Case C-676/20

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:

11 December 2020

Referring court:

Tribunal Superior de Justicia de Aragón (High Court of Justice, Aragon, Spain)

Date of the decision to refer:

23 November 2020

Applicant:

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

Defendant:

Consejería de Sanidad de la Diputación General de Aragón

Subject matter of the main proceedings

The dispute in the main proceedings concerns the legality of legislation of the Autonomous Community of Aragon which permits contracting authorities to make use of arrangements with private non-profit organisations to provide social services to persons 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 arrangements with private non-profit organisations to provide social services to persons without following the procedures laid down in EU public procurement legislation

Questions referred

1. Is 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 persons in return for reimbursement of costs, without following the procedures in the Procurement Directive [2014/24/EU] and irrespective of the estimated value, simply by classifying the arrangements in question as non-contractual, compatible with EU law — 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 XIV thereof)?

2. Is national legislation compatible with EU law — 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 XIV thereof) — when, with regard to the provision of health and social services of general interest, it enables public procurement legislation to be avoided through the use of public-private agreements that supplement or replace direct provision, not because such agreements are a more appropriate way to provide these services but because they are a means to achieve specific social policy objectives which affect the way in which the service is provided or which the service provider must satisfy in order to be selected, even if the principles of advertising, competition and transparency continue to apply?

3. If so, is it compatible with EU law — the provisions cited above, and also Article 15(2)(b) of Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market — to restrict these arrangements solely and exclusively to non-profit organisations (not solely voluntary associations), even if the principles of transparency and advertising are observed?

4. Having regard to Article 15(2)(b) of the Services Directive [2006/123/EC], can giving contracting authorities discretion to make use of public-private agreements in order to appoint non-profit organisations to manage social and health services be interpreted as making access to such services conditional on taking a specific legal form? And if the answer to this question is in the affirmative, is national legislation such as that at issue here (which the State has not notified to the Commission with regard to the requirement concerning legal form) lawful under Article 15(7) of the Services Directive?

5. If the answers to the previous questions are in the affirmative, must Articles 49 and 56 TFEU, Articles 76 and 77 of the Public Procurement Directive [2014/24/EU] 2014 (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 persons, 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 or geographical area where the service is to be provided*?

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): recitals 6 and 114 and 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) and (7)

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 11 December 2014, *Azienda sanitaria locale n. 5 'Spezzino' and Others* (C-113/13, EU:C:2014:2440)

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

Provisions of national law cited

National law

Ley 9/2017, de 8 de noviembre, de Contratos del Sector Público, por la que se transponen al ordenamiento jurídico español las Directivas del Parlamento Europeo y del Consejo 2014/23/UE y 2014/24/UE, de 26 de febrero de 2014 (Law 9/2017 of 8 November 2017 on Public Sector Procurement, which transposes Directives 2014/23/EU and 2014/24/EU of the European Parliament and of the Council of 26 February 2014 into Spanish law, 'National Law 9/2017'): preamble, Article 11(6) and 47th to 49th additional provisions

Autonomous Community law

Ley Orgánica 5/2007, de 20 de abril, de reforma del Estatuto de Autonomía de Aragón (Organic Law 5/2007 of 20 April 2007 amending the Aragonese Statute of Autonomy): Article 71(34) and (55), and Article 73

Ley 11/2016, de 15 de diciembre, de acción concertada para la prestación a las personas de servicios de carácter social y sanitario (Law 11/2016 of 15 December 2016 on public-private agreements for the provision of social and health services to the person, 'Autonomous Community Law 11/2016'): preamble, Articles 2 to 6, 4th additional provision and 2nd final provision

Decreto 62/2017, de 11 de abril, del Gobierno de Aragón, sobre acuerdos de acción concertada de servicios sanitarios y convenios de vinculación con entidades públicas y entidades sin ánimo de lucro (Decree 62/2017 of the Government of Aragon of 11 April 2017 on public-private health service agreements and cooperation agreements with public and non-profit organisations, 'Autonomous Community Decree' 62/2017'): Articles 1, 3, 4, 6, 7 and 9 to 13, 1st and 2nd additional provisions and sole transitional provision

Orden SAN/1221/2017, de 21 de julio, por la que se establecen los precios y tarifas máximas aplicables en la prestación de servicios sanitarios con medios ajenos al Sistema de Salud de Aragón (Order SAN/1221/2017 of 21 July 2017 laying down maximum prices and tariffs for the provision of health services other than directly by the Aragon Health Service, 'Autonomous Community Order SAN/1221/2017'): Article 2

Orden del Consejero de Sanidad por la que se aprueba el expediente relativo al acuerdo de acción concertada para la atención en dispositivos asistenciales de carácter residencial para enfermos de SIDA en la Comunidad Autónoma de Aragón, de 21 de agosto de 2017 (Order by the Minister for Health approving the procedure concerning the public-private agreement for the provision of residential care for AIDS patients in the Autonomous Community of Aragon, 'Autonomous Community Order on care for AIDS patients')

Brief summary of the facts and the main proceedings

Legislative summary

1 By virtue of the powers conferred on it in respect of social services by the Spanish Constitution and the powers conferred on it by the Statute of Autonomy in particular as regards social action, health, public health and education, the Autonomous Community of Aragon passed Autonomous Community Law 11/2016; implementing regulations were introduced by Autonomous Community Decree 62/2017. In essence, this legislation established and regulated the use of public-private agreements for the provision of social and health services to the person; it provided that public-private agreements could be entered into only with public-sector bodies and non-profit organisations (with for-profit entities therefore being excluded). The legislation was supplemented by Autonomous Community

Order SAN/1221/2017, which established tariffs for the provision of outsourced health services.

