

Case C-598/19

Request for a preliminary ruling

Date lodged:

6 August 2019

Referring court:

Tribunal Superior de Justicia del País Vasco (Spain)

Date of the decision to refer:

17 July 2019

Applicant:

Confederación Nacional de Centros Especiales de Empleo
(CONACEE)

Defendant:

Diputación Foral de Guipúzcoa

**TRIBUNAL SUPERIOR DE JUSTICIA DEL PAÍS VASCO (HIGH COURT
OF JUSTICE OF THE BASQUE COUNTRY, SPAIN) ADMINISTRATIVE
CHAMBER**

... [identification of the proceedings and the parties]

ORDER

... [composition of the Chamber]

Bilbao, 17 July 2019.

I. FACTS

FIRST. The action ... was brought by the Confederación Nacional de Centros Especiales de Empleo (National Confederation of Special Employment Centres) (CONACEE) against the decision of 15 May 2018 of the Consejo de Gobierno de la Diputación Foral de Gipúzcoa (Governing body of the Guipúzcoa Provincial Authority), which approved the instructions issued to that institution's contracting authorities concerning reservation of the right to participate in procedures for the

award of contracts or certain lots of those contracts to social initiative Special Employment Centres and to work integration social enterprises, and the performance of a number of such contracts in the context of sheltered employment programmes.

...

SECOND. The applicant requested in the application ... that ‘judgment be given which, in setting aside the contested decision, finds that there is no reason to use the term “social initiative” in relation to Special Employment Centres, as the intended beneficiaries of the reservation of contracts ... covered by the decision, in accordance with Article 20 of Directive 2014/24/EU, or, in the alternative and should the Chamber ... consider it necessary ... that a reference for a preliminary ruling should be made to the Court of Justice of the European Union in order to clarify the proper interpretation of the Treaties in relation to the validity of decisions adopted by the Spanish legislature concerning the restrictions linked to the introduction of the concept of *social initiative* Special Employment Centres by the Fourth Additional Provision and Fourteenth Final Provision of Law 9/2017, in the light of Article 20 of Directive 2014/24/EU.’

The form of order sought is based on the incompatibility of the contested decision and, therefore, of the Fourth Additional Provision and Fourteenth Final Provision of Law 9/2017 on public sector contracts (*Ley 9/2017 de contratos del sector público*) of 8 November 2017, on which the decision is based, with Article 20 of Directive 2014/24/EU, in so far as those national provisions limit the reservation of contracts laid down in Article 20 to social initiative special employment centres, thereby excluding from the scope of that reservation business initiative special employment centres; according to data from 2015, centres of that kind, which do not qualify as ‘social initiative’ centres, and the staff employed by them, comprised 50% of all the special employment centres in Spain.

The applicant contends that all the special employment centres created in Spain satisfy the conditions laid down in Article 20 of Directive 2014/24/EU, namely, that their activity is the promotion of employment for persons who are disabled or are at risk of exclusion and at least 30% of their workforce is made up of persons with disabilities; however, the provisions of the national law on which the contested decision is based require, for the same purposes, the creation of a non-profit-making entity and the reinvestment of revenue.

Therefore, in the applicant’s submission, the category of social initiative special employment centres created by the Fourth Additional Provision of Law 9/2017, in conjunction with the Fourteenth Final [Provision] of that Law, excludes from eligibility to tender for reserved contracts under Article 20 of Directive 2014/24/EU entities which satisfy the conditions laid down by that Directive, as is the case of special employment centres which, in accordance with Article 43 of Royal Legislative Decree 1/2013 (as it was worded prior to Law 9/2017) carry out a productive activity involving goods or services, participate regularly in market

transactions, have the aim of providing paid employment for persons with disabilities and employ workers with disabilities who make up at least 70% of the workforce.

