Articles

The Application of the Public Contracts Directive to Development Agreements and Planning Obligations Following *Auroux v Roanne*

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LT Development; Directives; EC law; Public works contracts; Urban regeneration

Introduction

A frequently employed mechanism for the development of land, particularly regeneration schemes in urban centres and the like, is a joint approach between developer and local authority whereby, on agreed terms, the authority exercises compulsory purchase powers (generally s.226 of the Town and Country Planning Act 1990[1]) in the public interest and makes available such property as is needed to carry out the development. In return, the developer will usually indemnify the authority for its costs of so doing, including CPO compensation, 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 provide for property interests to be transferred to the developer.

In some instances, where the authority may be participating as substantial landowner, and not just as planning authority, and issues both of good estate management and best value[2] will arise, there are likely to be complex arrangements regarding the transfer of property interests, accounting for costs and division of revenues/profits. In many cases, arrangements will be included for the improvement of infrastructure and ''the public realm'' which is usually (though not always) then returned to the authority.

There is inevitably a spectrum of circumstances from cases where the opportunity for the development scheme is one created by and led by the council or one created by the developer and facilitated by the council's exercise of statutory powers.

There has, at least until recently, been a lack of clarity as to the application of the procurement rules for at least public works contracts to such arrangements. The common view, supported by the Court

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[1] See, e.g., *Standard Commercial Property Securities Ltd v Glasgow CC* 2006 S.L.T. 1152 per Lord Hope at [11]–[23] and Lord Rodger at [48] *et seq.*, and *Sainsburys' Supermarkets Ltd v Secretary of State & Bexley LBC* [2001] EWHC Admin 323 at [3].

[2] See, e.g., of the Local Government Act 1972 ss.123–128, ODPM Circular 06/03 and *Commission Communication on State aid elements in sales of land and buildings by public authorities* [1997] OJ C209/3.

of Appeal in *R. v Brent LBC Ex p. O'Malley*,[3] was that where works were carried out by a developer which would own and manage the subsequent development, the public works procurement process did not apply.

Directive 2004/18[4] on the co-ordination of procedures for the award of public works contracts, public supply contracts and public service contracts (the Directive) imposes various procedural requirements wherever 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 the certain thresholds.[5] The Directive is transposed into English Law by the Public Contracts Regulations 2006 SI 2006/5 (the Regulations).[6]

This article focuses on the extent to which development agreements exceeding the threshold values are caught by the requirements of the Directive and Regulations, particularly in light of the ECJ's judgment of January 18, 2007 in *Auroux v Commune de Roanne* (Case C-220/05).[7] The authors also consider the implications of *Auroux* for agreements under s.106 of the Town and Country Planning Act 1990 (TCPA) and s.278 of the Highways 1980 (HA).

The authorities to date on procurement and development agreements (including *Auroux* itself) concern previous versions of the former Public Works Directive (originally Directive 71/305 and subsequently Directive 93/37, as amended by Directive 97/52). These cases remain relevant, however, since the definition of ''public works contracts'' is substantially unchanged by the new Directive.[8] In *Auroux*, the ECJ delivered its judgment in the full knowledge of the new Directive and did not suggest that the position would be any different had it been in force as of the date of the decision there.

1. Legislative framework

(a) Contracting authority

The first criterion for the applicability of the Directive—that one party to the contract is a ''contracting authority''—can be dealt with very shortly. Article 1(9) of the Directive defines ''contracting authorities'' as follows[9]:

> '''Contracting authorities' means the State, regional or local authorities, bodies governed by public law, associations formed by one or several of such authorities or one or several of such bodies governed by public law;

[3] *R. v Brent LBC Ex p. O'Malley* (1997) 30 H.L.R. 328.

[4] Corrected, owing to a clerical error in Art.78, by Directive 2005/75.

[5] The current range of thresholds (from £679k to £3.497 million) is set out at *www.ogc.gov.uk/procurement_policy_and_application_of_eu_rules_eu_procurement_thresholds.asp* [Accessed May 13, 2008]. It seems likely that most, if not all, development agreements for substantial projects will exceed these thresholds.

[6] The Directive consolidates and replaces the earlier directives on public supplies, public services and public works—including Directive 93/37 Co-ordination of procedures for the award of public works contracts (as amended by Directive 97/52). In the UK, the Regulations replace the Public Works Contracts Regulations 1991, in order to implement the new Directive. For the purposes of this article, the case law under the earlier Directives and Regulations remains relevant, as explained below.

[7] *Auroux v Commune de Roanne* (Case C220/05) [2007] All E.R. (EC) 918.

