



**Eurodiaconia**  | Connecting faith and social justice through action

# RESERVED CONTRACTS IN PUBLIC PROCUREMENT

*A TOOL FOR SOCIAL  
INTEGRATION*

**2023**

Position Paper



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# Eurodiaconia

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The concept of social responsibility in public procurement has gained importance as a model for creating inclusive opportunities and for promoting the integration of vulnerable groups into the workforce, for instance, through the utilization of reserved contracts.

The use of reserved contracts has been on the rise in Europe, in particular for some Member States. Building on the feedback and experiences of Eurodiaconia members, in this report, we explore the concept of reserved contracts and socially responsible public procurement.

Finally, we put forward some recommendations to promote the use of reserved contracts for social integration, both by national authorities and at the EU level.

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# WHO WE ARE

Eurodiaconia is a European network of churches and Christian NGOs providing social and healthcare services and advocating social justice.

## ORGANISATIONAL VALUES

- Love
- Courage
- Dignity
- Hope
- Trust

## OUR VISION AND MISSION

Inspired by our Christian faith, our vision is of a Europe where social injustice is eradicated and each person is valued, included and empowered to realize their fullest potential, particularly the most vulnerable and marginalized. Eurodiaconia is a network of churches and Christian organisations that provide social and health care services and advocate for social justice. Together we work for just and transformative social change across Europe

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# INTRODUCTION

Eurodiaconia is a European network of churches and Christian NGOs providing social and healthcare services across Europe and advocating for social justice. We represent 58 organisations in 33 countries, over 30 000 health and social services providers, over 1 million employees, and more than 1 million volunteers. The network has been advocating for socially responsible public procurement and promoting the use of reserved contracts as an instrument to achieve social integration in Europe. Eurodiaconia's member organisations have been actively engaged in initiatives that aspire to deliver social value through public procurement practices while fostering equal access to opportunities and prioritizing the integration of vulnerable groups. Together, our members are dedicated to creating opportunities for people who face barriers to employment.

The concept of social responsibility in public procurement has gained importance as a model for creating inclusive opportunities and for promoting the integration of vulnerable groups into the workforce, for instance, through the utilisation of reserved contracts. Reserved contracts involve public authorities or governments designating contracts or parts of them to specific suppliers that fulfill predetermined criteria, operating within the framework of directives and laws in the European Union (EU). While reserved contracts hold promise for achieving social integration and economic progress, it is essential to acknowledge the model's limitations, based on soft law (EU directive on Public Procurement), which grants flexibility in interpretation by Member States.

This position paper explores the concept of reserved contracts in public procurement and its relation to the integration of disadvantaged groups. We start with a brief overview of public procurement terminology, acknowledging the need for the promotion of more usage of reserved contracts in procuring social and health care services. We build on the examples of two court cases of reserved contracts in Norway and Spain. Finally, we conclude by offering recommendations at the EU level.



## **Reserved contracts**

Reserved contracts involve public authorities or governments designating contracts or parts of them to specific suppliers that fulfil predetermined criteria, operating within the framework of directives and laws in the European Union.

# **RESERVED CONTRACTS IN PUBLIC PROCUREMENT**

## **BACKGROUND**

Public procurement, governed by principles of non-discrimination, transparency, and equal treatment, refers to the processes through which national authorities and the public sector purchase goods and services from external suppliers. Public procurement constitutes a substantial portion of the Gross Domestic Product (GDP) in the EU, accounting for around €2 trillion (approximately 14%)<sup>1</sup> spent annually. It involves a vast network of public authorities, in sectors such as social protection, health, education energy, and waste management. In many European countries, spending on health represented the largest portion of public procurement spending in 2021, that is, around 30%, according to OECD estimates for the same year<sup>2</sup>. In addition, public procurement serves both as a technical and a policy instrument, guided by the EU governing framework to ensure open competition and management of public procurement procedures. It applies to all sorts of services and contributes to the reinforcement of the single internal

<sup>1</sup> European Commission - Public procurement [https://single-market-scoreboard.ec.europa.eu/business-framework-conditions/public-procurement\\_en](https://single-market-scoreboard.ec.europa.eu/business-framework-conditions/public-procurement_en)

OECD (2023), *Government at a Glance 2023*, OECD Publishing, Paris, <https://doi.org/10.1787/3d5c5d31-en>

market in the EU and offers a huge opportunity to achieve a vast list of horizontal objectives across Europe.