2 The above legislation provided the basis for the adoption of the Autonomous Community Order on care for AIDS patients, which is being directly challenged in these proceedings.

3 It should be noted that all the Autonomous Community legislation cited was passed before the enactment of National Law 9/2017, which governs public procurement in Spain – over which the State has exclusive jurisdiction – and which transposes Directive 2014/24 (among others) into Spanish law.

Main proceedings

4 In October 2017 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 the Autonomous Community Order on care for AIDS patients. In that action, in addition to seeking to have the said order declared void, it also sought the annulment of Autonomous Community Order SAN/1221/2017 and Autonomous Community Decree 62/2017 and requested that the matter be referred to the Court of Justice for an interpretation of the compatibility of Autonomous Community Law 11/2016 (specifically Article 2) and the aforesaid Autonomous Community Decree 62/2017 with Article 49 TFEU, Article 77 of Directive 2014/24 and Article 15(2) of Directive 2006/123.

Main arguments of the parties to the main proceedings

5 The applicant, ASADE, argues that a reference to the Court of Justice for a preliminary ruling on the interpretation of Autonomous Community Law 11/2016 and Autonomous Community Decree 62/2017 is necessary because Autonomous Community legislation cannot depart from the legislation governing contracts. It contends that the Autonomous Community legislation establishes procurement procedures which are similar to those for contracts for services but which are open only to non-profit organisations, and it is therefore contrary to Article 49 TFEU and Article 15 of Directive 2006/123. In its view, according to the case-law of the Court of Justice [*Centro Hospitalar de Setúbal and SUCH* (C-574/12) and *CASTA and Others* (C-50/14)], a restriction on freedom of establishment under which access to certain activities is restricted to operators with a particular legal form, such as non-profit organisations, is possible only on certain exceptional grounds relating to the principles of solidarity and budgetary efficiency. In its view, the case-law of the Court of Justice has accepted the direct award of contracts only in the case of contracts awarded to voluntary associations, whereas the Autonomous Community legislation at issue applies this exception not only to voluntary associations but also to non-profit organisations, thus extending the scope of the restriction. It believes that the Autonomous Community legislation at issue nullifies the objective of budgetary efficiency, because Autonomous Community

Order SAN/1221/2017 establishes the same service tariffs for both non-profit organisations and for-profit organisations awarded contracts under public procurement legislation, and those tariffs apply to all forms of outsourced service provision, with no distinction being drawn between public-private agreements and contracted-out services.

6 The Consejería de Sanidad (Department of Health) argues that, in accordance with Articles 14 and 106 TFEU, Protocol No 26 annexed to the Treaty and recital 114 to Directive 2014/24, the Autonomous Communities, including the Community of Aragon, have legislated on this matter by virtue of their power to organise social services of general interest; they have opted to establish different ways of managing this type of services, and commercial organisations are eligible to manage these services under the contracting-out route. It is therefore incorrect to conclude that organisations other than non-profit organisations are excluded from managing this type of services. It contends that it is not Autonomous Community Law 11/2016 which has created a third way for managing services of general interest, but Directive 2014/24, and the Autonomous Community of Aragon has transposed that option into domestic law. The legislation on public-private agreements does not breach legislation on contracts because they are different routes, since a public-private agreement is not a contract. The Department of Health believes that there is no breach of the freedom of establishment or the freedom to provide services, because it considers that restricting the use of public-private agreements in the health field to non-profit organisations – particularly in the case of the management of residential care for AIDS patients – is consistent with EU law. In its opinion, the EU legal principles of universality and solidarity and grounds of economic efficiency and appropriateness provide sufficient justification for the restriction, since it enables that service of general interest to be provided under stable economic conditions by organisations whose fundamental purpose is to serve the general interest, in accordance with EU case-law.

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

Legal issues

7 The referring court begins by noting that, in the light of decisions of the Court of Justice such as those in *Ordine degli Ingegneri della Provincia di Lecce* (C-159/11) and *Piepenbrock* (C-386/11), 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. Or, as noted by the Court of Justice in *CASTA and Others* (C-50/14) and *Azienda sanitaria locale n. 5 'Spezzino' and Others* (C-113/13), a contract cannot fall outside the concept of public contract merely because the remuneration is limited to reimbursement of the expenditure incurred to provide the agreed service or because the contract is concluded with a non-profit-making body. The referring court notes that, in *CASTA and Others* (C-50/14), the Court of Justice ruled that the direct award of a service to a voluntary association, without advertising, is consistent with EU law,

provided that the decision satisfies the criterion of budgetary efficiency and that the award contributes to a social purpose and to achieving the objectives of the good of the community.