Finally, the applicant contends that the transposition of Article 20 of Directive 2014/24/EU into Spanish law by Law 9/2017 breaches the conditions and purpose of the reservation (... recitals 28 and 36, respectively, of Directives 2004/18/EU and 2014/24/EU) and infringes the principles of equality and non-discrimination in procurement procedures which, according to recital 37 in the preamble to Directive 2014/24/EU, must be applied as basic principles of EU law when the relevant measures to give effect to the directive are drawn up.

THIRD. The defendant, the Diputación Foral de Guipúzcoa, argued in the defence ... that the action should be dismissed and objected to the reference for a preliminary ruling to the Court of Justice of the European Union for the following reasons:

1. The Fourth Additional Provision of Law 9/2017 of 8 November on public sector contracts transposed Article 20 of Directive 2014/24/EU within the limits and respecting the aims of the reservation laid down by that provision for sheltered workshops and social enterprises, by identifying as beneficiaries of that reservation social initiative special employment centres and work integration social enterprises which satisfy the conditions laid down in the consolidated text of the General Law on the rights and social inclusion of persons with disabilities (Ley general de derechos de las personas con discapacidad y de su inclusión social), approved by Royal Legislative Decree 1/2013, and in Law 44/2007 on work integration social enterprises (Ley 44/2007 de empresas de inserción social); these are, in summary, that the entities or persons concerned must be non-profit-making, they must undertake to reinvest any profits made in the performance of their business, and their primary objective must be the professional and social integration of persons who are disabled or socially excluded.

2. Directive 2014/24/EU (Article 20) is framed in terms which, because they are broad or general ('sheltered workshops', 'social businesses' and 'economic operators'), enable its transposition into national law in the manner effected by the Fourth Additional Provision of Law 9/2017 on public sector contracts.

3. Directive 2014/24/EU does not stipulate precisely and unconditionally the scope of the reservation governed by Article 20 thereof, so that, as the provision has been transposed into Spanish law [**OR. 4**] in terms compatible with that article, it is not possible to invoke the direct effect of that provision.

FOURTH. ... [domestic procedural issues]

It was decided by procedural decision ... '... [to hear] the parties, within the ... time limit of 10 days, so that they may make the submissions they ... consider relevant concerning a reference to the Court of Justice of the European Union (Article 267 TFEU) on whether the transposition of Article 20 of Directive

2014/24/EU into national law allows the scope *ratione personae* of the reservation of contracts laid down in that provision to be delimited in such a way that it restricts the application of that provision to certain of the persons referred to therein (sheltered workshops and economic operators), even if those who are excluded satisfy the condition that at least 30% of their employees must be disabled and the aim or objective of the social and professional integration of those persons.’

FIFTH. The applicant requested that a question framed in the terms set out in the procedural decision ..., and in line with the grounds of its action, regarding the conditions and scope of the reservation of contracts governed by Article 20 of Directive 2014/24/EU, be referred to the Court of Justice of the European Union for a preliminary ruling.

In the same procedural step, the defendant submitted it was not necessary to seek a preliminary ruling because the terms of Directive 2014/24/EU are not unconditional and that directive was transposed into national law in accordance with the limits and the aims of the directive itself.

II. LAW

FIRST. The judgment of 9 September 2015, *X and van Dijk* (... C-72/14 and C-197/14, ECLI:EU:C:2015:564) states as follows:

‘53. Article 267 TFEU confers jurisdiction on the Court to give preliminary rulings concerning both the interpretation of the Treaties and acts of the institutions, bodies, offices or agencies of the Union and the validity of those acts. The second paragraph of that article provides that a national court or tribunal may refer such questions to the Court, if it considers that a decision on the question is necessary to enable it to give judgment, and the third paragraph of that article provides that the national court or tribunal is bound to make a reference if there is no judicial remedy under national law against its decisions (judgment in *Melki and Abdeli*, C-188/10 and C-189/10, EU:C:2010:363, paragraph 40). ...