[8] Public Works Directive Art.1(a) defined ''public works contracts'' as ''contracts for pecuniary interest concluded in writing between a contractor and a contracting authority . . . which have as their object either the execution, or both the execution and design, of works related to one of the activities referred to in Annex II or a work defined in (c) below, or the execution, by whatever means, of work corresponding to the requirements specified by the contracting authority''. The definition of ''work'' in Art.1(c) was ''the outcome of building or civil engineering works taken as a whole that is sufficient of itself to fulfil an economic and technical function''.

[9] See also reg.3 of the 2006 Regulations.

> A 'body governed by public law' means any body:
>
> (a) established for the specific purpose of meeting needs in the general interest, not having an industrial or commercial character, and
> (b) having legal personality, and
> (c) financed, for the most part, by the State, or regional or local authorities, or other bodies governed by public law, or subject to management supervision by those bodies, or having an administrative, managerial or supervisory board, more than half of whose members are appointed by the State, regional or local authorities or by other bodies governed by public law.
>
> Non-exhaustive lists of bodies and categories of bodies governed by public law which fulfil the criteria referred to in (a), (b) and (c) of the second subparagraph are set out in Annex III. Member States shall periodically notify the Commission of any changes to their lists of bodies and categories of bodies.''

This definition, and the accompanying list in Annex III of ''bodies governed by public law'', will inevitably cover at least one party to the standard form of development agreement.[10]

Accordingly, the key question in determining whether a development agreement exceeding the threshold value is caught by the Directive has been whether it is a ''public works contract''.

(b) ''Public works contracts''

(i) Under the Directive

Article 1(2)(b) of the Directive defines the concept of ''public works contracts'' as follows:

> '''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.''

The concept of ''public contracts'' to which Art.1(2)(b) refers is defined in Art.1(2)(a) 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.''

A written contract for pecuniary interest between an ''economic operator'' and a contracting authority will be caught by the Directive if its objective is either:

1. The execution, or both the design and execution, of works related to once of the activities in Annex I of the Directive; *or*

[10] Further, bodies not within the list in Annex I but within the general definition are still covered: see *Commission v Spain* (Case C283/00) [2003] E.C.R. I-11697.

2. The realisation of ''work'' as defined in Article 1(2)(b) which ''corresponds to the requirements specified by the contracting authority.''

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

The definition as can be seen is a wide one, especially in terms of objective 2, which covers a wide range of circumstances where the requirements of the works have been ''specified'' by the authority.

A particular sub-category of public works contract is the ''public works concession contract'', which is defined by Art.1(3) as follows:

> ''. . . 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.''

(ii) Under the Regulations

There do not appear to be any material differences between the relevant definitions in the Directive and those contained in the Regulations. There are, however, some minor differences in the wording. In particular, reg.2 of the Regulations defines a ''public works contract'' in slightly different language from Art.1(2)(b) of the Directive:

> ''. . . a contract, in writing, for consideration (whatever the nature of the consideration)—
>
> (a) for the carrying out of a work or works for a contracting authority; or
> (b) under which a contracting authority engages a person to procure by any means the carrying out for the contracting authority of a work corresponding to specified requirements.''

This difference in wording is unlikely to be material, particularly given the courts' duty under EC law to interpret implementing regulations in a manner compatible with the governing Directive.[11] ''Work'' and ''works'' are defined in reg.2 effectively as in the Directive:

> '''work' means the outcome of any works which is sufficient of itself to fulfil an economic and technical function.
>
> . . .
>
> 'works' means any of the activities specified in Schedule 2.''

The list in Sch.2 of specific activities constituting ''works'' is essentially identical to that in Annex I of the Directive (see above).

Regulation 2 defines a ''public works concession contract'' in the same terms as under the Directive:

> ''a public works contract under which the consideration given by the contracting authority consists of or includes the grant of a right to exploit the work or works to be carried out under the contract.''

[11] See, e.g. *Marleasing SA v La Comercial Internacional de Alimentación SA* (Case C106/89) [1992] 1 C.M.L.R. 305 and *Webb v Emo* [1993] 1 W.L.R. 49 at 59.

(c) ''For pecuniary interest''

The majority of development agreements of the more complex type, involving interests held by the local authority, and the provision of some form of payment are plainly ''for pecuniary interest'' since both main parties to the agreement will obtain substantial value from the transaction—indeed, in the case of a public authority, best value would have to be obtained (subject to the limited exceptions).

