Public procurement issues in the planning and regeneration context

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Introduction

1. This paper considers frequently encountered issues concerning public procurement in the context of urban regeneration projects. Such projects often require the local authority to exercise compulsory purchase powers (generally s. 226 of the Town and Country Planning Act 1990) to assemble and make available to developers the land required for development. In return, the developer will typically indemnify the authority for its costs of the CPO and, depending on the circumstances, enter into a development agreement with the authority which to a greater or lesser extent will regulate aspects of the development and the revenues from the development, and sometimes provide for local authority property interests to be transferred or leased to the developer.

2. The importance of regeneration can be seen from DCLG's *"Regeneration to enable growth"* (January 2012):

> "When at its most effective, regeneration can remove the barriers to economic growth and help local leaders to strengthen their communities and support people back into work. And, in turn, economic growth can provide opportunities to tackle disadvantage, deprivation and dilapidation – helping to regenerate and breathe economic life into areas. Regeneration in its broadest sense can only really succeed and be sustainable if the underlying conditions for growth are right, with a healthy private sector economy. That's important to individuals and communities, but it matters for the country too – we need every part of Britain to fulfil its potential so we can prosper and grow as a nation."

Nevertheless, where the regeneration scheme involves land owned by the local authority, which will be sold off to the developer or another third party, issues relating to procurement are likely to arise which may pose considerable difficulties to local authorities and developers (and provide potential opportunities to commercial rivals or local residents to challenge the arrangements in court).

Procurement issues in the development/regeneration context

Introduction

3. Directive 2004/18/EC on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts ("the Directive") imposes various procedural requirements whenever a "contracting authority", either by itself or through a third party, seeks offers in relation to a proposed public "works", "supply" or "service" contract, the value of which exceeds certain thresholds. The Directive is transposed into English law by the Public Contracts

Regulations 2006 ("the 2006 Regulations")[1].

4. The aims and purposes of the Directive are: "to ensure that public bodies award certain contracts above a minimum value only after fair competition, and that the award is made to the person offering the lowest price or making the most economically advantageous offer": **Risk Management Partners Ltd v London Borough of Brent** [2011] 2 A.C. 34 at [10] per Lord Hope.

5. The term *"contracting authority"* is defined by Reg. 3(1) of the 2006 Regulations and includes a local authority such as the Council. *"Economic operator"* is defined as *"a contractor, a supplier or a services provider"*: see Regs. 2(1) and 4(1).

6. The concept of *"public contracts"* is defined in Article 1(2)(a) of the Directive as follows:

> "'Public contracts' are contracts for pecuniary interest concluded in writing between one or more economic operators and one or more contracting authorities and having as their object the execution of works, the supply of products or the provision of services within the meaning of this Directive."

7. Article 1(2)(b) defines the concept of *"public works contracts"* as:

> "'Public works contracts' are public contracts having as their object either the execution, or both the design and execution, of works related to one of the activities within the meaning of Annex I or a work, or the realisation, by whatever means, of a work corresponding to the requirements specified by the contracting authority. A 'work' means the outcome of building or civil engineering works taken as a whole which is sufficient of itself to fulfil an economic or technical function."

8. Article 1(3) defines a "*public work concession*":

> "'Public works concession' is a contract of the same type as a public works contract except for the fact that the consideration for the works to be carried out consists either solely in the right to exploit the work or in this right together with payment."

9. The 2006 Regulations are in similar terms: see Reg. 2(1) in particular.

10. Annex I of the Directive includes a range of construction, engineering and development activities including demolition, site preparation and construction.

11. Under Article 16(a) of the Directive, an exclusion exists in relation to contracts for -

> "the acquisition or rental, by whatever financial means, of land, existing buildings or other immovable property or concerning rights thereon; nevertheless, financial service contracts concluded at the same time as, before or after the contract of acquisition or rental, in whatever form, shall be subject to this Directive…"

12. This exclusion is replicated in Reg. 6(2)(e) of the 2006 Regulations, which provides that the Regulations do not apply to a proposed contract:

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[1] Although there are some minor differences in their wording, this is unlikely to be significant since the Courts are obliged by EU law to interpret the 2006 Regulations in a manner compatible with the Public Contracts Directive: see e.g. Case C-106/89 ***Marleasing S.A. v. La Comercial Internacional de Alimentación S.A.*** [1992] 1 C.M.L.R. 305.

> "(e) for the acquisition of land, including existing buildings and other structures, land covered with water, and any estate, interest, easement, servitude or right in or over land."

13. Where a development agreement between a local authority and a developer amounts to a *"public works contract"* then the public procurement requirements in the Directive and the 2006 Regulations apply (provided that the value of the agreement exceeds the relevant threshold, which will almost always be the case with large scale regeneration projects). If the agreement is not a public works contract, it is a pure land disposal and it will be outside of the scope of public procurement law.

14. There have been a number of significant judgments by the Court of Justice of the European Union ("CJEU") on the application of the Directive in the planning and development context: *Gestion Hotelera Internacional v. Comunidad Autonoma de Canarias (C-331/92)* [1994] E.C.R. I-1329, *Auroux v. Commune de Roanne (C-220/05)* [2007] E.C.R. I-385, [2007] All E.R. (EC) 918, *Helmut Müller GmbH v. Bundesanstalt für Immobilienaufgaben (C-451/08)* [2011] P.T.S.R. 200 and *European Commission v Netherlands (Re Public Works Concession) (C-576/10)* [2014] 1 C.M.L.R. 12.

15. The first two of these related to predecessor versions of the Directive (known at that time as the Public Works Directive) which were in materially identical terms.

16. It is also worth noting the judgment of the CJEU in ***Ordine degli Architetti Ordine degli Architetti delle Province di Milano e Lodi v. Comune di Milano*** (C-399/98) [2001] E.C.R. I-5409, concerning regeneration works which demonstrates that the domestic laws governing construction cannot be framed so as to avoid the application of the procurement rules. Under Italian law, any activity involving the development of municipal land and building works on such land made the owner liable to contribute to the related infrastructure costs. This infrastructure contribution was paid to the municipality when planning permission was granted.

17. However, the recipient of the permission could undertake to execute the infrastructure works directly, in accordance with the procedures and stands set down by the municipality, and the cost would be set off against the financial contribution. The owners of the land obtained planning permission from Milan CC for a project involving the restoration of La Scala Opera House, the conversion of certain municipal buildings, and the construction of a new theatre (the Teatro alla Bicocca) to be used during the refurbishment of La Scala. The developers entered into an agreement to fund and construct the related infrastructure works themselves and to transfer the Teatro alla Bicocca free of charge to the council. The fact that Italian public law required these matters to be dealt with in a particular way did not justify the failure to apply EU procurement rules.

Gestion Hotelera v. Comunidad Autonoma de Canarias C-331/92

18. In ***Gestion Hotelera***, the Government of the Canary Islands had issued two linked invitations to tender relating to a hotel owned by the Municipality of Las Palmas. The first concerned *"the award of the final concession for the installation and opening of a gaming establishment at the hotel".* The second concerned, *"the use of the hotel installations and the operation of the hotel*

business."

19. The conditions to be fulfilled by the tenderers included that their *"sole and exclusive object shall consist in the operation of gaming establishments"*. However, a condition of tender in Invitation (2) was that the successful tenderer *"was to carry out the necessary works for the renovation, conversion and restoration of the installations so that the hotel and its surroundings could retain their five-star status and could offer the obligatory additional services"*. The existing lessee of the hotel applied for the annulment of the invitations to tender and of the contract which had subsequently been granted, on the basis that the requirement to carry out renovation works meant that the invitations to tender were caught by the Directive and should have been advertised in the Official Journal of the European Communities.