**The EU Directive on Public Procurement 2014/24/EU of the European Parliament and of the Council**<sup>3</sup> (the Directive), adopted on 26 February 2014, sets the minimum rules for public procurement, aiming to ensure consistency among the procedures. Governments or public authorities must keep transparency during the contracting process, must not discriminate between the goods- or service-providers, and must treat them all equally, regardless of their origin or size. Public procurement is also linked to social care provision, work conditions and the employment of individuals with disabilities. EU Member States may ensure that both contractors adhere to EU and national environmental, social, and labour laws, as well as collective (inter)national agreements, implying that decisions of contracting authorities rely on national legislation, without obligation. Thresholds for tenders are set to ensure that these principles are upheld, while tenders that are less than the specified amount are regulated on a national basis, respecting the principles of EU law. These are the following tender thresholds from January 1, 2022<sup>4</sup>:

- €750,000 for social and specific service contracts
- €5,382,000 for public work contracts
- €140,000 for central government contracts
- €215,000 for local and regional government contracts

Furthermore, Articles 74 and 76 specify award procedures of reserved contracts in specific services such as health, social, education and cultural services. Article 77 (1) provides a list of Common Procurement Vocabulary (CPV) codes covering these services for public authorities that are willing to enjoy the benefits of reserved contracts. The following *Table 1* shows different services that are covered in the Directive, adapted from the Office of Government Procurement Ireland.

Table 1: Service categories listed in Article 77 of the Directive		
Administrative educational services	Administrative healthcare services	Administrative housing services
Supply services of domestic help personnel	Supply services of nursing personnel	Supply services of medical personnel
Pre-school education services	Higher education services	E-learning services

<sup>3</sup> The EU Directive on Public Procurement 2014/24/EU of the European Parliament and of the Council <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32014L0024&rid=3>

<sup>4</sup>EU Monitor - Directive 2014/24 - Public procurement [https://www.eumonitor.eu/9353000/1/j4nkv6yhcbpeywk\\_j9wik7m1c3gyxp/vjs5ga5m3dzb#:~:text=WHAT%20IS%20THE%20AIM%20OF,purchasing%20procedures%20for%20public%20buyers.&text=The%20legislation%20specifies%20that%20when,and%20not%20discriminate%20between%20them](https://www.eumonitor.eu/9353000/1/j4nkv6yhcbpeywk_j9wik7m1c3gyxp/vjs5ga5m3dzb#:~:text=WHAT%20IS%20THE%20AIM%20OF,purchasing%20procedures%20for%20public%20buyers.&text=The%20legislation%20specifies%20that%20when,and%20not%20discriminate%20between%20them)

Adult education services at university level	Staff training services	Training facilities
Tutorial services	All types of medical services fundamentally	Library, archives, museums and other cultural services
Services provided by youth associations	Sporting services	Services furnished by social membership organizations

Source: Office of Government Procurement Ireland (2022) "Reserved Contracts"

<https://www.gov.ie/en/publication/0b380-reserved-contracts/>

## RESERVED CONTRACTS

The use of reserved contracts is mentioned in the Article 20 of the Directive, stating that *"Member States **may** reserve the right to participate 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 programs, provided that at least 30 % of the employees of those workshops, economic operators or programs are disabled or disadvantaged workers."*

The Directive allows for reservations in public procurement related to social and professional integration of disadvantaged workers and workers with disabilities. Member States can reserve participation rights for sheltered workshops and economic operators. To qualify for reservation, a minimum of 30% of employees within these entities should be individuals with disabilities or from disadvantaged backgrounds (Article 20(1)). Use is optional, and contracts awarded under reservation typically have a maximum three-year duration (Article 77(3)).

Further, the Directive introduced "the light regime" for specific services such as social care, health care, cultural events and organization, as well as for education and training. The procedure of public procurement is slightly different for these services, namely contracts can be exclusively reserved for social enterprises (Article 77(2) of the Directive), with higher thresholds, but less strict requirements and award criteria. In the cases of contracting care services, cost considerations are often excluded from the award criteria as these are set by the contracting authority to ensure adequate pay and affordability. In certain cases, contracts for health, social, education and training and cultural services can be reserved for not-for-profit organizations, like charities, social enterprises that meet specific conditions and commit to fostering public service missions (as formulated in Articles 20, 74, 76 and 77). Certain conditions must be fulfilled such that these services are solidarity-based, universal and tax-financed. These organizations are eligible for reserved contracts, provided their organizational structure aligns with the requirements specified in Article 77 (2). Article 77 (2) of the Directive established the foundations for these conditions and sets requirements that not-for-profit organizations need to fulfill:

1. Pursuing a public service mission related to health, social and cultural services.
2. Reinvesting profits within the organization to achieve its objective. If the profits are redistributed, then the process must adhere to the organization's social goal.
3. Active participation of employees, stakeholders and users; or employee ownership and participatory principles.
4. If the organization has enjoyed the benefits of a contract in the previous three years, it cannot be awarded the same contract (with the same code) by the same authority. However, it can enjoy the benefits of the same contract provided by another authority; or a different contract issued by the same authority.

Article 77 does not preclude other ways of reserving contracts and public procurement procedures for social services, and there are possibilities for reserving contracts for non-profit organizations beyond the article 77, as will be described in the contested cases of reserved contracts further below. The contracting authority considers the quality, accessibility, availability, innovative character, and continuity of services provided that meet the specific needs of and empower users including disadvantaged and vulnerable groups (Article 76(2)).

The procurement procedure involves evaluating tenders based on award criteria (Article 67), including price, financial standing, experience, social considerations, price-to-quality ratio, and sustainability. For instance, bidders that can recruit and train people from disadvantaged backgrounds or with disabilities, must provide evidence, such as contracts that they previously carried out, to prove their ability and capacity for these working conditions in the selection process. Eventually, contracts shall be awarded based on the most economically advantageous tender (MEAT), determined by the best price-to-quality ratio, to balance aspects of financial sustainability and social objectives.

The following are two examples of reserving a contract:

- *Public contracting authorities may exercise the right to reserve a contract for competition by social organizations that employ individuals from vulnerable backgrounds, for instance, those who have experienced marginalization or face the*

*threat of labour market exclusion.*

- *Public contracting authorities may exercise the right to reserve a contract for competition by social organizations that employ individuals from vulnerable backgrounds, for instance, those who have been in a penitentiary or health institution and need to reintegrate into the workforce.*

Public procurement and reserved contracts represent not only a strategic approach but a significant potential for promoting inclusion, socially responsible practices, and economic growth. The EU has laid down directives and laws that provide a framework for public procurement practices. While these directives set the minimum standards, they do not, however, oblige Member States (MS) to uniformly follow them, allowing room for flexibility in interpretation.

# SOCIAL INTEGRATION THROUGH RESERVED

## CONTRACTS

Socially responsible public procurement (SRPP) aims to address the need for generating positive social outcomes with public contracts, such as inclusion, equal opportunities, and decent work standards. It is essential to recognize that contracting authorities are interested in social benefits beyond the services delivered and not only in purchases at the lowest price or best value for money given.

Reserved contracts play a vital role in creating employment opportunities, decent working conditions and enabling integration for persons with disabilities and in disadvantaged positions. They offer a possibility for public authorities and social enterprises to commit to more socially responsible and sustainable markets, employment, and management processes, facilitating the balance between market-driven efforts and social progress.

Three articles and a recital of the Directive refer to the social integration of individuals in disadvantaged situations or with disabilities and expect Member States to **transpose** the following into their national legislation:

1. *Article 20* of the Directive allows Member States to reserve the participation right for sheltered workshops, economic operators and sheltered employment programs, whose main objective is the social and professional integration of people with disabilities or disadvantaged workers.
2. *Article 42* emphasizes accessibility criteria and inclusive designs in technical specifications of contracts in public procurement.
3. *Article 67* introduces the concept of Most Economically Advantageous Tender (MEAT) award criteria, based on the best price-quality ratio, but also considering social, economic, environmental, quality, innovation, accessibility, and inclusive user-design features.
4. *Recital 99* addresses social aspects in contracts, suggesting that contracts can include social requirements related to the protection of workforce, social integration of disadvantaged individuals and vulnerable groups and training in the performance conditions, as well as accessibility and inclusive user-design in the technical conditions of the contract. Sheltered workshops have slightly different rules and regulations, due to their sheltered nature and specific employment status.

Reserved contracts offer several advantages, such as fostering social inclusion, promoting social goals, and aligning with responsible business practices. It is a useful tool to integrate people furthest from the labour market into employment. However, potential

challenges including the effects of a soft law instrument, potential for abuse and the need for robust implementation mechanisms, require careful consideration. According to the Directive, the decision to transpose Article 20 and 77 of the Directive lies with the Member States and the decision to actually reserve contracts for sheltered workshops and economic operators lies with the contracting authorities. This implies, it is within the discretion of the Member States to decide if their contracting authorities are allowed to reserve the contract in the social field.