There is a difficult question whether, in the simpler cases where the main agreement if for an indemnity for costs, such agreements are ''for pecuniary interest'' since the indemnity appears to be purely a defraying of costs. Although there may be a transfer of value in the transfer of property compulsorily acquired, this is a sense ''value neutral'' since the value paid for the property transfer is the value ascribed through the indemnity for compensation for CPO. However, the language of the Directive is not that of value but merely ''pecuniary interest''.[12]

Under the Regulations, the language used is ''for consideration (whatever the nature of the consideration)'',[13] which may well be wide enough to include pure indemnity arrangements, for which it might be said that the consideration for the indemnity was the authority's making and following of a CPO for the benefit of the developer.

A broad approach was taken to this issue by the ECJ in the *La Scala* case, below, ''conducive to ensuring that the Directive has full effect''.[14] In *Auroux*, the ECJ held (though in the context of plainly valuable consideration) that ''[t]he pecuniary interest in a contract refers to the consideration paid to the contractor on account of the execution of works intended for the contracting authority''.[15]

Even if this requirement is not satisfied, the contract may fall within the definition of public works concession contract where the consideration is the right to exploit the works.

(d) Exclusion—acquisition of real property rights

Under Art.16(a) of the Directive, there is excluded from the scope of Public Works Contracts 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 . . .''

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

> ''. . . (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.''

However, it will be a question of fact and degree in each case whether the transfer of the property rights is the main object of the contract or whether that transfer is simply ancillary to the works.

[12] The French version refers to ''à titre onéreux'' and the Italian ''a titolo oneroso'' which may suggest valuable consideration. However, if the concept is simply one of sufficient consideration to make the agreement binding, this might well include indemnity arrangements.

[13] Regulations reg.2(1)—definition of ''public works contract''.

[14] *Ordine degli Architetti (La Scala)* (Case C399/98) [2001] E.C.R. I-5409 at [85].

[15] *Auroux v Commune de Roanne* [2007] All E.R. (EC) 918 at [45].

(e) Enforcement

Enforcement in the national courts lies only at the instance of those entitled under reg.47 of the Regulations, where reg.47(1) establishes that the obligation of an authority to comply with the Regulations ''is a duty owed to an economic operator''.

The means of enforcement is a statutory remedy:

> ''(6) A breach of the duty owed in accordance with paragraph (1) or (2) is actionable by any economic operator which, in consequence, suffers, or risks suffering, loss or damage and those proceedings shall be brought in the High Court.
>
> (7) Proceedings under this regulation must not be brought unless—
>
> (a) the economic operator bringing the proceedings has informed the contracting authority or concessionaire, as the case may be, of the breach or apprehended breach of the duty owed to it in accordance with paragraph (1) or (2) by that contracting authority or concessionaire and of its intention to bring proceedings under this regulation in respect of it; and
>
> (b) those proceedings are brought promptly and in any event within 3 months from the date when grounds for the bringing of the proceedings first arose unless the Court considers that there is good reason for extending the period within which proceedings may be brought.''

An ''economic contractor'' is defined by reg.4(1)[16]:

> ''(1) In these Regulations, an ''economic operator'' means a contractor, a supplier or a services provider.''

A ''contractor'' is defined by reg.2(1) as:

> ''. . . a person who offers on the market work or works and—
>
> (a) who sought, who seeks, or would have wished, to be the person to whom a public works contract is awarded; and
>
> (b) who is a national of and established in a relevant State . . .''

There is not, therefore, a freestanding challenge available on the same broad basis as judicial review to any person with a sufficient interest. A local taxpayer or property owner would not, unless they otherwise fell within reg.47, be a person to whom the duty is owed or to whom a right of action for breach of that duty is given.

2. Pre-Auroux case law on the applicability of the Directive to development agreements

Prior to *Auroux* there were two ECJ decisions of importance which considered the applicability of the Public Works Directive to development agreements—*Gestion Hotelera Internacional* (Case C-331/92)[17] and *Ordine degli Architetti* (*La Scala*) (Case C-399/98).[18] The question was also considered, as noted already, by the Court of Appeal in *R. v Brent LBC Ex p. O'Malley*.[19] While

[16] See also Art.1(8) of the Directive.
[17] *Gestion Hotelera Internacional* (Case C331/92) [1994] E.C.R. I-1329.
[18] *La Scala* [2001] E.C.R. I-5409.
[19] *O'Malley* (1997) 30 H.L.R. 328.

the ECJ's decision in *Auroux* represents the latest word on the matter, these earlier cases provide an important context for the ECJ's decision in that case.

