

**Case C-635/19**

**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:**

26 August 2019

**Referring court:**

Órgano Administrativo de Recursos Contractuales de la Comunidad Autónoma de Euskadi (Spain)

**Date of the decision to refer:**

6 August 2019

**Applicant:**

Confederación Sindical Comisiones Obreras de Euskadi

**Defendant:**

Ayuntamiento de Arrigorriaga

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**Subject matter of the main proceedings**

Challenge to the procurement documents relating to a call for tenders.

**Subject matter and legal basis of the request for a preliminary ruling**

To determine whether national legislation which compels contracting authorities to include in procurement documents a special condition of performance which imposes on the successful tenderer an obligation to guarantee that the pay conditions applicable to workers under the relevant sectoral collective agreement will at least be honoured, is compatible with 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.

The legal basis is Article 267 TFEU.

### Question referred for a preliminary ruling

Does Directive 2014/24/EU preclude national legislation, such as Article 122(2) of the LCSP, which compels contracting authorities to include in the procurement documents governing a public contract a special condition of performance imposing on the successful tenderer an obligation to guarantee that the pay conditions applicable to workers under the relevant sectoral collective agreement will at least be honoured, even if that sectoral collective agreement is not binding on the undertaking to which the contract is awarded under the rules governing collective bargaining and collective agreements, which establish the primacy of the company agreement on pay and provide for the possibility of not applying a collective agreement in force for economic, technical, organisational or production reasons?

### Provisions of EU law relied on

- (i) Directive 2014/24/EU of 26 February 2014 on public procurement and repealing Directive 2004/18/EC. Recitals 98 and 104 and Article 70.
- (ii) Judgment of 3 April 2008, *Rüffert* (C-346/06, EU:C:2008:189), paragraphs 15, 24 and 40.
- (iii) Judgment of 17 November 2015, *RegioPost* (C-115/14, EU:C:2015:760), paragraphs 54, 62, 69, 73 and 75.

### Provisions of national law relied on

- (i) Law 9/2017 of 8 November 2017 on Public Sector Contracts, transposing into Spanish law Directives 2014/23/EU and 2014/24/EU of the European Parliament and of the Council of 26 February 2014.
  - Article 122(2): ‘The technical specifications shall include [...]; an obligation on the successful tenderer to honour the pay conditions applicable to workers under the relevant sectoral collective agreement [...].’
- (ii) Royal Legislative Decree 2/2015 of 23 October 2015 approving the recast text of the Law on the Workers’ Statute.
  - ‘Article 82. Concept and effects.

Collective agreements, being the result of negotiations held between workers’ and employers’ representatives, constitute the expression of the agreement freely entered into by them under their collective autonomy.

[...]

The collective agreements governed by this Law are binding on all employers and workers falling within its scope and for the duration of its validity.

Without prejudice to the foregoing, the undertaking may, on economic, technical, organisational or production grounds, by agreement between the undertaking and such workers' representatives as are authorised to negotiate a collective agreement in accordance with Article 87(1), and following a period of consultation as provided for in Article 41(4), choose not to apply within the company the working conditions laid down by the relevant collective agreement, be this at sectoral or company level, in the following areas:

[...]

d) System of remuneration and rates of pay.

[...]

– 'Article 84. Concurrence

1. While in force, a collective agreement shall not be affected by the provisions of agreements at different levels, unless otherwise agreed by negotiation in accordance with Article 83(2), and except as provided for in the following paragraph.

2. The rules governing the conditions laid down in a company agreement, which may be negotiated at any time during the period of validity of higher-level collective agreements, shall have priority of application over a sectoral agreement concluded at the level of the State, the autonomous community or below in the following areas:

a) Rates of basic pay and pay supplements, including supplements linked to the situation and results of the undertaking.

[...]

### **Summary of the facts and the main proceedings**

- 1 The Ayuntamiento de Arrigorriaga (Municipality of Arrigorriaga) issued a call for tenders for the award of a 'Home Help Service' contract. The tender documents were approved on 26 April 2019 and the contract notice was published in the Official Journal of the European Union on 30 April 2019 (2019/S 084-200929).
- 2 The contract is for a service that is included in Annex XIV to 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 ('Directive 2014/24/EU') and its estimated value is in excess of EUR 750 000. The

Municipality of Arrigorriaga is a local authority with the status of contracting authority and, in particular, sub-central contracting authority within the meaning of Article 2(1)(1) and (3) of Directive 2014/24/EU.

- 3 On 15 May 2019, the Órgano Administrativo de Recursos Contractuales de la Comunidad Autónoma de Euskadi (Administrative Board of Contract Appeals of the Autonomous Community of the Basque Country, Spain) ('the OARC') received a special procurement appeal lodged by Confederación Sindical Comisiones Obreras de Euskadi (Basque Country branch of the Trade Union Confederation of Workers' Commissions) ['the CSCO'] against the procurement documents relating to the aforementioned contract.
- 4 On 16 May 2019, the OARC asked the contracting authority for the documentation relating to that call for tenders and the report in response to the appeal as referred to in Article 56(2) of Law 9/2017 of 8 November 2017 on Public Sector Contracts, transposing into Spanish law Directives 2014/23/EU and 2014/24/EU of the European Parliament and of the Council of 26 February 2014 ('the LCSP'). The OARC received the aforementioned documentation on 21 and 29 May.
- 5 The OARC is uncertain whether Article 122(2) of the LCSP is compatible with Directive 2014/24/EU and has therefore decided to make the present request for a preliminary ruling.