Equally, the terms "disadvantaged", "socially marginalized" or "disabled" are not explicitly defined in the Directive from 2014, but briefly mentioned in Recital 36 of the Directive, referring to *"integration or reintegration of disabled and disadvantaged persons, such as the unemployed, members of disadvantaged minorities or otherwise socially marginalized groups. [...]"*. According to the UN Convention on the Rights of Persons with Disabilities (UNCRPD) (2006), people with disabilities include any person who has *"long-term physical, mental, intellectual and sensory impairment(s) which, in interaction with various barriers, may hinder their full and effective participation in society on an equal basis with other persons"*<sup>5</sup>. Disadvantaged persons include those at-risk of social exclusion and poverty, people with low educational attain those experiencing domestic violence and addiction, long-term unemployed, migrants, religious, racial, or ethnic minority members.<sup>6</sup> In these cases, it is crucial that Member States include all categories of individuals experiencing exclusion and adapt the Directive to their national needs. Some other challenges include the pushback from for-profit service providers, reluctance from administration and contracting authorities, lack of knowledge and competence on different levels, fear of process risks and difficulty in demonstrating added values and characteristics of contributions of not-for-profit service providers.

Furthermore, there is a considerable absence of data related to the use of SRPP (Socially Responsible Public Procurement), due to the lack of systems for consistent data collection on SRPP, as well as on green and innovative procurement, on both national and EU levels.<sup>7</sup>

Considering this, Eurodiaconia's member organizations contribute to creating an equitable European context that ensures active participation of all members of society and fosters social and economic well-being. Diakonie Deutschland<sup>8</sup>, a member organization of Eurodiaconia continues to emphasize the importance of leveraging

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<sup>5</sup> UNCRPD "Convention on the Rights of Persons with Disabilities" (2006) <https://www.ohchr.org/en/instruments-mechanisms/instruments/convention-rights-persons-disabilities>

<sup>6</sup> European Commission (2021) "Buying Social - a guide to taking account of social considerations in public procurement (2nd edition)" <https://ec.europa.eu/docsroom/documents/45767> pg. 59

<sup>7</sup> Caimi, V., & Sansonetti, S., (2023), The social impact of public procurement, publication for the Committee on Employment and Social affairs, Policy Department for Economic, Scientific and Quality of Life Policies, European Parliament, Luxembourg.

<sup>8</sup> Diakonie Deutschland <https://www.diakonie.de/>

existing expertise in sustainable procurement and aligning this with UN Sustainable Development Goals<sup>9</sup>. The challenges of socially oriented service procurement are exemplified by cases like labour market services and debt counselling<sup>10</sup>, whereby contracts are often selected based on the costs and do not favour collaborations, affecting social enterprises and their ability to provide services. Financial limitations and uncertain contract extensions also affect the workforce and services.

German Federal Government sets out to achieve a transformation of public procurement with the aim to facilitate proceedings, improve legal security and to foster sustainable procurement. Some of the goals of the transformation project include efficient contracting procedures, digitalization, strategic procurement and support for SMEs and start-ups. After a detailed stakeholder consultation, it remains to be seen, to what extent sustainable procurement and reserved contracts will receive further legal attention. There are debates whether the lawmakers reduce the contracting authorities' scope for discretion and make sustainability a more mandatory aspect of public procurement. To address these issues and promote sustainable procurement, especially of social service provision, Diakonie Deutschland advocates for using available resources, for instance free consulting services for guidance, to achieve sustainability, inter-departmental communication, and legal comprehension.

In addition, as Eurodiaconia's member Diakonie Deutschland note, Germany is creating a database on federal procurement statistics, including references to sustainable, social and ecological aspects, as well as the innovation in public procurement. According to sources from 2023, the German federal statistics office has published two reports for 2021, and it is expected to develop the database further to gain better understanding of public procurement procedures. According to German procurement statistics, in 2021, there were 22.894 sustainable procurement contracts, constituting some 28.062 million EUR in contract volume. Reserved contracts under Article 20 of the § 118 Competition Law<sup>11</sup> in Germany are mostly used on municipal level, thus the individual characteristics and autonomy of municipalities makes structured data collection difficult.