(a) Gestion Hotelera

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:

1. *Invitation (1)*—concerning the award of the final concession for the installation and opening of a gaming establishment at the hotel;
2. *Invitation (2)*—concerning the use of the hotel installations and the operation of the hotel business.

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 this requirement to carry out renovation works meant that the invitations to tender were caught by the Public Works Directive and should have been advertised in the Official Journal of the European Communities (OJEC).

Following a preliminary reference under Art.234 EC, the ECJ 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.
>
> . . .
>
> 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.
> 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].
> 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.
> 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.

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.''

(b) O'Malley

The applicability of the earlier version of the Public Works Directive and its implementing regulations to development agreements was considered by the Court of Appeal in *O'Malley*. This case concerned an agreement whereby a housing estate owned by the council would be transferred (via a development company) to the Metropolitan Housing Trust (MHT), who would undertake the development and works on the site, before granting the council a 150-year lease of the properties of any occupants who wished to remain tenants of the council rather than become tenants of MHT. In return, the council undertook to pay MHT a subsidy of up to £7.68 million in support of its activities.

Under the Housing Act 1985, the Secretary of State's consent was required for this transaction. This was duly granted, and was subsequently challenged by two of the council's tenants on grounds including that the council ought to have advertised the contract pursuant to the Public Works Directive.

Bearing in mind that the definition of ''public works contract'' in the regulations included the requirement the work or works in question be carried out ''for the contracting authority'', Schiemann L.J. (sitting as a judge of the High Court) considered that the key question in this case was whether the work undertaken by MHT would be carried out ''for the Council''. He held[20]:

''Here it is helpful to distinguish between two different cases:

(1) Where a local authority pays a developer to develop social housing, which will be owned by the Council (and leased and managed by it).
(2) Where a local authority provides financial assistance to a Housing Association to develop houses which the Housing Association will own lease and manage.

In the first case, the local authority commissions the development and is the main beneficiary of the resulting housing—the developer acts merely as the local authority's agent to arrange the development. This is undoubtedly the case of a work 'carried out for the local authority'.

In the second case, however, it is the Housing Association who commissions the development and who becomes the main beneficiary of the developed housing. There is no sense in which the Housing Association develops the houses 'for' the local authority—it acts on its own behalf and for its own purposes. The respondent submits that this is undoubtedly not a case of work 'carried out for the local authority'.

Turning to this case. This is a case where the Council provides funding (through New Horizons) to MHT, a Housing Association, so that MHT can develop houses which it, MHT, will own and manage. This is the second case identified above (i.e. Council funding a Housing Association development) The development of social houses in this case is not 'carried out

[20] *O'Malley* (1997) 30 H.L.R. 328 at 354–355.

> for' the local authority, but is carried out by MHT as principal, with (indirect) local authority funding.
>
> Mr Howell draws attention to the Public Works Directive 93/37EEC and submits that the Regulations ought to be construed in the light of the Directive and in particular the wide definition of public works contracts in Article 1(a) as 'contracts which have as their object the execution of works related to [building works]'.
>
> I am prepared to accept that it is right to use the Directive as an aid to the construction of the Regulations. Doing so, however, does not lead me to attribute to the regulations in the present context a meaning other than that which I would give them if they stood on their own.''

The Court of Appeal dismissed the appeal. Judge L.J. held:[21]

> ''When implemented as the parties intend the framework agreement will result in work of demolition and reconstruction on the Bison estate and work of refurbishment on the Scientist estate. In this general sense the scheme is a project for building and engineering. However that is not sufficient to bring it within the 1991 Regulations and Directive 93/37/EEC.
>
> The Council is a party to the framework agreement with New Horizons. Generally, New Horizons has agreed to carry out and complete or procure the completion of the works so as to effect the proposed redevelopment of the Chalkhill estate. However its obligations are more closely defined in the agreement itself. The development of social housing requires New Horizons to procure planning permission and thereafter to transfer the relevant land to MHT and for New Horizons to enter into a development agreement with MHT for the construction of the housing. The actual work will be carried out by Wimpey as the contractor, with MHT as the developer, and MHT will, when the framework agreement has reached its intended conclusion, become the freehold owner of a substantial amount of housing throughout the estate. We have considered the framework agreement as a whole. We are reinforced in this approach by the judgment of the European Court of Justice in *Gestion Hotelera Internacional* [judgment dated April 19, 1994]—Case 331/92. The question in issue was whether the predecessor to Directive 93/37/EEC applied to what was described as a 'mixed contract' which undoubtedly included some work which fell within the ambit of the Directive. The court considered the object of the contract 'as described in the documents before the court', and concluded that the Directive did not apply.
>
> In our judgment if a single word may describe this complex arrangement, this was a contract for development. Whether or not this description is apt, considered as a totality, the framework agreement does not fall within the ambit of the 1991 Regulations or the Directive.''