55. The Court has held that a court or tribunal against whose decisions there is no judicial remedy under national law is required, where a question of EU law is raised before it, to comply with its obligation to bring the matter before the Court of Justice, unless it has established that the question raised is irrelevant or that the EU law provision in question has already been interpreted by the Court or that the correct application of EU law is so obvious as to leave no scope for any reasonable doubt. The Court has further held that the existence of such a possibility must be assessed in the light of the specific characteristics of EU law, the particular difficulties to which its interpretation gives rise and the risk of divergences in judicial decisions within the EU (judgment in *Cilfit and Others*, 283/81, EU:C:1982:335, paragraph 21).’

For its part, the Tribunal Supremo (Supreme Court, Spain) ruled on essential aspects of making a reference to the Court of Justice for a preliminary ruling in the recent judgment ... of the Chamber for Contentious Administrative Proceedings of 17 December 2018 (Law reports: Supreme Court judgment 4260/2018; case number 553/2018):

‘... when an uncertainty arises concerning a possible conflict between a national provision and EU law, even if the court is not the court of last instance, it is required to set out the reasons why it finds no conflict between the national provision and the EU provision invoked and why it is not necessary to seek a preliminary ruling on the grounds that the doctrine of *act clair* or *acte éclairé* is applicable ...’

In accordance with that case-law, this court will give an account of:

- (a) The issue in contention in the proceedings.
- (b) The interpretation and application of a provision of European Union law as a condition for the resolution of the issue in contention.
- (c) The uncertainties regarding the compatibility of the national law applicable to the case with that provision of European Union law.

SECOND. The contested decision in these proceedings approved the instructions issued to the contracting authorities of the Diputación Foral de Guipúzcoa concerning reserved contracts, as governed by Article 20 of Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014, which was transposed into national law by Law 9/2017 of 8 November on public sector contracts, specifically by the Fourth Additional Provision of that Law:

‘1. By decision of the Council of Ministers or of the competent body within the sphere of the autonomous communities and local authorities, minimum percentages shall be set for reservation of the right to participate in procurement procedures for the award of certain contracts or certain lots of those contracts to social initiative special employment centres and to work integration social enterprises, governed, respectively, by the consolidated text of the General Law on the rights and social inclusion of persons with disabilities, approved by Royal Legislative Decree 1/2013 of 29 November, and by Law 44/2007 laying down the rules governing work integration social enterprises (Ley 44/2007 para la regulación del régimen de las empresas de inserción) of 13 December 2007, which satisfy the eligibility criteria laid down in that legislation, or a minimum percentage shall be set for reservation of the performance of those contracts in the context of sheltered employment programmes, provided that the proportion of disabled or socially excluded staff of special employment centres, work integration social enterprises and programmes is that stipulated in the legislation in question and, in any event, at least 30%.’

The decision of the Council of Ministers or of the competent body within the sphere of the autonomous communities and local authorities shall set out the minimum requirements for ensuring compliance with the provisions of the previous paragraph.

... [transitional procedure, not relevant to this case]

2. The contract notice shall make reference to this provision.

... [financial guarantees, matter not relevant to the present case]’.

The provision transcribed above applies to the reservation of contracts under Article 20 of Directive 2014/24/EU to social initiative special employment centres and to work integration social enterprises governed by the provisions cited, which has the effect of excluding the (private and not social initiative) special employment centres which the applicant Confederation represents at national level from the scope of that legislation.

The issue, as explained in the second and third paragraphs under the heading ‘Facts’ of this order, is whether the abovementioned provision of Spanish law, on which the contested decision of the Diputación Foral de Guipúzcoa is based, is compatible with Article 20 of Directive 2014/24/EU, and therefore the outcome of the proceedings depends on the interpretation of that provision of European Union law, since, if it is found, as the applicant submits, that special employment centres which do not come within the category of ‘social initiative’ referred to in the Fourth Additional Provision of Law 9/2017 on public sector contracts, satisfy the criteria and aims laid down by Article 20 of Directive 2014/24/EU for eligibility to tender for contracts reserved under that provision, their exclusion from the scope of that reservation under the provision of national law in question will not be compatible with Article 20 of Directive 2014/24/EU.