8 However, the referring court notes that, while the general premiss of recital 114 and Articles 76 and 77 of Directive 2014/24 is that the procurement rules must be followed, Member States are given considerable freedom to provide health and social services of general interest themselves or to organise the way in which such services are provided, with provision for reserved contracts (Article 77) and even direct award of contracts, as can be seen from the final part of recital 114, which provides examples of actions or organisational methods that do not rely on contracts.

9 The referring court therefore concludes that Directive 2014/24 allows Member States freedom to provide this type of services themselves without applying procurement procedures, but in broad terms, that is to say, without discriminating between organisations depending on whether or not they operate in the market or between for-profit and non-profit organisations, and that the case-law of the Court of Justice has ruled that certain types of services can be awarded direct to voluntary associations, without advertising, only in exceptional cases, where the decision is justified on grounds of budgetary efficiency and contributes to the pursuit of the objectives of the good of the community and a social purpose.

10 With regard to the disputed Autonomous Community Law 11/2016, the referring court notes that, under that law, public-private agreements provide one option for managing social and health services, alongside direct management using own resources and indirect management through the contracting-out of services (Article 2). Administrations may use any of these three routes to provide this type of services. Public-private agreements are defined as a non-contractual organisational tool (Article 3) which offers a subsidiary alternative to direct management using own resources for services that are required to be provided directly by administrations (4th additional provision).

11 In the view of the referring court, it can be seen from the above provisions and Article 5(2) and (4) of Autonomous Community Law 11/2016, taken together, that the use of public-private agreements by the administration, as a subsidiary alternative to direct management using its own resources, is determined not so much by the specific or particular nature of the services to be provided (the Law indicates that any of the three routes may be used to ensure appropriate provision of this type of services) but rather by the objective which use of such an agreement seeks to achieve, which is justified by the body required to provide the service. It should be noted that Article 5(2) of the Law establishes three separate situations in which public-private agreements may be used, and therefore their use does not necessarily have to be justified on grounds of ‘the suitability of the aforesaid form of management, having regard to the specific content of the service to be provided’.

12 The referring court interprets this as meaning that the objective of a public-private agreement is not so much to ensure suitable provision of a particular service of general interest — unlike the EU procurement rules, the disputed legislation does not specify particular services — since the contractual route could also offer suitable provision, but for the service to be provided by a non-profit organisation that has particular characteristics. Therefore, the use of a public-private agreement is not determined by the provision of the service but by the characteristics of the person designated to provide that service. In the light of Article 5(4) of Autonomous Community Law 11/2016, it seems that public-private agreements are intended as an instrument of social policy, and the agents of that policy are non-profit organisations in general and the non-profit organisations selected by the administration in particular.

13 It follows from this that, by their very nature, all non-profit organisations are automatically deemed to be efficient in budgetary and financial terms. This conclusion cannot in any way be inferred from the EU legislation or from the exceptional grounds on which the Court of Justice ruled that the contractual route was not required and that certain services could be awarded direct, without advertising, which was accepted by the Court solely and exclusively in the case of services awarded to voluntary associations. It should also be added that indirect management (via the contracting-out route) and public-private agreements appear to be equally efficient in economic terms, since Autonomous Community Order SAN/1221/2017 applies equally to both cases.

14 In short, the use of public-private agreements is restricted, solely and exclusively, to the provision of health or social services of general interest by non-profit organisations. Such agreements are deemed to be a subsidiary alternative to direct service provision by the administrations, using their own resources, not for service provision reasons (that is, to ensure complete satisfaction for the citizen), but on grounds of achieving certain social policy objectives pursued by each administration. Non-profit organisations become agents for delivering that policy and those objectives.

Justification of the need for a request for a preliminary ruling

15 The referring court notes that the action concerns the Autonomous Community Order on care for AIDS patients. The brief grounds cited in the order for the use of public-private agreements with non-profit organisations are: the lack of resources on the part of the administration providing the public service of general interest in question; the undesirability of increasing the administration's own human and material resources; and the need to ensure continuity of care services for AIDS patients in Aragon; no further explanation is given.

16 The lawfulness of the contested administrative measure is dependent on whether the applicable legislation complies with EU law, which justifies this request for a preliminary ruling. Clearly, if the legislative option in Autonomous Community Law 11/2016 which provides for public-private agreements as a subsidiary

alternative to the direct management of certain services of general interest does not comply with EU law, due to breach of the principle of freedom of establishment, among other principles, then the contested administrative measure could scarcely be compliant with EU law, and therefore there would be no need to rule on whether the measure in question complied with the applicable legislation.