Finally, according to the Federal Organization of Sheltered Workshops (BAG WfbM)<sup>12</sup> in Germany, there has been a notable increase in the usage of reserved contracts. For instance, one of best practices in Germany is the preferred treatment of inclusion

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<sup>9</sup> UN Sustainable Development Goals 2015, in particular "Goal 12: Ensure sustainable consumption and production patterns", have put forward the promotion of sustainable public procurement and its reporting cycles, in accordance with national policies and priorities.

<sup>10</sup> EPD Sozial "Nachhaltigkeit und Qualitätswettbewerb bei der Auftragsvergabe"

[https://w.epd.de/digital/soz\\_weekly/2023/08/04/524188.htm](https://w.epd.de/digital/soz_weekly/2023/08/04/524188.htm)

<sup>11</sup> Competition Act in the version published on 26 June 2013 (Bundesgesetzblatt (Federal Law Gazette) I, 2013, p. 1750, 3245), as last amended by Article 2 of the Act of 19 July 2022 (Federal Law Gazette I, p. 1214) [https://www.gesetze-im-internet.de/englisch\\_gwb/englisch\\_gwb.html#p1495](https://www.gesetze-im-internet.de/englisch_gwb/englisch_gwb.html#p1495)

<sup>12</sup> Federal Organization of Sheltered Workshops („Die Bundesarbeitsgemeinschaft Werkstätten für behinderte Menschen (BAG WfbM)“) <https://www.bagwfbm.de/>

enterprises in public procurement in Landschaftsverband Westfalen-Lippe (LWL), a local government association in Nordrhein-Westfalen, where social and cultural duties are autonomously performed on the municipal level. One of the priorities of this practice is the maintenance or improvement of the social context, in which social services are performed (employment, labour conditions, social infrastructure). Equally, the motive of this practice is to offer better employment chances for handicapped people, while creating a socially and economically sustainable environment with the use of reserved contracts under the EU Directive, §118 German Competition Law and §141 Book IX Social Law. For contracts with a value of no more than 10.000 EUR, offered prices receive a reduction by maximum 15%, while those above contract volume of 10.000 EUR have exclusive competition only for sheltered workshops and inclusive enterprises, and conditions for contract performance (inclusion of at least 25% of staff with disabilities). Between 2014 and 2017, 683 contracts were awarded within these conditions, with a volume of 2.7 million EUR in branches such as facility management, transport and disposal, conference and accommodation, catering and others.

Although reserved contracts have the potential to be a useful tool in achieving social integration, it has experienced a pushback from other for-profit service providers in some Member States. In some cases, contracting authorities are still reluctant to use this procurement procedure or there exist different barriers such as complicated procedures, little relevance of tariff contracts and legal environment.

# EXAMPLES OF RESERVED CONTRACTS CONTESTED

## NORWAY

The EFTA (European Free Trade Association) Court<sup>13</sup> recently issued an advisory opinion (Case E4-22, 28 March 2023) stating that Norwegian municipalities can, under specific circumstances, reserve tenders for non-profit actors in elderly care services under Article 77 of the Directive. The Oslo Municipality offered three legal justifications for reserving procurement for non-profit organizations:

1. The services are considered "non-economic services of general interest," falling outside the scope of the EEA Agreement and the Public Procurement Directive.
2. Alternatively, the services are exempt from the EEA Agreement under Article 32, coupled with Article 39, as they involve services with the exercise of official authority.
3. Furthermore, the Public Procurement Directive does not prevent the reservation of procurement for non-profits, as long as it complies with national law.

This decision was made after a legal dispute involving private health providers Stendi and Nordlandia, who contested Oslo municipality's practice of reserving tenders for nursing homes to non-profit actors. The case before Oslo District Court centred on a procurement by Oslo municipality for long-term leasing and service agreements for 800 new long-term places in nursing homes, initiated in November 2020. The controversy arose from the municipality's decision to reserve the operation of nursing home places for non-profit organizations, leading to the exclusion of two private health providers Stendi AS and Norlandia Care Norge AS due to their non-not-for-profit status. The plaintiffs did not agree with this decision and believed it was illegal.

