

Case C-436/20**Summary of the request for a preliminary ruling pursuant to Article 98(1) of the Rules of Procedure of the Court of Justice****Date lodged:**

16 September 2020

Referring court:

Tribunal Superior de Justicia de la Comunidad Valenciana (High Court of Justice of the Community of Valencia, Spain)

Date of the decision to refer:

3 September 2020

Applicant/appellant:

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

Defendant/respondent:

Consejería de Igualdad y Políticas Inclusivas

Subject matter of the main proceedings

The purpose of the main proceedings is to determine the legality of legislation of the Community of Valencia which permits contracting authorities to make use of agreements with private non-profit organisations to provide social services to the person without following the procedures set out in EU public procurement legislation.

Purpose and legal basis of the request for a preliminary ruling

‘Request for a preliminary ruling on interpretation – Article 267 TFEU – Public procurement – Articles 49 and 56 TFEU – Directive 2014/24/EU – Directive 2006/123/EC – National legislation which permits contracting authorities to make use of agreements with private non-profit organisations to provide social services to the person without following the procedures laid down in EU public procurement legislation’

Questions referred

1) Must Article 49 TFEU and Articles 76 and 77 of Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 (as read with Article 74 and Annex 14 thereof) 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 the Procurement Directive 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 the Procurement Directive (as read with Article 74 and Annex 14 thereof) 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 the Public Procurement Directive (as read with Article 74 and Annex XIV thereof) 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 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*?

EU case-law and provisions of EU law cited

Articles 49 and 56 TFEU.

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). Articles 76 and 77 (as read with Article 74 and Annex XIV).

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). Article 15(2).

Judgment of the Court of Justice of 19 December 2012, *Ordine degli Ingegneri della Provincia di Lecce and Others* (C-159/11, EU:C:2012:817).

Judgment of the Court of Justice of 13 June 2013, *Piepenbrock* (C-386/11, EU:C:2013:385).

Judgment of the Court of Justice of 19 June 2014, *Centro Hospitalar de Setúbal and SUCH* (C-574/12, EU:C:2014:2004).

Judgment of the Court of Justice of 28 January 2016, *CASTA and Others* (C-50/14, EU:C:2016:56).

National case-law and provisions of national law cited

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). (Law of the Community of Valencia.) Articles 44 bis, 53, 56, 62, 63, 64, 66, 67 and 68. [Amended by the 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).]

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). (Law of the Community of Valencia.) Articles 87, 88 and 92.

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).

Brief summary of the facts and the main proceedings

- 1 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 of 25 June 1997

governing the Social Services System within the Community of Valencia ('Law 5/1997'). Regulations to implement this law were made by Decree 181/2017 of 17 November 2017 of the Council of the Community of Valencia making regulations on public-private agreements for the provision of social services by social enterprises within the Community of Valencia ('Decree 181/2017'). Law 5/1997 was repealed by Law 3/2019 of 18 February 2019 on inclusive social services in the Community of Valencia ('Law 3/2019'). Under this law, Decree 181/2017 remains in force.

- 2 The Asociación Estatal de Entidades de Servicios de Atención a Domicilio (State Association of Domiciliary Care Providers, 'ASADE') lodged an administrative-law action with the referring court against Decree 181/2017. In that action, in addition to seeking to have Decree 181/2017 declared void *ab initio*, it sought a ruling that Article 44 bis(c), Article 53, Article 56(2) and Title VI of Law 5/1997 were inapplicable.
- 3 In the action ASADE also relied on Article 267 TFEU, asking the referring court to refer the matter to the Court of Justice for an interpretation concerning the compatibility of Law 5/1997 with Article 49 TFEU, Article 77 of Directive 2014/24/EU and Article 15(2) of Directive 2006/123/EC. Having heard ASADE and the other party to the proceedings (the Consejería de Igualdad y Políticas Inclusivas de la Comunidad Valenciana (Community of Valencia Department for Equality and Inclusive Policies)), the referring court referred the three questions in the request summarised herein to the Court of Justice for a preliminary ruling.