Significant difficulties exist with this decision since it now appears that it is not necessary that the purpose is that the authority should become the owner or occupier of the works.[22]

[21] *O'Malley* (1997) 30 H.L.R. 328 at 373.
[22] *Auroux* [2007] All E.R. (EC) 918 at [47], see below.

(c) Ordine degli Architetti (La Scala)

The applicability of the Public Works Directive to development agreements was considered for a second time by the ECJ in *La Scala*. 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. 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. Pursuant to a complex development agreement, the developers agreed to fund and construct the related infrastructure works themselves and to transfer the Teatro alla Bicocca free of charge to the council. The value of these works exceeded the threshold for the applicability of the earlier version of the Public Works Directive.

The arrangements were challenged on the ground that they constituted a public works contract and ought to have been subject to the contract award procedure under the Directive. The Italian Government argued:

1. that the direct execution of infrastructure works was provided for by a rule contained in Italian legislation on urban development, which differed from EC public procurement legislation in terms of its subject-matter, purpose, and characteristics;
2. that the City Council had no power to choose the person to be given responsibility for executing the works since, by operation of law, the only person who could do that was the owner of the land to be developed who had obtained planning permission; and
3. that the agreement was governed by public law and was concluded in the exercise of a public function, and therefore could not be a contract for the purposes of the Directive.

The ECJ held in robust terms that this agreement was a public works contract:

1. Importantly, the court emphasised that the definition of ''public works contract'' should be interpreted in light of the aim of the Public Works Directive[23]:

   > ''This means that in circumstances involving the execution, or the design and execution, of works or the execution of a work for a contracting authority within the meaning of the Directive, the assessment of the situation in terms of the other elements referred to in Article 1(a) of the Directive must be made in such a way as to ensure that the Directive is not deprived of practical effect, particularly where that situation displays special characteristics because of the provisions of national law applicable to it.''

2. On this basis, the court held that the fact that direct execution of infrastructure works formed part of a set of urban development regulations was not sufficient to exclude it from the scope of the Public Works Directive when the elements needed to bring it within the scope of the Public Works Directive were present.[24] Once there was a contract for

[23] *La Scala* [2001] E.C.R. I-5409 at [55].
[24] *La Scala* [2001] E.C.R. I-5409 at [66].

pecuniary interest between a contractor and a contracting authority for public works above the applicable threshold, it fell within the scope of the Public Works Directive:

> ''67 In that regard, as the national court pointed out, the infrastructure works referred to in Article 4 of Law No 847/64 are fully capable of constituting public works, partly because they are specifically designed to meet development requirements over and above the construction of housing and partly because they come wholly under the control of the competent administrative authority since it holds a legal right over the use of such works, so as to ensure that they remain at the service of all members of the local community.
> 68 These are important considerations because they confirm that the planned works are intended, as has always been maintained, for the benefit of the public.''

3. The fact that the authority could not choose the other party, since by law it had to be the owner of the land, that did not preclude a contract[25] since:

''. . . it is the development agreement concluded between them which determines in each case the various infrastructure works to be undertaken, together with the related terms and conditions, including the requirement that the projects for such works be approved by the municipality. Furthermore, it is by virtue of the commitments assumed by the developer in that agreement that the municipality acquires legal rights over use of the works contracted for, so that they can be made available to the public.''

4. The fact that the development agreement was governed by public law did not preclude but rather militated in favour of the existence of a public works contract. In several Member States, any contract concluded between a contracting authority and a contractor would be governed by public law.[26]
5. Although the city council had no power to choose anyone other than the owner to be given responsibility for executing the works, it could require the owner to comply with the procedural requirements of the Public Works Directive in selecting who should carry out the work on its behalf.[27]

(d) Conclusion on pre-Auroux case law

Prior to the ECJ's decision in *Auroux*, the following propositions could have been drawn from *Gestion Hotelera*, *O'Malley* and *La Scala*:

1. The question of whether a contract was for public works would be considered by reference to the main object of the contract—*Gestion Hotelera*.
2. Where the ''work'' or ''works'' in question are not the object of the contract but are incidental to another object which is outside the scope of the Directive, the Directive and Regulations would not apply—*Gestion Hotelera*.
3. However, if a project taken as a whole contains the elements needed to bring it within the scope of the Directive, it would be very difficult to avoid the effect of the Directive by means

[25] *La Scala* [2001] E.C.R. I-5409 at [71].
[26] *La Scala* [2001] E.C.R. I-5409 at [73].
[27] *La Scala* [2001] E.C.R. I-5409 at [100].

of contractual drafting, reliance on domestic statutory requirements, or "salami-slicing" one large project into a series of different agreements: the ECJ would adopt a purposive and robust approach to the Directive's application—*La Scala*.