20. Following a preliminary reference under Art. 234 EC, the CJEU held that this was not a public works contract because the *"work"* in question was not the object of the contract but was incidental to the installation, opening and operation of the gaming establishment. The ECJ determined the issue by reference to the "main object" of the contract:

> "20. In the first place it is apparent…that the successful tenderer would be required to carry out a series of works, not only in the outbuildings of the hotel but also in those of the casino. Those works were to be such as to make the premises suitable for the activities for which they were intended.
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> …
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> 23. … [T]he main object of the award of the contracts was, first, the installation and opening of a casino and, secondly, the operation of a hotel business. It is common ground that those contracts, considered as such, do not fall within the scope of Directive 71/305.
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> 24. It is next apparent, first, that the documents mentioned above did not contain any description of the subject-matter of the works to be carried out, either as regards the installation and opening of the casino or as regards the operation of the hotel; secondly that there was no provision for remuneration for those works and thirdly, that the successful tenderer was not in a position to carry them out itself, by reason of the strict definition of its object in [the invitations to tender].
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> 25. The question which arises for the national court is whether a mixed contract relating both to the performance of works and to the assignment of property falls within the scope of Directive 71/305.
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> 26. The answer must be that, where the works to be carried out in the hotel and the casino are merely incidental to the main object of the award, the award, taken in its entirety, cannot be characterized as a public works contract within the meaning of Directive 71/305.
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> 27. …[F]or a contract to be a public works contract, its object must be the achievement of a work and… insofar as those works are incidental rather than the object of that contract, they do not justify treating the contract as a public works contract."

21. The determination of the nature of the contract, and whether a public works contract, remains an important factor and the failure of the Commission to demonstrate this led to the dismissal of its action in ***Commission v. Spain (Re award of urban development contracts in Valencia region) C-306/08*** [2011] 3 C.M.L.R. 43. The CJEU held:

> "89 In addition, it is clear from the 16th recital in the preamble to Directive 92/50 and from

> recital 10 in the preamble to Directive 2004/18 , in conjunction with art.1(a) of Directive 93/37 and art.1(2)(b) of Directive 2004/18 respectively, that a contract can be deemed to be a "public works contract" only if its subject-matter corresponds to the definition given in the preceding paragraph and that works which are incidental to, and not the subject-matter of, the contract do not justify the contract's qualification as a public works contract.
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> 90 It is clear, moreover, from the case law of the Court that, where a contract contains elements relating both to a public works contract and another type of contract, it is the main object of the contract which determines which body of EU rules on public contracts is to be applied in principle (see, to that effect, *Auroux* [2007] E.C.R. I-385 at [37]).
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> 91 That determination must be made in the light of the essential obligations which predominate and which, as such, characterise the transaction, as opposed to those which are only ancillary or supplementary in nature and are required by the very object of the contract (*Commission of the European Communities v Italy* (C-412/04) [2008] E.C.R. I-619 at [49])."

Auroux v. Roanne C-220/05 [2007] E.C.R. I-385

22. In 2002, the Mayor of the Municipal Council of Roanne was authorised to sign an agreement with a development company known as SEDL for the construction of a leisure centre in successive phases consisting of the construction of a multiplex cinema, hotel and commercial premises, all of which would be transferred to a third parties, together with a car park, access roads and public spaces, all of which would be transferred to the Council. SEDL was partly owned by the French state and partly owned by the private sector.

23. According to the preamble to the agreement, the Council sought, by means of this project, to regenerate a run-down urban area and promote the development of leisure and tourism. The Council was to contribute towards the financing of the project. Any land and buildings unsold at the end of the project would be transferred to the Council, which would then guarantee the performance of any ongoing contracts.

24. The total amount of receipts from the project was estimated at approximately €14.27M. The principal components of this sum were:

    (1) approx. €2.93M from the Council as consideration for the transfer of the car park;

    (2) approx. €8.1M from the transfer of property to third parties; and

    (3) the Council would contribute €3.03M towards the financing of the works.

25. Certain individual Council members took the view that the agreement should have been made subject to advertising and a call for tenders in accordance with the earlier version of the Public Works Directive, and brought proceedings requesting the *Tribunal administratif de Lyon* to annul the Council's resolution to authorise the Mayor to sign the agreement. The Court referred three questions to the ECJ, the first of which was:

> "1. Does an agreement under which one contracting authority engages a second contracting authority to carry out a development agreement project for a purpose of general interest pursuant to which agreement the second authority is to deliver works to the first intended to meet its needs and at the end of which such of the other land and works as have not been disposed of to third parties vest automatically in the first contracting authority, constitute a public works contract within the meaning of Art.1 of the Directive?"

26. The Council submitted that the agreement did not constitute a public works contract since, as a public development agreement, its purpose went beyond the execution of works. Public development agreements under French law concerned the overall implementation of all aspects of a town planning project and/or policies, including the planning of the project, management of the legal and administrative aspects, the acquisition of land by way of expropriation and putting in place procedures for the award of contracts.

27. The French Government argued that, the main element of the contract comprising the leisure centre and certain other commercial premises was outside the scope of the Directive because these were intended to be transferred to the private sector. Accordingly they did not *"correspond to the requirements of the contracting authority"* within the meaning of Art 1(a) of the Public Works Directive. It contended that only the construction of the car park and access roads, which would ultimately be transferred to the Municipality of Roanne, could in principle constitute "works". Further, because the Municipality would purchase the car park and access roads once the works had been completed, the French Government also argued that this should be characterised as the purchase of land by a contracting authority (and thus excluded from the Directive) rather than the procurement of public works.

28. The CJEU rejected these submissions and held that the contract was a public works contract within the meaning of the Directive. In particular, it held that

    (1) In addition to the execution of works, the agreement entrusted SEDL with further tasks which had the character of a supply of services. However, it did not follow from the fact that the agreement contained elements which went beyond the execution of works that it fell outside the scope of the Public Works Directive (para. 36). Following ***Gestion Hotelera***, it was the main purpose of the contract which would determine whether the Directive is to be applied in principle (para. 37).

    (2) The French Government's argument that because a large part of the works was intended for third parties *"it cannot be regarded as corresponding to the municipality's requirements"* (para. 33) was rejected (para. 39). It follows that the fact that an authority does not have to intend to own or operate the subject of the works is not determinative. Works carried out at the authority's specification, in the public interest, are still capable of falling within the public works contract provisions.

    (3) Whether or not SEDL would execute the works itself or arrange for their execution by subcontractors was irrelevant. It was well established that in order to be classed as a contractor under a public works contract it was not necessary that the person who entered into a contract with a contracting authority is capable of direct performance using his own resources (para. 38).

    (4) The definition of a *"public works contract"* was a matter of EU law and therefore the legal classification of the contract in French law was irrelevant (para. 40).

    (5) It was clear from Art. 1(c) of the Public Works Directive that the existence of a *"work"*

"*must be determined in relation to the economic or technical function of the result of the works undertaken*". In the present case, it was clear from the agreement that the construction of the leisure centre was intended to accommodate commercial and service activities, with the result that the agreement was to be regarded as fulfilling an economic function (para. 41).

(6) The construction of the leisure centre was to be regarded as *"corresponding to the requirements specified by the municipality"* because, taken as a whole, the project was intended by the Council to reposition and regenerate the local area (para. 42).

(7) SEDL, *"as an economic operator on the market which undertakes to execute works provided for in the agreement"* was to be regarded as a *"contractor"* within the meaning of the Public Works Directive not withstanding its semi-public status.