#### **Main arguments of the parties to the main proceedings**

- 6 The Basque Country branch of the CSCO claims that the procurement documents relating to the aforementioned call for tenders fail to comply with Article 122(2) of the LCSP, which provides that the technical specifications must include an obligation on the successful tenderer to honour the pay conditions applicable to workers under the applicable sectoral collective agreement.
- 7 The Municipality of Arrigorriaga contends that the tenderer to which the contract is awarded must take over the employment contracts of the staff who had been performing the service forming the subject of the contract and that Annex I to the tender documentation itself states that staff taken over in this way will be covered by the sectoral agreement referred to by the Basque Country branch of the CSCO.

#### **Summary of the grounds for the request for a preliminary ruling**

- 8 Article 122(2) of the LCSP imposes on contracting authorities an obligation to lay down in the procurement documents relating to contracts which they conclude a special condition of performance, as provided for in Article 70 of Directive 2014/24/EU, which is based on social considerations and of benefit to the workers providing the services in question (see, to this effect, the judgment of

17 November 2015, *RegioPost* (C-115/14, EU:C:2015:760, paragraph 54); ‘the judgment in *RegioPost*’).

- 9 It must be noted that, although Article 122(2) of the LSCP refers literally to the pay conditions ‘under the relevant sectoral collective agreement’, it is apparent from the legislative documents preparatory to that provision, which account for the inclusion of that obligation in procurement documentation by reference to the need to ensure that competing undertakings do not resort to ploys aimed at abnormally or disproportionately driving down market prices or contract-related costs to the detriment of workers’ rights and competition, and from the widely endorsed interpretation of that provision by national legal practitioners, that, while its purpose is to guarantee that those pay conditions are at least honoured, it does not preclude workers from enjoying more favourable conditions under the provisions of other relevant collective agreements or in their contracts of employment.
- 10 Under Spanish employment legislation, an undertaking may legally pay its workers a wage below that laid down in the collective agreement applicable to that undertaking, either because that is the wage laid down in a company agreement, which has ‘priority of application’ in matters of pay, or because it has been agreed that, for economic, technical, organisational or production reasons, the sectoral agreement in question is not to apply (a situation generally known as ‘opting out’).
- 11 Consequently, the provision contained in Article 122(2) of the LCSP could compel an undertaking to pay the workers due to perform the services covered by the contract it has been awarded a wage higher than that which they had been receiving (even if this was consistent with the general legislation on collective agreements and the rules laying down the minimum wage); this may constitute an additional economic burden that may prohibit, impede or render less attractive the submission of a tender (see the judgment of 17 November 2015, *RegioPost* (C-115/14, EU:C:2015:760, paragraph 69)).
- 12 In accordance with the judgment in *RegioPost*, it is acceptable, in the light of Article 26 of Directive 2004/18 (the content of which is similar to that of Article 70 of Directive 2014/24/EU), interpreted in conjunction with Directive 96/71, to lay down a mandatory minimum protection rule that requires undertakings established in other Member States to honour a minimum rate of pay (laid down in the same rule; see paragraphs 62 and 75 of the judgment in *RegioPost*) for the benefit of workers they post to the territory of the host Member State for the purposes of performing that public contract.
- 13 However, the OARC considers it doubtful that the principle established in the judgment in *RegioPost* is applicable to the present case, account being taken in particular of paragraphs 62 and 73 et seq. of that judgment and the judgment of 3 April 2008, *Rüffert* (C-346/06, ECLI:EU:C:2008:189; ‘the judgment in *Rüffert*’).

- 14 The OARC observes that Article 122(2) of the LCSP has not modified or repealed, either entirely or in the field of public procurement, the general legislation on collective agreements and collective bargaining or the legislation on the minimum wage or minimum guarantees for posted workers, but simply contains a requirement that contracting authorities include a provision in the contracts they award which guarantees that the pay conditions applicable under the [relevant] sectoral agreement are at least honoured; the application of those conditions therefore originates solely and exclusively from the public contract itself.
- 15 On the other hand, it is important to take into account that, unlike in the situation analysed in the judgment in *RegioPost*, Article 122(2) of the LCSP does not itself lay down any minimum rate of pay and is not therefore a ‘law’ on minimum rates of pay within the meaning of Directive 96/71 (see, for example, paragraph 24 of the judgment in *Rüffert*), and that the Spanish legislation already makes general provision for a minimum rate of pay without distinguishing between public and private-sector contracts.
- 16 The OARC states that sectoral collective agreements, the obligation to comply with which in relation to pay conditions must be included in the documentation connected with every call for tenders, in accordance with Article 122(2) of the LCSP, are not measures of general application, in the sense that the undertakings to which they apply may legally pay wages lower than those prescribed by such agreements if a company collective agreement or an ‘opt-out’ agreement so determines.
- 17 In the light of the foregoing considerations, the OARC takes the view that the question to be answered is whether the present case, given the circumstances characterising it, is not a proper subject for the principle established in the judgment in *Rüffert*, which declares to be contrary to EU law a measure which effectively compels a contracting authority to require the tenderer to which it awards a contract to pay its workers, in return for performing the services in question, as a minimum, the remuneration provided for in the collective agreement applicable to the place of performance.
- 18 Furthermore, as in the situation at issue in the judgment in *Rüffert* (paragraph 15), it is questionable whether the successful tenderer’s undertaking to observe sectoral collective agreements is justified by overriding reasons in the public interest and does not go beyond what is necessary for the protection of workers; it is also uncertain whether there is any justification for the fact that the measure in question is necessary only for workers performing a public contract but not for those performing a private-sector contract (paragraph 40 of the judgment in *Rüffert*), given that, under a private-sector contract, the company collective agreement and the opt-out procedure would have priority of application over a sectoral collective agreement concluded at the level of the State, autonomous community or below in matters such as rates of basic pay and pay supplements, including supplements linked to the situation and results of the undertaking.