to preclude any risk of favouritism or arbitrariness on the part of the contracting authority. The obligation of transparency thus implies that all the conditions and detailed rules governing the award procedure must be drawn up in a clear, precise and unequivocal manner so that (i) all reasonably informed tenderers exercising ordinary care can understand their exact significance and interpret them in the same way and (ii) the contracting authority is able to ascertain whether the bids submitted satisfy the criteria applying to the contract in question (see, to that effect, judgments of 16 February 2012, *Costa and Cifone*, C-72/10 and C-77/10, EU:C:2012:80, paragraph 73, and of 4 April 2019, *Allianz Vorsorgekasse*, C-699/17, EU:C:2019:290, paragraphs 61 and 62 and the case-law cited).

98 In the present case, first, it does not appear from the documents before the Court that the national legislation at issue in the main proceedings fails to offer sufficient guarantees to protect private non-profit organisations from the risk of favouritism or arbitrariness on the part of the contracting authority during the procedure for the award of a contractual action agreement.

99 Second, Article 75 of Directive 2014/24 specifies, in respect of procedures for the award of public contracts falling within the scope of the simplified regime established in Articles 74 to 77 thereof, the conditions regarding advertising required by the principle of transparency, as recalled in paragraph 97 of the present judgment.

100 In accordance with Article 75 of that directive, contracting authorities intending to award a public contract for the services referred to in Annex XIV to Directive 2014/24 must, in principle, make known their intention by means of a contract notice or a prior information notice which is to be published, in accordance with Article 51 thereof, by the Publications Office of the European Union or, where appropriate for prior information notices, on their buyer profile.

101 In the present case, as the Advocate General noted in point 116 of her Opinion, it would appear to follow from the national legislation at issue in the main proceedings that the contract notices to which it refers are published only in the *Diari Oficial de la Generalitat Valenciana* (Official Journal of the Valencia Regional Government). If that were the case, which it is for the referring court to ascertain, such publication would not constitute publicity in accordance with Article 75 of Directive 2014/24.

102 It follows from all of the foregoing considerations that Articles 76 and 77 of Directive 2014/24 must be interpreted as not precluding national legislation which reserves the right for private non-profit organisations to conclude, subject to a competitive bidding process, agreements under which those organisations provide social services in the form of personal assistance in return for

reimbursement of the costs which they incur, irrespective of the estimated value of those services, even where those organisations do not satisfy the requirements laid down in Article 77, provided, first, that the legal and contractual framework within which the activity of those organisations is carried out contributes effectively to the social purpose and objectives of solidarity and budgetary efficiency on which that legislation is based and, second, that the principle of transparency, as specified in particular in Article 75 of that directive, is respected.

The third question

103 As a preliminary point, it must be observed that, under Article 64(3) of Law 5/1997, the establishment of private non-profit organisations in the place where the service is provided is one of the selection criteria which may be used by the contracting authority when concluding a contractual action agreement. Thus, and subject to verification by the referring court, it would appear that the contracting authority may require, on the basis of such a criterion, that, from the time of submission of their tenders, tenderers are located in the territory of the place concerned by the social services to be provided.

104 By its third question, the referring court asks, in essence, whether Articles 76 and 77 of Directive 2014/24 must be interpreted as meaning that they allow, in the award of a public contract for social services referred to in Annex XIV thereto, the establishment of the economic operator in the place where the services are to be provided to be a criterion for the selection of economic operators, prior to the examination of their tenders.

105 In the first place, it must be recalled that, as pointed out in paragraph 84 of the present judgment, Article 76 of that directive requires that criterion of establishment to be compatible with the principle of equal treatment of economic operators.

106 Such a criterion creates a difference in treatment between economic operators depending on whether or not they have an establishment in the place where the social service concerned is provided. Since the situation of those operators is comparable with regard to the award of a public contract for a service referred to in Annex XIV to that directive, such a difference in treatment is compatible with the principle of equal treatment only in so far as it may be justified by a legitimate objective.

107 In the second place, it is apparent from the written observations submitted to the Court that the selection criterion based on the establishment of the economic operator in the place where the services are to be provided is intended, inter alia, to ensure the proximity and accessibility of the social services that are the subject of a contractual action agreement.

108 It is true that that objective constitutes a legitimate objective under EU law and, moreover, is recognised both in Article 1 of Protocol No 26 and in Article 76 of Directive 2014/24, the latter article requiring Member States, as recalled in paragraph 84 of the present judgment, to ensure that contracting authorities may take into account the need to ensure inter alia the accessibility and availability of the services referred to in Annex XIV thereto.

109 That said, a criterion, such as that in the present case, which requires that, from the time of submission of their tenders, tenderers are located in the territory of the place concerned by the social services to be provided, is clearly disproportionate to the attainment of such an objective (see, to that effect, judgment of 27 October 2005, *Contse and Others*, C-234/03, EU:C:2005:644, paragraph 43). Even if the establishment of the economic operator in the territory of the place

where it is called upon to provide the social services concerned is necessary in order to guarantee the proximity and accessibility of those services, such an objective could, in any event, be attained just as effectively by requiring that that economic operator satisfies that condition only at the stage of performance of the public contract in question.

110 In the light of the foregoing, the answer to the third question referred for a preliminary ruling must be that Article 76 of Directive 2014/24 must be interpreted as precluding national legislation under which, in the award of a public contract for social services referred to in Annex XIV to that directive, the location of the economic operator in the place where the services are to be provided is a criterion for the selection of economic operators, prior to the examination of their tenders.

Costs

111 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Fourth Chamber) hereby rules:

1. **Articles 76 and 77 of Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC must be interpreted as not precluding national legislation which reserves the right for private non-profit organisations to conclude, subject to a competitive bidding process, agreements under which those organisations provide social services in the form of personal assistance in return for reimbursement of the costs which they incur, irrespective of the estimated value of those services, even where those organisations do not satisfy the requirements laid down in Article 77, provided, first, that the legal and contractual framework within which the activity of those organisations is carried out contributes effectively to the social purpose and objectives of solidarity and budgetary efficiency on which that legislation is based and, second, that the principle of transparency, as specified in particular in Article 75 of that directive, is respected.**

2. **Article 76 of Directive 2014/24 must be interpreted as precluding national legislation under which, in the award of a public contract for social services referred to in Annex XIV thereto, the location of the economic operator in the place where the services are to be provided is a criterion for the selection of economic operators, prior to the examination of their tenders.**

[Signatures]