(8) The agreement was clearly concluded *"for pecuniary interest"*. Notably, in reaching this view the ECJ referred not only to monies payable by the Council but also the fact that SEDL was *"entitled to obtain income from third parties as consideration for the sale of the works executed"* (para. 45).

29. It was therefore clear that the main purpose of the contract was the execution of a work, namely the construction of the leisure centre (para. 46). Accordingly, it was a public works contract within the meaning of the Directive.

30. Overall, the CJEU's judgment made clear that the Directive could apply even where the contracting authority would not be the owner or occupier of the proposed works. On one view it also suggested that any agreement the purpose of which was to achieve an urban regeneration scheme was caught by the Directive on the basis that: the scheme would *"fulfil an economic function"* through the economic benefits it would bring to the local area and would correspond to *"the requirements specified by the contracting authority"* by virtue of meeting the authority's planning policy and objectives.

Helmut Müller GmbH v. Bundesanstalt für Immobilienaufgaben C-451/08

31. ***Helmut Müller*** was a reference to the CJEU concerning the sale of a disused barracks owned by a public authority to a private sector body that intended to carry out redevelopment works on that site. Four tender offers had been submitted before the sale, one from Helmet Müller, and another from a company called GSSI. The authority expressed a preference for GSSI's project on urban development grounds. The redevelopment works were subject to approval by the local council. After the project was approved by the council, the authority sold the site to GSSI. Helmut Müller challenged the sale contract on the basis that the Directive had not been complied with in two respects:

(1) GSSI was about to obtain a public works contract in that, at some point in the relatively near future, the local council would, under the domestic Building Code, draw up a building plan for the works intended for the site and award GSSI a contract for the execution of works; and

(2) This should be viewed together with the sales contract as part of the same overall transaction for the purposes of the Directive.

32. In total nine questions were referred to the ECJ. Question 3 asked: "does the concept of a public works contract in accordance with the first and second variants of Article 1(2)(b) of Directive [2004/18] require that the contractor be directly or indirectly obliged to provide the works? If so, must there be a legally enforceable obligation?"

33. The CJEU answered as follows:

> "59 By its third and fourth questions, which it is appropriate to examine together, the referring court asks, in essence, whether the concept of 'public works contracts', within the meaning of Article 1(2)(b) of Directive 2004/18, requires that the contractor be under a direct or indirect obligation to carry out the works which are the subject of the contract and that that obligation be legally enforceable.
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> 60 … Article 1(2)(a) of Directive 2004/18 defines a public works contract as a contract for pecuniary interest. That concept is based on the premise that the contractor undertakes to carry out the service which is the subject of the contract in return for consideration. By concluding a public works contract, the contractor therefore undertakes to carry out, or to have carried out, the works which form the subject of that contract.
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> 61 It is irrelevant whether the contractor carries out the works itself or uses subcontractors for that purpose (see, to that effect, Ordine degli Architetti and Others, paragraph 90, and Auroux and Others, paragraph 44).
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> 62 Since the obligations under the contract are legally binding, their execution must be legally enforceable. In the absence of rules provided for under European Union law, and in accordance with the principle of procedural autonomy, the detailed rules governing implementation of those obligations are a matter for national law.
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> 63 Consequently, the answer to the third and fourth questions is that the concept of 'public works contracts', within the meaning of Article 1(2)(b) of Directive 2004/18, requires that the contractor assume a direct or indirect obligation to carry out the works which are the subject of the contract and that that obligation be legally enforceable in accordance with the procedural rules laid down by national law."

34. The requirement for a legal obligation to carry out works specified by the contracting authority was considered by Advocate General Mengozzi as follows (at paragraphs AG76–77):

> "In my view, however, it is clear that… the obligation to carry out the work and/or works constitutes an essential element in order for there to be a public works contract….
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> This follows, first and foremost, from the provisions of [the Public Contracts Directive] itself which… define public works contracts as contracts for pecuniary interest. The concept is therefore based on the idea of an exchange of services between the contracting authority, which pays a price (or, alternatively, grants a right of use), and the contractor, who is required to execute a work or works. Thus, public contracts are clearly mutually binding. It would obviously be inconsistent with that characteristic to accept that, after being awarded a contract, a contractor could, without any repercussions, simply decide unilaterally not to carry out the specified work. Otherwise, it would mean that contractors were entitled to exercise discretion with regard to the requirements and needs of the contracting authority."

35. On the question of economic benefit, the Advocate General considered there to be a need for a "strong and direct link" between the authority and the works to be executed, which he then

explained by reference to three groups of case at [53]-[62]. The CJEU did not take such a detailed approach but held that it is not sufficient to engage the PWC regime for the contracting authority to make provision which simply benefits the public interest in a wider sense. There has to be some *immediate economic benefit* conferred the contract though, as ***Auroux*** demonstrates, the Court will take a broad view of direct benefit. In ***Helmut Müller*** the Court put the matter clearly at [57]-[58] emphasising that an immediate economic benefit did not arise by the exercise of public planning powers:

> "57 However, it is not the purpose of the mere exercise of urban-planning powers, intended to give effect to the public interest, to obtain a contractual service or immediate economic benefit for the contracting authority, as is required under article 1(2)(a) of the Directive.
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> 58 Consequently, the answer to the first and second questions is that the concept of "public works contracts", within the meaning of article 1(2)(b) of the Directive, does not require that the works which are the subject of the contract be materially or physically carried out for the contracting authority, provided that they are carried out for that authority's immediate economic benefit. The latter condition is not satisfied through the exercise by that contracting authority of regulatory urban-planning powers."

36. The three cases of a direct link considered by the Advocate General were:

    (1) situations where the public authority immediately acquires ownership of the property to be produced;

    (2) cases where the public authority employs public resources for the execution of the work and/or works (whether or not it acquires ownership);

    (3) cases where the work and/or works are in any case the result of an initiative taken by the authority in question such as in ***Auroux***.

37. ***Helmet Müller*** suggests that the application of the Directive to development agreements may not be quite as far-reaching as it appeared following the decision in ***Auroux***. Importantly, development agreements that simply involve the exercise of a local authority's planning powers would not fall under the procurement rules, unless they contained an obligation by the developer, legally enforceable by the contracting authority, to perform relevant works.

European Commission v Netherlands (Re Public Works Concession) C-576/10

38. On 7 August 2001, a Netherlands municipal council approved a construction project which included a healthcare centre, a play, integration and learning centre and a commercial centre with apartments and housing. The municipality's aim was to redevelop the land, which it owned.

39. The council subsequently approved an opinion concerning the selection of a promoter for the project, which set out the criteria to be applied in selecting the purchaser of the land on which the project would be carried out. The opinion had been drafted by the council's staff.

40. By July 2003, the council had selected a contractual partner ("H") for the conclusion of a contract for the sale of the plots of land on which the project was sited. In 2007, the council concluded a "co-operation contract" with H, by which H was to carry out the works at its own

risk. It also concluded an agreement for the sale of land by the council to H.

41. The European Commission alleged that the Netherlands had failed to fulfil its obligations under art.2 and Title III of Directive 2004/18/EC in connection with the award of the purported public works concession by the council.

42. One of the arguments put forward by the Commission concerned the temporal application of the Directive. Under art. 80 of the Directive, it had to be transposed no later than 31 January 2006. According to the Commission, negotiations between the council and H did not really begin until after February 2006, i.e. after the entry into force of the Directive. The council however, considered that a decision it took on 23 April 2002 (when the municipality decided not to follow the European tender procedure but to choose just two candidates) determined the applicable Directive.