4. In addition, *O'Malley* supported the proposition that where works are carried out on property which will be transferred to and managed by the contractor (as opposed to being retained by the contracting authority), the Directive and Regulations would not apply because the works are not carried out "for the contracting authority".

However, proposition 4 is difficult to reconcile with the ECJ's subsequent decision in *Auroux*.

3. Auroux v Commune de Roanne[28]

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.

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.

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

1. approx. €2.93 million from the council as consideration for the transfer of the car park;
2. approx. €8.1 million from the transfer of property to third parties; and
3. the council would contribute €3.03 million towards the financing of the works.

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 two of which were:

"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?

2. If the answer to Question 1 is in the affirmative, is it necessary, in assessing the threshold [at that time €5 million] imposed by Art.6 of the same Directive, to take into account only the price paid in return for the delivery of the works to the contracting authority, or

[28] *Auroux* [2007] All E.R. (EC) 918.

the sum of that price and the contributions paid, even if the latter are only partly allocated to the execution of those works, or the total value of the works, with assets not disposed of at the end of the agreement vesting automatically in the first contracting authority and the latter then pursuing the execution of ongoing contracts and assuming the debts incurred by the second contracting authority?''

Question 1: Was this a public works contract?

The council submitted that the agreement did not constitute a public works contract since, as a public development agreement, its purpose went beyond the exhibition 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.

The Polish Government intervened in the proceedings to argue, inter alia, that the contract at hand was more in the nature of a service contract than one for works. It observed that SEDL had been entrusted with the provision of certain project management services. These included the expropriation of land and the holding of design contests. Although the contract did provide for the construction of certain buildings, this work would be sub-contracted by SEDL.

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.[29] 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.

The ECJ 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.[30] Following *Gestion Hotelera*, it was the main purpose of the contract which would determine whether the Directive is to be applied in principle.[31]
2. The French Government's argument that the fact that a large part of the works was ''intended for third parties it cannot be regarded as corresponding to the municipality's requirements''[32] was rejected.[33] It follows that the fact that an authority does not have

[29] Now Art.2(b) of the Directive as transposed by reg.2 of the Regulations.
[30] *Auroux* [2007] All E.R. (EC) 918 at [36].
[31] *Auroux* [2007] All E.R. (EC) 918 at [37].
[32] *Auroux* [2007] All E.R. (EC) 918 at [33].
[33] *Auroux* [2007] All E.R. (EC) 918 at [39].

to intend to own or operate the subject of the works is not determinative, contrary to the approach in *O'Malley*. 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.[34]
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.[35]
5. It was clear from Art.1(c) of the Public Works Directive[36] 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.[37]
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.[38]
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 moneys 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''.[39]
9. It was therefore clear that the main purpose of the contract was the execution of a work, namely the construction of the leisure centre.[40] Accordingly, it was a public works contract within the meaning of the Directive.

Question 2: What was the appropriate method of calculating whether the value of the contract exceeded the threshold?

There appeared to be three possible methods of assessing the value of a contract of this nature:

1. taking into account only the consideration paid by the contracting authority for the works actually transferred to it (which would bring the contract below the then threshold for the applicability of the Public Works Directive); or
2. taking into account all sums paid directly or indirectly by the contracting authority (which would bring the contract above the threshold); or

[34] *Auroux* [2007] All E.R. (EC) 918 at [38]. On this point the ECJ referred back to its earlier decision in *Ballast Nedam Groep* (Case C-389/92) [1994] E.C.R. I-1289 at [13], and *Holst Italia* (Case C176/98) [1999] E.C.R. I-8607 at [26].

[35] *Auroux* [2007] All E.R. (EC) 918 at [40].

[36] Now Art.2(b) of the Directive as transposed by reg.2 of the Regulations.

[37] *Auroux* [2007] All E.R. (EC) 918 at [41].

[38] *Auroux* [2007] All E.R. (EC) 918 at [42].

[39] *Auroux* [2007] All E.R. (EC) 918 at [45].

[40] *Auroux* [2007] All E.R. (EC) 918 at [46].

3. taking into account all sums received by the contractor, whether from the municipality or from third parties for works transferred to them (which would also bring the contract above the threshold).