Accordingly, it is necessary to determine whether the national legislation referred to lays down eligibility criteria or conditions for tendering for reserved contracts under Article 20 of Directive 2014/24/EU, particularly with regard to special employment centres, which are not compatible with the rules — which cannot be laid down by the Member States — in that article, which must, of necessity, be interpreted ... [by the Court of Justice] of the European Union.

The rules governing social initiative special employment centres introduced into Spanish law by Law 9/2017 on public sector contracts stipulate additional criteria, other than those laid down by Article 20 of Directive 2014/24/EU, for the purposes of eligibility to tender for reserved contracts in public procurement procedures, as a comparison of both provisions quite clearly shows:

– Article 20 of Directive 2014/24/EU. Reserved contracts:

‘1. Member States may reserve the right to participate in public procurement procedures to sheltered workshops and economic operators whose main aim is the

social and professional integration of disabled or disadvantaged persons or may provide for such contracts to be performed in the context of sheltered employment programmes, provided that at least 30% of the employees of those workshops, economic operators or programmes are disabled or disadvantaged workers.

2. The call for competition shall make reference to this Article.’

– The Fourteenth Final Provision of Law 9/2017, ... [defines] the concept of social initiative special employment centres to which the Fourth Additional Provision of that Law, transcribed above, restricts the reservation of public contracts as far as those centres are concerned:

‘... Social initiative special employment centres are those which satisfy the criteria laid down in paragraphs 1 and 2 of [Article 43 of the consolidated text of the General Law on the rights and social inclusion of persons with disabilities, approved by Royal Legislative Decree 1/2013 of 29 November] ... and are promoted and in which more than 50 per cent of the shares are held, directly or indirectly, by one or more public or private undertakings which are not-for-profit or whose social nature is referred to in their articles of association, whether these are associations, foundations, bodies governed by public law, social initiative cooperatives or other social economy entities, and also those owned by commercial companies referred to above, whether directly or indirectly through the concept of dominant company governed by Article 42 of the Commercial Code (Código de Comercio), and provided in all cases that it is stipulated in their articles of association or a shareholders’ resolution that their profits must be reinvested in full in the creation of employment opportunities for persons with disabilities and the continuous improvement of their competitiveness and their social economy activity, while having, in any event, the right to opt to reinvest profits in the special employment centre itself or in other social initiative special employment centres.’

THIRD. Finally, this court is uncertain whether the transposition of Article 20 of Directive 2014/24/EU into Spanish law, on whose interpretation the outcome of these proceedings depends, allows for determination of the scope *ratione personae* of the reservation of contracts governed by that EU provision in the terms of the rules governing social initiative special employment centres, with the result that it excludes from the scope of that reservation undertakings and economic operators, like those represented by the applicant, even though, in accordance with Article 20 of Directive 2014/24/EU, they satisfy the requirement that 30% of their employees must be persons with disabilities and the aim or objective of the social and professional integration of those persons.

Therefore, in accordance with Article 267(2) of the Treaty on the Functioning of the European Union,

THIS COURT DECIDES

To refer to the Court of Justice of the European Union the following question of interpretation:

‘Must Article 20 of Directive 2014/24/EU on public procurement be interpreted as meaning that the scope *ratione personae* of the reservation laid down therein cannot be defined in terms which exclude from its scope undertakings or economic operators which satisfy the condition that at least 30% of their employees must be persons with disabilities and which meet the aim or objective of the social and professional integration of those persons, by setting additional criteria related to the constitution, character and aims of those bodies, to their activities and investments, or to other matters?’

... [Closing wording and signatures]

WORKING DOCUMENT