The Diakonhjemmet<sup>14</sup>, a member organization of Eurodiaconia, emphasises the importance of civil society welfare providers and NGOs in the welfare sector as the demand for care services continues to grow and views the decision as a positive one to address societal needs effectively. The EFTA Court's advisory statement provides an opportunity to reserve contracts for non-profit actors in line with national law in the care

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<sup>13</sup> The EFTA Court "Case E-4/22 Stendi AS & Norlandia Care Norge AS v Oslo Kommune"  
<https://eftacourt.int/cases/e-4-22/>

<sup>14</sup> Diakonhjemmet Foundation <https://www.diakonhjemmet.no/>

sector and can potentially influence similar decisions in various countries of Europe.

## SPAIN

The **"ASADE"** case in Spain refers to Case C-436/20 in the Court of Justice of the European Union (CJEU)<sup>15</sup>, which was the first to discuss the Article 77 of the Directive in detail. The case involved a trade association for private undertakings, the State Association of Domiciliary Care Providers "ASADE" ("The Asociación Estatal de Entidades de Servicios de Domicilio") from Spain versus the Ministry of Equality and Inclusive Policies in Valencia, Spain. The trade association ASADE has brought an action for annulment of Decree 181/2017, with supporting Articles and Title VI of Law 5/1997, which excludes profit-making entities from the possibility of providing certain social services such as personal assistance under a contractual action agreement, before the High Court of Justice of the Community of Valencia, Spain. Only private non-profit organizations may enter into these agreements to provide social services (support for children, teenagers, young people, elderly, people with disabilities, LGBTI people and Roma population groups). The ASADE asked the Court to clarify whether the Directive constitutes an obstacle to national legislation that excludes for-profit organizations from these agreements. The Court ruled that Articles 76 and 77 of the Directive must be interpreted as not precluding national legislation, referring to reservation of the right for private non-profit organizations to conclude agreements for the provision of social services (personal assistance) in return for reimbursement of the costs incurred, even when these organizations do not satisfy the requirements of Article 77, provided that the social purpose, objectives of solidarity, budgetary efficiency and transparency (Article 75) are respected. In other words, contracts can be reserved to social enterprises under Article 76, even if these do not fulfil the requirements under Article 77. Finally, the Court ruled that Article 76 must be interpreted as precluding national legislation, in a way that the location of the economic operator, in the place where the services are to be provided (when the contract is to be executed), is a criterion for the selection of economic operators before tender examination.

Similarly, in Spain, the **"Conacee"** case refers to Case C-598/19 in the Court of Justice of the European Union (CJEU)<sup>16</sup>, involving the interpretation of Article 20 of the Directive and reserved contracts in public procurement procedures. In this case<sup>17</sup>, the Diputación Foral de Gipuzkoa (Provincial Council of Gipuzkoa) in Spain issued a decision on the right to reserve participation in contracts for social initiative special employment centers or work integration social enterprises, excluding business initiative special employment centers.

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<sup>15</sup> <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:62020CJ0436>

<sup>16</sup> <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A62019CJ0598>

<sup>17</sup> Sapiens Network "Case C-598/19 Conacee Reserved Contracts and Additional National Criteria" <https://sapiensnetwork.eu/case-c-598-19-conacee-reserved-contracts-additional-national-criteria/>

Conacee, representing business initiative special employment centres, challenged this decision. Special employment centres, a tool for inclusion coming from either a social or a business initiative, are designated to provide paid employment to people with disabilities, as stated in the national legislation. Besides this, a minimum of 70% of the employees of these centres are people with disabilities. The central question before the CJEU was whether Member States could impose additional criteria for economic operators beyond those in Article 20(1) of Directive 2014/24/EU, into national law. This exclusion was based on additional criteria set by Spanish law, raising questions about whether Member States could impose such criteria beyond what was in the EU directive.

The CJEU ruled (6 October 2021) that Member States have the authority to set additional criteria for reserved contracts, beyond those from Article 20 of the Directive, if they comply with equal treatment principles, allowing certain flexibility in implementing the conditions of the reserved contracts. Essentially, the ECJ ruling allows Member States to establish additional national criteria, as long as it is explicitly stated in their legislation, to reserve specific contracts for not-for-profit or social economy organizations.

*Judgement of the Court (Fifth Chamber) 6 October 2021 (46)<sup>18</sup>:*

*“In the light of the foregoing considerations, the answer to the question referred is that Article 20(1) of Directive 2014/24 must be interpreted as not precluding a Member State from imposing additional criteria beyond those laid down by that provision, thereby excluding from reserved public procurement procedures certain economic operators which satisfy the criteria laid down in that provision, provided that that Member State complies with the principles of equal treatment and proportionality.”*

This reservation can be justified if these organizations can demonstrate that their involvement better serves social, health, or employment objectives. This approach is permitted because such organizations may be more effective in achieving these objectives, largely due to their not-for-profit or social economy orientation. The ruling aligns with the idea that social and employment goals can be better achieved through such organizations. This case is significant as it clarifies the extent to which Member States can practice the rules of the Directive and establish additional requirements for reserved contracts.