43. The CJEU concluded that the applicable directive was the one in force when the contracting authority chose the type of procedure to be followed and decided definitively whether it was necessary for a prior call for competition to be issued for the award of a public contract. The CJEU commented that this rule was founded upon the principle of legal certainty which did not permit the applicable law to be determined by reference to the date of the award of the contract since that date marked the end of the procedure (see further ***Commission v France*** [2000] E.C.R. I-8377 at [40]).

44. The exception to this was in instances where negotiations subsequently opened "*were substantially different in character from those already conducted and were, therefore, such as to demonstrate the intention of the parties to renegotiate the essential terms of the contract"*. In such circumstances, the application of the provisions of a subsequent directive might be justified (see paragraph AG51 and ***Commission v France*** [2000] E.C.R. I-8377 at [44]).

45. The Court concluded that the decision within the meaning of the cited case law was unquestionably taken by the council on 23 April 2002 and that the exception, as set out above, did not apply (see paragraphs AG63 – AG81). On that basis the Court concluded that the Directive was not applicable.

46. However, the CJEU went on to consider whether the contract concluded between the council and H was a public works concession within the meaning of the Directive.

47. The Netherlands Government argued that the contract concluded between the council and H did not fall under any of the categories of a public works contract in Article 1(2)(b) of the Directive because it only covered the sale of land.

48. The CJEU rejected that argument, noting that although the agreements between the council and H related to the sale of several plots of land, this was only an accessory element of the contract. The object of the contract was thus not primarily for the sale of land but above all, the execution of works related to one of the activities within the meaning of Annex I to the Directive (see paragraphs AG85 – AG101).

49. The Court further pointed out that it disagreed with the claim of the Netherlands Government that the three situations covered by art. 1(2)(b) of the Directive were mutually exclusive. The fact that the works planned by the council came under more than one of the cases envisaged by the Directive could not result in the dismissal of its application (see AG102 – AG104).

50. The CJEU also considered whether the contract was concluded for pecuniary interest to satisfy the definition of a "public work concession". As the Court noted at AG106, the pecuniary nature of the concession contract means that the contracting authority which has concluded a public contract receives a service pursuant to that contract in return for consideration paid by it to the contractor. For the contracting authority, that service consists in the realisation of works from which it intends to benefit.

51. This was considered by the CJEU first in the context of a service and economic benefit. The CJEU noted that in ***Helmut Müller***, the Court had stated that the service had to be of direct economic benefit to the contracting authority (***Helmut Müller*** at [49]).

52. The CJEU however noted that the interpretation given in ***Helmut Müller***, allowed public authorities a certain margin of discretion (see AG111 – AG113):

> "In *Helmut Müller*, the Court only excluded from the concept of immediate economic benefit the mere exercise of urban-planning powers intended to give effect to the public interest. Otherwise, the Court simply illustrated its remarks by giving five non-exhaustive examples. Relevant situations were cases where:
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> - the public authority becomes owner of the works or work which is the subject of the contract;
> - the contracting authority holds a legal right over the use of the works which are the subject of the contract, in order that they can be made available to the public;
> - the contracting authority benefits from economic advantages derived from the future use or transfer of the work;
> - the contracting authority contributed financially to the realisation of the work;
> - the contracting authority assumes risks were the work to be an economic failure.
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> The Court does not mention the case referred to by Advocate General Mengozzi in which the work or works to be carried out are the result of an initiative taken by the authority in question. On the other hand, like him it excludes the case where that public authority merely exercises urban-planning powers, intended to give effect to the public interest."

53. In the present case, the CJEU concluded that the existence of an immediate economic benefit had been proven. The council had gone well beyond simply achieving the objective of "the development of coherent planning of part of an urban district" (as set out in ***Helmet Müller*** at [55]) and the development project was clearly of immediate economic benefit to the council (see AG114 – AG127).

54. The CJEU also noted that the pecuniary nature of a concession contract meant that the

contracting authority which had concluded the public contract received a service pursuant to that contract in return for *consideration* which consisted either in the right to exploit the work or in this right together with payment (art.1(3) of the Directive).

55. In that respect, the CJEU stated that, the only question that arose in analysing the consideration required for the concession contract to be a contract for pecuniary interest, was the ownership of the site as a whole. The CJEU noted the comments of the Court in ***Helmut Müller*** – that the contracting authority may not exploit the work where "*the only basis for the right of exploitations is the right of ownership of the economic operator concerned".*

56. The CJEU concluded that in the present case, the only other basis for the right of exploitation asides from the right of ownership exercised over the land was the acquisition of the permits required for the execution of the works covered by the co-operation contract. This was not a possible basis on which to infer a right to exploit the works. The Commission had thus failed to demonstrate the actual existence of a consideration. Since H derived its right of exploitation from ownership of the land purchased from the council, it had not obtained it through a public works concession contract.

57. The CJEU noted that its conclusion allowed the risk of circumvention of public procurement rules to persist, through contracts of sale with the transmission of the right of ownership.

58. The following can now be seen from the cases:

    (1) The main purpose(s) of the agreement will determine whether or not it is a contract for public works (see para. 37 of ***Auroux***, expressly following ***Gestion Hotelera***).

    (2) It remains the case that, following ***Gestion Hotelera***, where the agreement involves *"work"* or *"works"* which are not a main object of the contract but are incidental to another object which is outside the scope of the Public Contracts Directive, the Directive and Regulations would not apply.

    (3) For an agreement to be within the scope of the Public Contracts Directive, its purpose must be to achieve a development which is *"sufficient to fulfil an economic or technical function"* for the contracting authority's immediate benefit: see Art. 1(2)(b).

    (4) The contracting authority needs to derive an actual economic benefit from the scheme as it did in ***Auroux*** through the financial contribution it made to the project and its assumption of risk by guaranteeing to take over any elements that did not sell.[2] It is not necessary that the contracting authority must be/remain the owner of all or part of the land on which the works take place, although if it does then the works will indeed be for its immediate economic benefit. Something more than simply achieving a beneficial development in the public interest by the mere exercise of planning regulatory powers is required (see ***Helmut Müller*** at paras. 48-58).

[2] See ***Helmet Müller*** at paras 48-58.

(5) To fall within the Public Contracts Directive, the contract needs to place the contractor under an enforceable direct or indirect obligation to carry out the works in question (see ***Helmut Müller*** at para. 68)[3].

(6) The criterion in Art. 1(2)(b) that, in order to fall within the scope of the Public Contracts Directive, the work must correspond *"to the requirements specified by the contracting authority"* is not met by the mere fact that a development must comply with the local authority's planning policies and objectives. In ***Helmut Müller*** the CJEU held at para. 67 that: *"the authority must have taken measures to define the type of work or, at the very least, have had a decisive influence on its design"*. Precisely where the dividing line lies in practice remains unclear. In ***Auroux***, it was sufficient that *"the work referred to by the agreement is the leisure centre as a whole, including the construction of a multiplex cinema, service premises for leisure activities, a car park and, possibly, a hotel."* (para. 42).

(7) Whether or not the commercial party to the agreement will execute the works itself or have them carried out by subcontractors is irrelevant (see ***Auroux*** at para. 38).

(8) Any revenue which the agreement envisages the commercial party receiving from third parties is likely to have the following consequences –

(a) It will mean that the agreement is "for pecuniary interest" within the meaning of Art. 1(2)(b) (***Auroux*** para. 45); and

(b) It will count towards the value of the agreement for the purposes of assessing whether it meets the threshold for the applicability of the Directive (***Auroux***, para. 57).