The ECJ held that the third of these options was the correct approach, namely that of value to the contractor:[41]

> ''57. Having regard to the foregoing, the answer to the second question must be that, in order to determine the value of a contract for the purpose of Article 6 of the Directive, account must be taken of the total value of the works contract from the point of view of a potential tenderer, including not only the total amounts to be paid by the contracting authority but also all the revenue received from third parties.''

In particular, the ECJ held:

1. The Public Works Directive did not contain any express restrictions on the type of consideration which can be taken into account. To imply any such restrictions would be both wrong in principle and contrary to the purpose and spirit of the Public Works Directive, namely to open up competition and the EU internal market for public contracts.[42]
2. There was a clear danger that if the Public Works Directive were interpreted to exclude consideration coming from sources other than the contracting authority, this would give clear scope for contracting authorities to structure projects in such a way that there would be no need to hold a competitive tender.[43]
3. Public works concessions, which are also subject to the Public Works Directive's provisions, are defined in Art.3[44] as arrangements under which the contractor's consideration consists in the receipt of revenues arising from exploitation of the structure constructed. Such revenues would usually come from third parties. It would be contrary to the purpose of the Public Works Directive if amounts received from third parties were excluded from assessing the value of a public works contract.[45]

4. Conclusion—the current position

Development agreements

Following *Auroux*, the key factors affecting whether a development agreement is a ''public works contract'' within the scope of the Directive appear to be as follows (on the basis it is with a contracting authority and in writing):

1. The main purpose of the agreement will determine whether or not it is a contract for public works.[46]

[41] *Auroux* [2007] All E.R. (EC) 918 at [53], [54] and [57].
[42] *Auroux* [2007] All E.R. (EC) 918 at [50]–[52].
[43] *Auroux* [2007] All E.R. (EC) 918 at [55].
[44] Now Art.1(3) of the Directive as transposed by reg.2 of the Regulations.
[45] *Auroux* [2007] All E.R. (EC) 918 at [56].
[46] *Auroux* [2007] All E.R. (EC) 918 at [37], expressly following *Gestion Hotelera*.

2. It remains the case that, following *Gestion Hotelera*, where the agreement involves ''work'' or ''works'' which are not the main object of the contract but are incidental to another object which is outside the scope of the Directive, the Directive and Regulations would not apply.
3. However, in determining what the object of the agreement is, and whether it is within the scope of the Directive, it now appears that:

   (a) an agreement the purpose of which is to achieve a development which is sufficient in itself to fulfil an economic or technical function—such as the commercial-led urban regeneration scheme in *Auroux*—will be a ''work'' within the meaning of Art.1(2)(b) the Directive as transposed by reg.2 of the Regulations.[47] This is capable of including a wide range of agreements for development; and
   (b) if the agreement also intends that the development should meet a specific objective of the contracting authority in question—such as the regeneration of the local area in the *Auroux* case—then it will also ''correspond to the requirements specified by the contracting authority'' within the meaning of Art.1(2)(b).[48] It leaves open the question of whether the specification would have to be in the works agreement itself or whether it could be specified separately in, say, a planning obligation under s.106 TCPA or in an agreement under s.278 HA (see further below).

4. The majority of development agreements will be for pecuniary interest, subject to the issue of whether, in cases where only an indemnity for costs and compensation is entered into, such agreements are included (see above).
5. On this basis, it is doubtful whether *Gestion Hotelera* would now be decided the same way on its facts given that the gaming establishment which was held to be the object of the contract was probably sufficient to fulfil an economic function and was expressly intended to meet a policy objective of the contracting authority in question.
6. The basis for *O'Malley* now seems doubtful. Although in *Auroux* the agreement provided for the council to receive title to the car park, access roads and public spaces (as well as any buildings remaining unsold at the end of the project), this does not appear to have been a decisive so far as the ECJ was concerned. Instead, the fact that the leisure centre scheme as a whole was intended by the council to reposition and regenerate the local area was what meant that the agreement ''corresponded to the requirements specified by the municipality'' within the meaning of Art.1(2)(b)—notwithstanding that the leisure centre and the other commercial buildings were intended for private ownership. Indeed the ECJ's answer to the first question was:

   ''. . . that an agreement by which a first contracting authority entrusts a second contracting authority with the execution of a work constitutes a public works contract within the meaning of Article 1(a) of the Directive, *regardless of whether or not it is anticipated that the first contracting authority is or will become the owner of all or part of that work*.''

