

**Spain, Administrative Board of Contract Appeals Community of the Basque Country, Spain,
Decision of 21 October 2016, ordinary**

Member State

 Spain

Topic

Independence (tenure, discipline, transfers, and removal)

Deciding Court Original Language

Órgano Administrativo de Recursos Contractuales de la Comunidad Autónoma de Euskadi

Deciding Court English translation

Administrative Board of Contract Appeals of the Autonomous Community of the Basque Country,
Spain

Registration N

N/A

Date Decision

21 October 2016

ECLI (if available)

N/A

National Follow Up Of (when relevant)

N/A

EU legal sources and CJEU jurisprudence

Article 267 TFEU, Directive 2014/24/EU

Subject Matter

Request for a preliminary ruling – Article 267 TFEU – Jurisdiction of the Court – Whether the

referring body qualifies as a court or tribunal – Public procurement procedures – Open procedure – Award criteria – Technical evaluation – Minimum score threshold – Price-based evaluation

Legal issue(s)

Independence for requesting a preliminary ruling: the Administrative Board of Contract Appeals of the Autonomous Community of the Basque Country, Spain, and its independence and judicial nature

National Law Sources

Article 150(4) of the Texto Refundido de la Ley de Contratos del Sector Público (Law on Public Sector Contracts), resulting from Real Decreto Legislativo 3/2011 por el que se aprueba el Texto Refundido de la Ley de Contratos del Sector Público (Royal Legislative Decree 3/2011 approving the consolidated text of the Law on Public Sector Contracts) of 14 November 2011

Facts of the case

Musikene, a public-sector foundation in the Autonomous Community of the Basque Country, launched a tendering procedure, under an open procedure, for the award of a public contract relating to the supply of music equipment. The contract obliged to reach a minimum score threshold at the end of the technical stage to continue to participate in the selection process. Montte argued that this minimum did not allow to weight the price criteria, since the tender will be previously eliminated due to technical criteria before the evaluation of the price of the offer.

The Administrative Board of Contract Appeals of the Autonomous Community of the Basque Country decided to stay the proceedings and to refer to the Court of Justice several questions for a preliminary ruling. In particular, the Board asked whether Directive 2014/24/EU precluded national legislation which authorizes contracting authorities to establish documents governing an open tendering procedure award criteria which apply in successive elimination stages for tenders which do not exceed a predetermined minimum score threshold. And if the answer is negative, the Board also asked whether it is compatible with Directive 2014/24/EU the use of the aforementioned system of award criteria which apply in successive elimination stages in such a way that in the last stage there are not sufficient tenders to ensure “genuine competition”.

Reasoning (role of the Charter or other EU, ECHR related legal basis)

The Decision of the Administrative Board of Contract Appeals of the Autonomous Community of the Basque Country entailed two separated questions.

From the formal standpoint, it is necessary to determine whether under Article 267 TFEU the Board can send a preliminary reference to the Court of Justice. Therefore, it is necessary to analyse whether the Board is a body established by law, permanent, whether its jurisdiction is compulsory, whether its procedure is inter pares, whether it applies rules of law and whether it is

independent.

From the substantive standpoint, the Board questioned the Spanish public procurement law in light of Directive 2014/24/EU. Article 150(4) of the Law on Public Sector Contracts allows the establishment of minimum technical thresholds in open procedures, in such a way that they can be applied as award criteria in different stages before evaluating the price of the offer. The Board decided to ask to the Court of Justice whether Directive 2014/24/EU allows this award criteria and, if so, whether it is also permissible the use of that criteria in the case that in the last stage were not sufficient tenders to ensure “genuine competition”.

Relation of the case to the EU Charter

N/A

Relation between the EU Charter and ECHR

N/A

Use of Judicial Interaction technique(s)

Preliminary reference

Horizontal Judicial Interaction patterns (Internal – with other national courts, and external – with foreign courts)

N/A

Vertical Judicial Interaction patterns (Internal – with other superior national courts, and external – with European supranational courts)

In the case C-546/16 Montte SL v Musikene, EU:C:2018:752, the Court did recognize the possibility of this kind of body to send a preliminary reference. The Administrative Board of Contract Appeals of the Autonomous Community of the Basque Country complies with all the requisites of a judicial body and it is entitled to send a preliminary reference under Article 267 TFEU.

Then, the Administrative Board of Contract Appeals of the Autonomous Community of the Basque Country is a permanent, independent body established under a legal provision which adopts its decision based on exclusively legal criteria following an inter pares procedure. The Board is independent, that is, is not subject to hierarchical constraint and does not receive instructions from third parties. The Board carries out its function objectively, impartially, and entirely autonomously. Regarding the nature of the jurisdiction, under Spanish public procurement law, the jurisdiction of the Board is optional. Parties can choose between the jurisdiction of the Board (special administrative appeal) and an ordinary contentious-administrative action (before a court).

However, if the Board's jurisdiction is chosen, then the resolution of the body is binding on the parties. Therefore, for the Court of Justice the Board fulfils the criterion of compulsory jurisdiction.

In relation to the substance of the case, the Court determined that Directive 2014/24/EU allows a system award criterion in which it is possible to establish a minimum technical threshold in different stages. The Court declared that the merit or technical requirements are a relevant awarding criterion and it is possible to eliminate tenders based on that criteria before the evaluation of the economic offer. If the tender is eliminated, this means that it does not fulfil the needs of the contracting authority and must not be taken into account for the determination of the most economically advantageous tender. Therefore, a technical filter before the economic (price criteria) evaluation is possible. And the use of that technical filters is possible also regardless of the number of tenderers remaining. In the case that there is only one tender left for the contracting authority to consider, that authority is in no way required to accept that tender. If the contracting authority considers that the procedure lacks effective competition in the last stage, it is open to that authority to terminate the procedure and, if necessary, to launch a new procedure with a different award criterion.

[Strategic use of judicial interaction technique \(purpose aimed by the national court\)](#)

Presumably, the Administrative Board of Contract Appeals of the Autonomous Community of the Basque Country used the preliminary reference to enforce its position. The public procurement boards are pivotal institutions in managing public procurement law. They oversee the special administrative appeals which can be launched by tenderers against unfair and illegal governing documents of the public procurement, missteps of the awarding procedures or the adjudication of public contracts. The boards have a long tradition and a solid independence background. Considering the relevance of EU law in public procurement law, it seems natural that these administrative boards wanted to be entitled to send directly preliminary references to the Court of Justice. This possibility ensures its position in the system and gives them a similar tool that is hands of the ordinary judiciary.

[Impact on Legislation / Policy](#)

N/A

[Notes on the national implementation of the preliminary ruling by the referring court](#)

N/A

[Impact on national case law from the same Member State or other Member States](#)

N/A

[\(Link to\) full text](#)

N/A

[Author](#)