Reserved contracts in public procurement hold significant economic and social importance within the EU, involving a complex process of acquiring goods and services while complying with the principles of fairness, transparency, and non-discrimination. Reserved contracts are a useful tool for social services provision, ensuring cooperation between (not-for-profit) social service-providers and public contracting authorities. By

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<sup>18</sup> <https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX:62019CJ0598>

collaborating with policymakers and social enterprises, Member States and national authorities can incorporate reserved contracts as a standard practice in public procurement to support the integration of individuals with disabilities and disadvantaged populations.

# CONCLUSION AND RECOMMENDATIONS

While the Directive serves as a soft law instrument, the need for a stronger implementation, aligning economic growth with social inclusion, is evident. By fostering socially responsible public procurement and integrating the Directive into national laws, reserved contracts can become a powerful tool for social integration and sustainable practices in the EU. Based on the insights gathered from various sources, therefore, Eurodiaconia calls on the EU and National authorities to:

- 1. Integrate reserved contracts into national laws:** An integrated approach should be implemented in public procurement procedures, whereby the focus should be shifted to societal benefits that can be achieved with reserved contracts in public procurement. It is recommended to integrate the Directive and reserved contracts into national laws, whereby certain tenders can be limited to sheltered workshops and economic operators, dedicated to integrating people with disabilities and those that are disadvantaged. Some of the countries that have communicated the transposition measures of the EU Directive on public procurement include the following: Denmark, France, Germany, Hungary, Italy, Slovakia, the United Kingdom (all transposed within the initial deadline by 18 April, 2016), Belgium, Czech Republic, Bulgaria, Estonia, Ireland, Greece, Spain, France, Croatia, Cyprus, Latvia, Lithuania, Luxembourg, Hungary, Malta, the Netherlands, Austria, Poland, Portugal, Romania, Slovenia, Finland, Sweden.<sup>19</sup>
- 2. Collaborate with social enterprises and similar stakeholders:** Encourage the adoption of reserved contracts by codesigning services with social enterprises, to address work conditions, and combat discrimination through recruitment and training of staff and contractors. As one of the purposes of incorporating reserved contracts is to promote social inclusion and socially responsible public procurement practices, discrimination against the disadvantaged groups can be removed. The Directive to some extent implements the concept of co-design with its dialogue-permitting procedures, for negotiation and innovation for instance. Insofar, the newly adopted Council Recommendation on developing social economy framework conditions (EC 13287/23) might be helpful as well, as the inclusion of handicapped or otherwise disadvantaged persons into employment or society in general is an expressly highlighted focus on all the proposed

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<sup>19</sup> <https://eur-lex.europa.eu/legal-content/en/NIM/?uri=CELEX:32014L0024>

measures, some of which again is a promotion of socially responsible procurement.

3. **Verify conditions for participation:** While evaluating tenders, public contracting authorities should ensure that organizations prioritize the integration of disabled and disadvantaged people in their core missions. Criteria should include the capacity and the quality of projects for integration to prevent opportunistic employment during the contracting process. If an enterprise lacks the development and implementation capacity, authorities should consider dividing the contract into lots or encouraging partnerships.
4. **Good practice examples:** Guidelines for development, usage and implementation of reserved contracts should be further developed on the national and European level, as well as post-procurement monitoring practices to ensure quality and consistency.
5. **Choice justification:** Public contracting authorities should stay transparent in their public procurement procedures and justify their choices of enterprises for reserved contracts. Justifying according to the criteria of quality, value and Most Economically Advantageous Tender (MEAT) should be incorporated into post-procurement practices.
6. **Continuous promotion** of Socially Responsible Public Procurement by encouraging public authorities to integrate social aspects in their procurement.

By implementing these recommendations and transposing the Directive into national laws, Member States and their public contracting authorities can foster social responsibility within reserved contracts and support inclusive growth and societal well-being.



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*Reserved contracts in public procurement hold significant economic and social importance, while complying with the principles of fairness, transparency, and non-discrimination.*

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# Eurodiaconia

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