   Rather than ultimate ownership, the focus appears now to be on whether the purpose of the agreement is to achieve a development which will fulfil an economic or technical function and whether the agreement intends that development to fulfil a specific objective of the contracting authority. If the answer to both these questions is ''yes'', the development agreement is likely to be within the scope of the Directive.

[47] *Auroux* [2007] All E.R. (EC) 918 at [41].
[48] *Auroux* [2007] All E.R. (EC) 918 at [42].

7. Whether or not the commercial party to a development agreement will execute the works itself or have them carried out by subcontractors is irrelevant.[49]
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)[50]; 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.[51]

It is also reasonable to draw the following conclusions:

1. The exclusion for the acquisition, etc. of property rights is unlikely to assist since in many development agreements this will be ancillary to the main purpose of the contract which is the carrying out of works. Submissions relying on the property exception in *La Scala* and *Auroux* were rejected by the ECJ.
2. A highly purposive approach is likely to be taken in applying the Regulations/Directive to the agreement in question.
3. The level of involvement of the local authority, at whatever part of the spectrum of agreements regulating development arrangements it falls, will at least bring into question to application of the Public Works Contracts provisions, possibly under the public works concessions contracts heading. In cases where the authority is bringing something to the table other than simply its ability through its statutory powers to facilitate a development, even if it is for the public and not its own benefit, there will be a real prospect of its falling within the Directive/Regulations procedures.

Section 106 and section 278 agreements

In many cases, development is regulated not by a development agreement common for CPO scheme but simply by s.106 obligations or s.278 highways agreements which are required to be executed prior to the grant of the relevant planning permission. These may require the developer to meet specific objectives of the local planning or highway authority, for instance, the carrying out of highways or other infrastructure works, the delivery of affordable housing, education contributions, or the provision of open space.

While such obligations or agreements may in some cases simply be regarded in the same light as planning conditions, namely as terms limiting the grant of permission and specifying mitigation to be carried out by the developer, or make contributions to highways improvements to be implemented by the authority, in some cases they may go much further and stipulate the carrying out of works which might have otherwise been carried out by the authority. These may include, for example, the provision of new highways infrastructure or the construction of new schools, although plainly some of these types of works may be part of the planning application and could be conditioned.[52]

[49] *Auroux* [2007] All E.R. (EC) 918 at [38].

[50] *Auroux* [2007] All E.R. (EC) 918 at [45].

[51] *Auroux* [2007] All E.R. (EC) 918 at [57].

[52] Which may be the better course in the light of the position as it now appears with regard to procurement, as well as being consistent with DCLG policy only to use planning obligations where the matters cannot be stipulated by condition: see, e.g., ODPM Circular 05/05 paras B2 and B51. The difficulties thrown up by procurement do appear more likely to generate problems where a developer may offer a wide range of community benefits more than may arguably be required in order to mitigate the impacts of the development in order to facilitate the removal of objections (subject of course to the principles set out in 05/05, e.g. at paras B6, B7 and B9).

In such cases, where works are required to be carried out (as opposed simply to the regulation of operational development) the question may arise as to whether the works in question ''correspond to the requirements specified by the contracting authority'' within the meaning of Art.1(2)(b)[53] even though those specifications are not contained in a typical development agreement. The purposive approach of the ECJ in *La Scala* is relevant:

> ''. . . [T]he assessment of the situation . . . must be made in such a way as to ensure that the Directive is not deprived of practical effect, particularly where that situation displays special characteristics because of the provisions of national law applicable to it.''[54]

This suggests that the Directive obligations may well be applicable to those planning obligations and highways agreements which stipulate the carrying out of substantial works by the developer (rather than making a contribution to provision by the authority, e.g., of educational, health or infrastructure improvements), which go beyond the detailed regulation of works proposed in the planning application, since these may involve a public authority specifying works in accordance with a specific objective which it has, e.g., in policy terms. The ECJ will take a holistic view of the situation and if it includes that there is an agreement for ''works'', for valuable consideration, which ''correspond to the requirements specified by the contracting authority'', then Directive will apply regardless of where those requirements are laid down. There appears no reason in principle why either s.106 obligations or HA agreements should be exempt in principle from this, although much will turn on the precise drafting and it leaves open the issue of the extent to which unilateral planning obligations can be used to avoid Directive issues.

As with development agreements, much greater care is now required to be taken with the terms of any form of planning related agreement with a public authority in the light of the requirements of the Directive and Regulations than heretofore has often been assumed to be the case.

[53] *Auroux* [2007] All E.R. (EC) 918 at [42].
[54] *La Scala* [2001] E.C.R. I-5409 at [55].