(9) In determining whether a contract is a public works concession, "consideration" will not be established and the contracting authority may not exploit the work pursuant to art. 1(3) of the Directive where the only basis for the right of exploitation is the right of ownership of the economic operator (***Helmut Müller*** para. 73 and ***Netherlands (Re Public Works Concessions*** at paras. AG143 – AG157).

59. In PPN 12/10 (June 2010) the former OGC[4] issued guidance on **Development Agreements and s106 "Planning Agreements"; Updated and Additional Guidance**, which sought to provide guidance on the position following ***Helmut Müller***. Whilst not all of that note is necessarily consistent with the CJEU's approach, it did usefully note:

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[3] Note the Commission's decision in ***Flensburg*** (IP/08/867) which suggests that a development obligation might be drafted in the form of conferring a right on a local planning authority to purchase or repurchase land if certain works are not carried out. In other words, the obligation does not impose a requirement to carry out the works but simply confers a right to take the land if the specified works are not carried out, i.e. an indirect means of securing the carrying out or specification or works without imposing a direct obligation to do so.

[4] From 2011 it became part of the Efficiency and Reform Group within the Cabinet Office.

> "9. It is emphasised that the European authorities are likely to take a purposive view of the activities and agreements entered into by a public body, and artificial arrangements intended to circumvent the application of the rules are unlikely to be persuasive. Public bodies should proceed with that in mind, and they are strongly recommended always to seek their own case-specific legal advice before entering into agreements."
>
> "57. The European Commission (and the ECJ) can be expected to look at the totality and overall nature of the relevant agreements between a contracting authority and an economic operator in relation to a development, to decide whether the public procurement rules apply. Any artificial arrangements intended to circumvent the application of the public procurement rules are therefore likely to attract challenge."

Developments following ***Helmut Müller***

60. Two UK cases following ***Helmut Müller*** are of particular importance: ***R (Midlands Co-Operative Society Limited) v. Birmingham City Council*** [2012] B.L.G.R. 393 and ***AG Quidnet Hounslow LLP v. London Borough of Hounslow*** [2013] 1 C.M.L.R. 25 (TCC). Neither of these cases cast doubt on the above propositions but rather confirm a more restrictive application of the Directive to development agreements that was taken in ***Helmut Müller***.

R (Midlands Co-Operative Society Ltd) v. Birmingham City Council

61. The Claimant sought judicial review of the decision of Birmingham City Council to enter into a contract to sell to Tesco its interest in a plot of land in Stirchley, Birmingham consisting of an indoor bowls and community centre ("the Site"), part of which was owned by the Council.

62. Tesco and the Midlands Co-operative had rival proposals for the Site, each of which had planning permission. Following a public tendering process (albeit not undertaken pursuant to the 2006 Regulations) Tesco were selected as the Council's preferred developer and entered into an agreement to purchase the Site. The section 106 agreement to which their planning permission was tied contained an obligation providing that the demolition of the community centre could not be commenced until replacement community facilities had been provided. The s.106 agreement itself did not become effective unless and until Tesco's planning permission was first implemented.

63. The Co-Op sought judicial review of the Council's decision to sell its interests to Tesco. One of the grounds was that the arrangements between the Council and Tesco amounted to a *"public works contract"*, and should therefore have been procured under the 2006 Regulations.

64. The Court held that there was not a *"public works contract"* for the purposes of the 2006 Regulations. In doing so, it noted that in ***Müller*** it was held that for there to be a public works contract there must be a commitment by the contractor, legally enforceable by the contracting authority, to perform relevant works. It is insufficient if, legally, the contractor has a choice and is entitled not to perform the works. The Court found that Tesco was not under any legally enforceable obligation to perform any relevant works. It was not relevant that in the future Tesco might be committed to such an obligation. As it was put by Hickinbottom J:

> "Tesco are not under any legally enforceable obligation to perform any works; and it is not to the point that, in the future and dependent upon how matters in fact proceed and choices

Tesco make, they might at some stage be committed to such an obligation."

65. The Court took into account a number of factors in reaching this conclusion. These factors are likely to be considered by the Courts in the future in determining whether or not a developer is obliged to perform relevant works:

    (1) The Court will consider the whole of a contractual arrangement when deciding on the application of the 2006 Regulations. If the land sale was accompanied by, or dependent on, a binding contractual obligation to carry out works, then the hiving off of the contractual obligation into a separate agreement would not defeat the application of the procurement rules: see paragraphs 36 and 41 of the OGC guidance.

    (2) If at the time of the land transaction, the authority merely intends to, or is very likely to, enter into a works contract with the contractor, this is insufficient. What is required is a formal, legally enforceable commitment (paragraph 104).

    (3) The Court did seem to place some reliance on the conditionality of the agreement in that the obligations only arose on implementation of the planning permission. This is not wholly straightforward since the Court found that there was no requirement in any event and at [118] Hickinbottom J. said it was unnecessary to decide a number of questions which included the applicability of the Directive and Regulations to planning obligations generally. To draw any wider conclusions from the judgment on conditionality would be unsafe especially since the fact that the agreement is conditional does not alter the fact that, once the permission is implemented, the conditional obligations become immediately enforceable.

    (4) Statements of intent made by a local authority may be of little assistance in determining the developer's obligation. In ***Midlands Co-operative***, the Council made a declaration that replacement community facilities would be provided. However, nothing in this declaration required this, or obliged Tesco to provide the facilities. The Court found that the declaration did not add to the obligations imposed on Tesco under its contractual agreement with the Council.

    (5) The precise obligations on the developer under any section 106 agreement are likely to be particularly important. In ***Midlands Co-operative***, the obligations in the section 106 agreement were not triggered until the planning permission was implemented. Consequently, Tesco was not legally committed to start the development at all, and could still walk away from the Site. As such, the Court found that the section 106 agreement was not an immediately binding obligation to perform the works:

        > "Whether they decide to proceed, and take impose upon themselves any obligation to perform any works, is entirely in their own hands. Of course, given their commitment to the Site in terms of money and effort to date, it may well be very likely that they will in fact proceed, if given an appropriate opportunity; but they have no legally enforceable obligation to do so. The Council cannot require them, as yet, to perform any works." (per Hickinbottom J at para. 110)

(6) The Court agreed that the evolving intentions of the Council as to what was likely to happen to the replacement Community Facilities was instructive. This showed that the Council had moved towards not requiring the developer of the Site to relocate the Community Facilities.

(7) The Court was not concerned that the Council had sought a way round to the potential application of the 2006 Regulations, which would have applied to the first tender process. Whilst selling the land without imposing development obligations had the advantage of avoiding the procurement rules, it also meant that the Council had lost the opportunity to impose an obligation on the developer. As Hickinbottom J put it at para. 116 -

> The Council cannot be criticised for formulating a strategy with regard to the development of this Site that, whilst having other downsides (including an absence of development obligations it could enforce against a successful tenderer) avoided the onerous obligations of the Public Works Directive and 2006 Regulations. That is particularly so as the Council's primary objective was of a planning nature – to develop the Site – rather than having performed the works involved in replacing the Community Facility.

(8) Finally, whilst the Council committed to sell the Community Facility to Tesco, it did not legally commit itself to meet any conditions relating to the development or to use its CPO powers in support of it. The Council was prepared to exercise its CPO powers in support of a preferred developer, however as part of the tender process it did not commit to exercising these powers in favour of the purchaser of the Community Facility.

66. The Court was keen to point out that even if Tesco's obligations had been enforceable, it would not necessarily have followed that the transaction represented a public works contract. In particular, the following issues would still fall to be determined: (i) whether those obligations were simply planning obligations that would not invoke the provisions of the 2006 Regulations, (ii) whether the 2006 Regulations would not apply, because the main purpose of the arrangement was not the procurement of works, and (iii) whether the 2006 Regulations only gave rise to private rights, such that a public law claim based upon them is inappropriate. Despite highlighting these issues, the Court did not consider these in any further detail.