Main arguments of the parties to the main proceedings

- 4 ASADE argues that Decree 181/2017, which makes regulations on the public-private agreements provided for in Law 5/1997, excludes for-profit entities from providing public services under a public-private agreement and allows non-profit organisations (not solely voluntary associations) to provide public services in return for payment without having to go through a transparent competitive process that ensures equal treatment. In its view, this is contrary to Article 49 TFEU (freedom of establishment), to Directive 2014/24/EU, in that it does not respect the principle of equal treatment between economic operators, and to Article 15(2) of Directive 2006/123/EC.
- 5 ASADE states that freedom of establishment is restricted and that the restriction is not justified on grounds of public policy, public security or public health, or for overriding reasons in the public interest. Moreover, in its view, the exceptions to the rule that were established in *Centro Hospitalar de Setúbal and SUCH* and in *Casta and Others* are not applicable, because the legislation of the Community of Valencia is not restricted to the areas of health and social security, but covers all types of social services and, moreover, applies to non-profit organisations rather than solely to voluntary associations.

- 6 Lastly, ASADE notes that the repeal of Law 5/1997 by Law 3/2019 does not in any way alter the situation, since the system of public-private agreements is reproduced with minor changes, and public-private agreements continue to be reserved for non-profit organisations rather than solely for voluntary associations.
- 7 The Department for Equality and Inclusive Policies considers that both Law 5/1997 and Decree 181/2017 comply with Directives 2014/24/EU and 2006/123/EC. It states that, having regard to the principle of solidarity enshrined first in the TEU and now in the TFEU, the Court of Justice has already permitted 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. In this respect, it refers to recitals 6, 7 and 114 of Directive 2014/24/EU, and also to Article 77 of the directive, which even permits contracts in the field of social, cultural or health services to be reserved for certain organisations.
- 8 The Department for Equality and Inclusive Policies notes that public-private agreements offer an alternative form of management to direct or indirect management of non-economic public services, which are provided by non-profit organisations that receive payment in the form of reimbursement of costs (which may not include any business profit), in accordance with the principle of budgetary efficiency. It also considers that public-private agreements do not infringe Directive 2006/123/EC, since the directive 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.
- 9 Lastly, the Department for Equality and Inclusive Policies considers that the request for a preliminary ruling is unfounded, since Law 5/1997 has been repealed by Law 3/2019.

Brief summary of the reasons for the request for a preliminary ruling

- 10 The referring court notes that, in the light of decisions of the Court of Justice such as those in *Ordine degli Ingegneri della Provincia di Lecce* and in *Piepenbrock*, the concept of a contract for pecuniary interest also includes contracts for which the agreed remuneration is limited to reimbursement of the costs of providing the agreed service. The referring court therefore doubts that the arrangements for public-private agreements contained in Article 4 bis(1)(c), Article 53, Article 56(2) and Title VI of Law 5/1997 comply with European Union law and, in particular, with Articles 49 and 56 TFEU, Articles 76 and 77 of Directive 2014/24/EU (as read with Article 74 and Annex XIV thereof) and Article 15(2) of Directive 2006/123/EC.

- 11 The referring court believes that an answer is needed from the Court of Justice to its question concerning the compatibility of the arrangements for public-private agreements with EU law, since the referring court's ruling on ASADE's application for a declaration of nullity of Decree 181/2017 is dependent on this point.
- 12 The referring court notes that the fact that Law 5/1997 has been repealed by Law 3/2019 does not lessen its interest in obtaining the requested interpretation from the Court of Justice, since the new law does not materially alter the arrangements for public-private agreements for the provision of social services, and the starting point for the examination of the contested administrative provision (Decree 181/2017) must be the lawfulness or otherwise of the originating law which it implements (Law 5/1997).

WORKING DOCUMENT