67. There are a lot of positives for local authorities in the decision. It is a further example of the Courts moving away from the high watermark position in ***Auroux***. Further, it was expressly held that local authorities can weigh up the pros and cons of bringing a transaction within or outside of the public procurement rules: *"The Council cannot be criticised for formulating a strategy that…avoided the onerous obligations of the Public Works Directive and 2006 Regulations".*

68. Indeed, in many cases, it may now be possible to avoid the reach of the Directive and the 2006 Regulations by using appropriately drafted 'Grampian' style clauses rather than legally binding positive obligations.

AG Quidnet Hounslow LLP v. London Borough of Hounslow

69. In ***Quidnet***, the High Court considered the circumstances in which the Treaty on the Functioning

of the European Union ("TFEU") requires a public authority to advertise a development opportunity which falls outside the scope of the 2006 Regulations.

70. The Claimant challenged Hounslow's decision to enter into a development agreement for a site in Hounslow Town Centre ("the Site"), and to negotiate the terms of this agreement with only one developer. The site is adjacent to the Blenheim Centre, one of two existing shopping centres in Hounslow. During 2011, the Council entered into discussions with Legal and General Assurance Society Limited ("L&G"), the owner of the Blenheim Centre about proposals to develop the site. AG Quidnet Hounslow LLP ("Quidnet"), which owns the other existing shopping centre in Hounslow also approached the Council about the status of the Site. In January 2012, the Council agreed to enter into a Lock-Out Agreement with L&G for the purpose of negotiating a development agreement. The effect of the Lock-Out Agreement was that the Council would grant L&G a long lease of the Site and the Council agreed that, during an exclusivity period, it would not enter into negotiations with any other party.

71. In its claim, Quidnet maintained that:

    (1) The proposed agreement comprises a public works contract to which the public procurement rules set out in the 2006 Regulations applied.

    (2) Even if the proposed agreement with L&G did not constitute a public works contract, the proposed agreements were in breach of Article 56 of the Treaty on the Functioning of the European Union (TFEU) which prohibits restrictions on freedom to provide services within the EU.

    The first ground has been stayed, pending the High Court's consideration of whether Article 56 TFEU applied.

72. Coulson J found that the general principles of EU law derived from the Treaty do apply to contracts that are not covered by the EU procurement rules: see, for example, Case T-258/06 ***Federal Republic of Germany v Commission*** [2007] 3 C.M.L.R. 50. Further, a number of cases relating to service concessions confirm that where Article 56 applies there is an obligation to take at least some positive steps to ensure transparency. Therefore, whilst a formal tender process is not necessarily required, there must be a degree of advertising sufficient to enable the service markets to be opened up to competition.

73. The Court then considered whether the proposed agreement provided L&G with an opportunity to provide services within the meaning of Article 56, and found that it did not. The following features of the agreement were noted:

    (1) The agreement was merely to agree the terms of a long lease of the Site. The granting of the head lease does not oblige L&G to carry out any development. The heads of terms revealed no express obligation on the part of L&G to develop the site or provide any services whatsoever, and the Council would not be required to provide any support to facilitate such development.

(2) On the grant of the lease, L&G would have a proprietary interest in the Site, it would be for L&G to decide what it intended to do with the interest.

(3) Any services under the agreement, such as demolition, the preparation of the land, the construction and the fitting-out of the new buildings, would be provided to L&G, not by them, through contractors, sub-contractors and suppliers. Any future provision of such services to a commercial organisation such as L&G would be outside Article 56.

74. However, what appears to have been decisive is that the effect of Quidnet's arguments would be that EU law could require an authority to grant a lease of land to a party with whom it did not wish to contract:

> "The Council wants to grant a long lease on property they either own or are in a position to acquire. They want to grant that long lease to a particular lessee (L&G), not anyone else, because of L&G's ability to raise the necessary capital for the potential project. In my view, it would be stretching the ambit of Articles 56 and 57 beyond breaking point to suggest that European or domestic law requires a landowner in that situation, who happens to be a public authority, to grant a lease of its land to a party with whom it does not wish to contract. None of the authorities, whether in the UK or the EU, support such a radical proposition; indeed, for the reasons which I have endeavoured to explain, I consider that the cases run counter to any such suggestion."

75. The Court concluded that the proposed agreement was not a contract for the provision of services and fell outside Article 56 of the TFEU. As a result, Quidnet's claim based on the application of Article 56 failed.

76. In any event, the Court found that even if the proposed agreement did amount to the provision of services, Article 56 was not engaged, as (i) there is no relevant restriction on the provision of services. L&G remains free to contract with whom it likes if and when they decide to develop the site. No restrictions are placed on any contractors or suppliers who may play a part in any development (ii) there was no cross-EU inter-state element necessary to trigger the application of Article 56, in particular there was no evidence that any undertaking in any other EU member state was interested in the development of the site.

77. The latter finding, albeit obiter, is particularly significant as it required the Court to reconcile two conflicting lines of CJEU authority. The first line of authority, derived from ***Parking Brixen*** [2005] E.C.R. 1-8585, found an inter-state element on the basis that undertakings in other Member States might have been interested in providing the relevant services, had they been advertised. A different line of CJEU authority, preferred by Coulson J, ignored the possibility of interest had the contract been advertised, and focused on whether there was any positive evidence that any undertaking in any other Member State was interested in the development. If Coulson J is correct, it will be much harder for developers to raise a claim based on Treaty obligations in the future.

78. Overall, this is a new form of challenge to development agreements. Coulson J noted that the application of Article 56 of the TFEU was a novel claim, and had not been raised in any of the EU case law on development agreements and was not considered in ***Midlands Co-Operative.***

Ironically, Quidnet's claim failed for the same reason as those in ***Helmut Müller*** and ***Midlands Co-Operative***: there was no obligation on L&G to deliver anything. Quidnet's claim under the 2006 Regulations is likely to fail for the same reason.

Public Services (Social Value) Act 2012

79. Finally, note the provisions of the Public Services (Social Value) Act 2012, which was enacted on 8 March 2012. The Act imposes an obligation all on public authorities which are subject to the 2006 Regulations to consider at the pre-procurement stage, (a) how what is proposed to be procured might improve the economic, social and environmental well-being of the relevant area, and (b) how, in conducting the process of procurement, it might act with a view to securing that improvement: see section 1(3). The Act also requires contracting authorities to consider whether to undertake community consultation in relation to the above matters. See Cabinet Office Guidance **PPN 10/12** (20 December 2012).

80. These provisions came into force on 31st January 2013. In many cases the Act is unlikely to impose substantial additional burdens on local authorities, since the considerations mentioned in section 1(3) will typically be taken into account in any event as part of the business case before commencing procurement.

Procurement Procedures and Other Obligations under the 2006 Regulations

81. The 2006 Regulations apply whenever a contracting authority seeks offers in relation to a proposed public supply contract, public works contract, Part A services contract, framework agreement or dynamic purchasing system other than a contract, framework agreement or dynamic purchasing system that is excluded under the Regulations (see Reg. 5).

82. Four main procurement procedures are set out in the 2006 Regulations. The choice between the procedures is partly a matter of choice for the contracting authority and partly dictated by the 2006 Regulations (see Reg. 12).

    (1) **The open procedure (Reg. 15):** Any economic operator can tender under this procedure, although the contracting authority may require an economic operator to satisfy minimum levels of technical or professional ability or economic and financial standing. The contracting authority must publicise its intention to seek offers in relation to the public contract by sending to the Official Journal a contract notice inviting tenders and containing specified information as soon as possible after forming its intention.

    (2) **The restricted procedure (Reg. 16):** Under this procedure, the contracting authority first invites economic operators to tender and then awards the contract to one of those who submitted a tender. The contracting authority must ensure that the number of economic operators invited to tender is sufficient to ensure genuine competition. As with the open procedure, minimum standards provisions may be applied.

    (3) **The negotiated procedure (Reg. 17):** The contracting authority must make the selection of the economic operators to be invited to negotiate the contract and in specified circumstances may limit the number of economic operators which it intends to invite to

negotiate the contract. The contracting authority must ensure that the number of economic operators invited to tender is sufficient to ensure genuine competition. The contracting authority may provide for the negotiated procedure to take place in successive stages in order to reduce the number of tenders to be negotiated by applying the award criteria in the contract documents. Again, a minimum standards provision may be applied.

(4) **The competitive dialogue procedure** (Reg. 18): This procedure can be used where the contracting authority wishes to award a particularly complex contract and considers that the open or restricted procedures are unsuitable. The contracting authority must open a dialogue with the participants selected, the aim of which is to identify and define the means best suited to satisfying its needs. The contracting authority may specify that payments may be made to a participant in respect of the participant's expenses incurred in participating in the competitive dialogue procedure.

83. A contracting authority must treat economic operators equally and in a non-discriminatory way. It must also act in a transparent way. Further, where the Regulations apply, a contracting authority must not treat a person who is not a national of a Member State or certain EEA States[5] and established in a Member or certain EEA State more favourably than one who is (see Reg. 4).

84. Where a contracting authority wishes to lay down technical specifications in relation to (i) the services to be provided under a public services contract and the materials and goods used in or for it or (ii) the goods to be purchased or hired under a public supply contract or (iii) the work or works to be carried out under a public works contract and the materials and goods used in or for it, those specifications must be set out in the contract documents. A contracting authority must also ensure that technical specifications afford equal access to economic operators and do not have the effect of creating unjustified obstacles to the opening up of public procurement to competition (see Reg. 9).

85. A contracting authority must treat an economic operator as ineligible (and must not select that economic operator) if the contracting authority has actual knowledge that the economic operator or its directors or any other person who has powers of representation, decision or control of the economic operator has been convicted of a number of specified offences (see Reg. 23).

86. A contracting authority must not treat the tender of a services provider as ineligible nor decide not to include a services provider amongst those from which it will make its selection of services providers to be invited to tender for or to negotiate a contract on the ground that under the law of any part of the United Kingdom the services provider is required to be an individual, a corporation or other type of body, if under the law of the relevant State in which the services provider is established, that services provider is authorised to provide such services (see Reg.

[5] These are Iceland, Liechtenstein and Norway (see Regulation 4(4) and Column 1 of Schedule 4 of the 2006 Regulations).

29).

87. Subject to certain specifications, a contracting authority must award the public contract on the basis of either the most economically advantageous offer, or that which offers the lowest price. In determining whether an offer is the most economically advantageous, an authority is required to use criteria linked to the subject matter of the contract, including quality, price, and technical merit. Where a contracting authority intends to award a public contract on the basis of the offer which is the most economically advantageous it must state the weighting which it gives to each of the criteria chosen in the contract notice or in the contract documents or, in the case of a competitive dialogue procedure, in the descriptive document. If an offer for a public contract is abnormally low the contracting authority may reject that offer but only if it has:

    (a) requested in writing an explanation of the offer or of those parts which it considers contribute to the offer being abnormally low;

    (b) taken account of the evidence provided in response to a request in writing; and

    (c) subsequently verified the offer or parts of the offer being abnormally low with the economic operator.

(see Reg. 30)

88. Once a contracting authority has awarded a public contract or concluded a framework agreement, detailed notification requirements specify the manner in which a contract award notice must be sent to the Official Journal. The notice must be sent not later than 48 days after the contract has been awarded or the conclusion of a framework agreement (see Reg. 31).

89. Furthermore, after a contracting authority has made its decision, it must inform the tenderers and candidates of its decision to award a contract or conclude a framework agreement and must do so by notice in writing by the most rapid means of communication practicable. The notice must include the criteria for the award of the contract and the reasons for the decision, including the characteristics and relative advantages of the successful tender (see Reg. 32).

90. Where a contracting authority sends an award decision notice under Reg. 32, a standstill period of either 10 or 15 days applies. The contracting authority must not enter into the contract or conclude the framework agreement before the end of the standstill period (see Reg. 32A).This allows unsuccessful tenderers a period of time to challenge the award of the contract to the successful tenderer, if they are so minded.

91. A contracting authority may stipulate conditions relating to the performance of a public contract, provided that those conditions are compatible with EU law and are indicated in either the contract notice and/or the contract documents. The conditions may include social and environmental considerations (see Reg. 39).

Remedies

92. The 2006 Regulations used to provide that interim relief suspending the procurement

procedure, or the award of damages, or both, may be given where the contract had not already been entered into, but that where the contract had already been entered into the only remedy was the award of damages.

93. The Public Contracts (Amendment) Regulations 2011 implemented Directive 2007/66 ("the Remedies Directive") and made important changes to the remedies from breach of the 2006 Regulations. The changes mean that for certain breaches (e.g. advertising breaches or a failure to respect the standstill period) the resulting contract must be held to be "ineffective". But that does not mean that the contract will be *void* because domestic courts have discretion whether or not to set aside a contract if there are overriding reasons relating to the general interest that it be continued.

94. Where the contract has not been entered into and a breach is found, it is provided that (without prejudice to any of its other powers) the court may do one or more of the following:

    (a) Order the setting aside of the decision or action concerned;

    (b) Order the contracting authority to amend any document;

    (c) Award damages to an economic operator which has suffered loss or damage as a consequence of the breach: Reg. 47I.

95. Where the contract has been entered into and a breach is found, the court:

    (a) Must, if it is satisfied that any of the grounds for ineffectiveness applies, make a declaration of ineffectiveness in respect of the contract, unless there are general interest grounds for not doing so;

    (b) Must, where required by the 2006 Regulations, impose penalties;

    (c) May award damages to an economic operator which has suffered loss or damage as a consequence of the breach, regardless of whether the court also imposes penalties or makes a declaration of ineffectiveness; but

    (d) Must not order any other remedies: Reg. 47J (1), (2).

96. Three grounds for ineffectiveness are specified:

    (1) The first ground applies where the contract has been awarded without a required prior publication of a contract notice, unless:

        (i) The contracting authority considered the award of the contract without prior publication of a contract notice to be permitted by the 2006 Regulations;

        (ii) The contracting authority has had published in the Official Journal a voluntary transparency notice expressing its intention to enter into the contract; and

        (iii) The contract has not been entered into before the end of a period of at least 10 days beginning with the day after the date on which the voluntary transparency notice

was published in the Official Journal: Reg. 47K(2), (3).

(2) The second ground applies where:

(i) The contract has been entered into in breach of any requirement imposed by the standstill period; suspension because of a challenge to award; or an interim order restoring or modifying a suspension originally imposed by the court; and

(ii) There has also been a breach of the duty owed to the economic operator in respect of obligations other than those imposed by the standstill period; and

(iii) The first breach has deprived the economic operator of the possibility of starting proceedings in respect of the second breach, or pursuing them to a proper conclusion, before the contract was entered into; and

(iv) The second breach has affected the chances of the economic operator obtaining the contract: Reg. 47K (5).

(3) The third ground applies where:

(i) The contract is based on a framework agreement or was awarded under a dynamic purchasing system; and

(ii) The contract was awarded in breach of any requirement imposed in relation to the award of particular contracts under framework agreements through reopening of competition, or the award of contracts under dynamic purchasing systems; and

(iii) The estimated value of the contract is equal to or exceeds the relevant threshold: Reg. 47K (6).

97. The court must make a declaration of ineffectiveness unless there are general interest grounds for not doing so. The 2006 Regulations provide that the court must not make a declaration of ineffectiveness if the contracting authority or another party to the proceedings raises this ground and the court "is satisfied that overriding reasons relating to a general interest require that the effects of the contract should be maintained": Reg. 47L(1).

98. In terms of time limits:

(1) Where proceedings do not seek a declaration of ineffectiveness, they must normally be started within 30 days beginning with the date when the economic operator first knew or ought to have known that grounds for starting the proceedings had arisen (but there is no requirement to do so before the end of the standstill period): Regulation 47D(1)-(3) –previously the claim had to be brought within 3 months and in any event promptly but this had to be changed in order to comply with the CJEU's decision in Case C-406/08 ***Uniplex (UK) Ltd v NHS Business Services Authority***);

(2) Proceedings where a declaration of ineffectiveness is sought must be started within 30 days of the publication in the Official Journal of a relevant contract award notice

containing a justification of why the contract was awarded without prior publication of a contract notice, or where the authority has informed the operator of the conclusion of the contract with a summary of the relevant reason: Reg. 47E.

99. The court may extend the time limit where it considered that there is a good reason for doing so, subject to a maximum period of 3 months after the date when the economic operator first knew or ought to have known that grounds for starting the proceedings had arisen: Regulation 47D(4) and (5). In ***Parker Rhodes Hickmotts Solicitors v Legal Services Commission*** [2011] EWHC 1323 (Admin) where a claim was made substantially out of time it was held that it was not open to a bidder in a tender, conscious of a potential defect in the tendering procedures, to wait and see whether, notwithstanding those defects, it achieved success with its bid.

What mechanisms may be used in planning which do not engage the Directive?

100. In the light of the authorities and the likely applicability of the Directive where there is a PWC even if it is contained within a planning agreement, the following mechanisms may not fall within the procurement process:

(1) An obligation by the developer to fund works, which are then separately carried out or procured by the authority;

(2) An option agreement such as that found by the Commission to fall outside the Directive in Flensburg (IP/08/867, 5.6.08) –and apparently outside the requirements in ***Helmut Müller*** at [85]-[88] for there to be a binding obligation to undertake the works -

> "The European Commission has decided to close an infringement case against Germany concerning a land sale for urban development purposes by the public utility company of the city of Flensburg.
>
> The public utility company, a 100% affiliate of the city of Flensburg, had sold a piece of land to a private property developer for the construction of a building that would correspond to certain urban development needs. Apart from a simple statement of intent, the sales contract does not contain a legally binding obligation for the developer to realise the envisaged building; it only stipulates a right to purchase the land for the city of Flensburg, in case the building should not be constructed.
>
> In the view of the Commission, such a land sale can neither be considered as a public works contract nor as a public works concession, because the contract in question did not contain a legally binding obligation to execute works specified by the contracting authorities. The mere right for the public authority to (re-)purchase the land in case of non-construction is not, in the Commission's view, a sufficient sanction that could give rise to a legal obligation to execute the works."

(3) A negative, "Grampian" style condition which prevent works being undertaken or from proceeding beyond a certain point until other works have been provided.

New public procurement directives adopted

101. On 15 January 2014, the EU Parliament adopted 3 new public procurement directives to

replace the Directive and the Utilities Directive (2004/17/EC)[6]. The new directives comprise a revised public sector directive, a revised utilities sector directive and a new directive containing procedural rules for the award of concessions contracts[7].

102. The new directives will enter into force 20 days after publication in the Official Journal of the European Union. Thereafter, Member States will be required to transpose the new directives within 2 years from the date the directives enter into force. For implementing electronic procurement fully, Member States may extend this period by up to 30 months[8].

103. Once implemented, the new rules will apply only to procurement exercises commenced after the date when the new domestic implementing rules take effect. The new public sector procurement directive does not appear to make any changes to scope or definitions which are likely to change the substance of the approach set out in ***Auroux*** and ***Helmut Müller*** to the application of the procurement rules in the development and regeneration context.

104. Some of the key changes being introduced are:

(1) The distinction between "A" ("priority") services and "B" ("non-priority") services will be abolished

Part A services are currently fully regulated by the procurement rules whereas Part B services (e.g. education, health, cultural and some transport services) are regulated to a more limited extent. Under the new directives, all contracts above the financial thresholds will generally have to be procured formally unless listed in the "new simplified regime" annex to the directives. All services not explicitly listed fall under the full regime of the directives[9].

(2) More flexible procedural rules with increased opportunity to negotiate

The new directives introduce a number of simplified rules and procedures. A new lighter-touch regime is introduced for certain low-value health and social service contracts which will enable contracting authorities to dictate their own procedures provided that they advertise their contracts properly and adhere to the principles of equal treatment and transparency. Also, the directives introduce 2 new procedures: (i) the competitive procedure with negotiation; and (ii) the innovative partnership procedure. Additionally, competitive dialogue will no longer be limited to complex procurements.

(3) **Simplified tendering through e-procurement**

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[6] www.europarl.europa.eu/sides/getDoc.do?pubRef=-%2f%2fEP%2f%2fTEXT%2bTA%2b20140115%2bTOC%2bDOC%2bXML%2bV0%2f%2fEN&language=EN

[7] https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/225398/PPN_-_outcome_of_negotiations.pdf

[8] http://europa.eu/rapid/press-release_MEMO-14-20_en.htm

[9] http://europa.eu/rapid/press-release_MEMO-14-20_en.htm

The mandatory use of means of electronic communication in public procurement means that it will be possible to submit contract notices online and to download tender documentation following publication of a notice.

(4) Benefits for SMEs

The changes are intended to promote the participation of small businesses. A contracting authority procuring large contracts will have to justify why the large contract could not be broken down into smaller ones. The new rules will allow bidders to self-certify that they meet the selection criteria at pre-qualification stage in order to reduce the administrative burden (financial information will be verified as the bid progresses still). Also, contracting authorities will no longer be able to specify a turnover of more than three times the contract value in a pre-qualification questionnaire. Instead, the turnover requirements will be limited to a maximum of twice the estimated value of the contract, except in duly justified cases.

(5) **In-house suppliers exemption**

The ***Teckal*** test for in-house provision will be codified so as to clarify the exemption criteria for direct awards of contracts. For the exemption to apply: (i) there must be no private ownership; (ii) a prescribed percentage of the contractor's turnover must be generated by work for the contracting authority; and (iii) the contractor must be controlled as if it were a department of the authority.

(6) **Clarification of the effect of change in a project**

Changes to the terms of a contract that are not material are permitted, but it is difficult to determine when there is a significant change triggering a new procurement. The new rules follow the CJEU's decision in ***Pressetext Nachrichtenagentur GmbH v Austria*** (C-454/06) [2008] E.C.R. I-4401 and make clear that changes increasing the value to the contract by less than 5% of the initial contract price are not material (provided that the change in question does not alter the nature of the contract). Also, structural changes to a party to a contract (such as internal restructuring or merger) will no longer in themselves trigger a fresh procurement.

(7) **Additional rules on framework agreements**

The new rules will clarify when authorities not party to a framework agreement can subsequently change it.