**THE IMPACT OF PROCUREMENT LAW ON**

**DEVELOPMENT/REGENERATION AGREEMENTS**

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**Introduction**

1. The EU procurement regime is based on the EU Treaty principles of transparency, non-discrimination, equal treatment and proportionality and is driven by evolving European and domestic case law, European Commission communications, new and revised Public Contracts Directives and amendments to the existing UK Regulations.
2. The purpose of the EU procurement rules, underpinned by the Treaty principles, is to open up the public procurement market and to ensure the free movement of supplies, services and works within the EU. In most cases they require competition.
3. In ***Risk Management Partners Ltd v Brent LBC*** Lord Hope stated:[[1]](#footnote-1)

*The broad object of Directive 2004/18/EC and the Regulations that give effect to it, is 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.*

1. Similarly, in ***Edenred (UK Group) ltd v HM Treasury*** Lord Hodge said:[[2]](#footnote-2)

*The principal purpose of EU procurement law…. is to develop effective competition in the field of public contracts…..Thus if a public body decides to obtain services by a public contract, and the contract exceeds the prescribed threshold…., the public body must advertise the opportunity and follow fair and transparent procedures ensuring equality of treatment, to enable potential service providers to compete for the work*.

**VARIATIONS OF THE CONTRACT**

1. The scope for variations in the past was established by the leading case of ***Pressetext***.[[3]](#footnote-3) In the important decision in ***R(Gottlieb) v Winchester CC*** Laing J pointed out the CJEU held, at [31] to [38]:[[4]](#footnote-4)

*34. In order to ensure transparency of procedures and equal treatment of tenderers, amendments to the provisions of a public contract during the currency of the contract constitute a new award of a contract within the meaning of Directive 92/50 when they are materially different in character from the original contract and, therefore, such as to demonstrate the intention of the parties to renegotiate the essential terms of that contract (see, to that effect, Case C-337/98* ***Commission v France*** *[2000] ECR I-8377, paragraphs 44 and 46).*

*35. An amendment to a public contract during its currency may be regarded as being material when it introduces conditions which, had they been part of the initial award procedure, would have allowed for the admission of tenderers other than those initially admitted or would have allowed for the acceptance of a tender other than the one initially accepted.*

*36. Likewise, an amendment to the initial contract may be regarded as being material when it extends the scope of the contract considerably to encompass services not initially covered. This latter interpretation is confirmed in Article 11(3)(e) and (f) of Directive 92/50, which imposes, in respect of contracts concerning, either solely or for the most part, services listed in Annex I A thereto, restrictions on the extent to which contracting authorities may use the negotiated procedure for awarding services in addition to those covered by an initial contract.*

*37. An amendment may also be regarded as being material when it changes the economic balance of the contract in favour of the contractor in a manner which was not provided for in the terms of the initial contract.*

1. In ***R(Gottlieb) v Winchester CC*** Laing J held that variations clause required transparency:

*68. In* ***R (Law Society) v Legal Services Commission****,[[5]](#footnote-5) the Court of Appeal was concerned with legal aid contracts which had been awarded by the Legal Services Commission to solicitors without a competitive bidding process. The Court concluded that the contract did not meet the requirements of transparency under the 2004 Directive and the 2006 Regulations. Lord Phillips LC said, at [80]:*

*"We consider that the principle of transparency will not be satisfied in the present context if uncertainty as to the nature and effect of the amendments that may be made deters, or is liable to deter, some potential service providers from entering into the contract."*

*Thus, the court made its assessment, at least in part, on the basis that the amendments deterred or were liable to deter potential service providers.*

1. There is, however, an important limitation on the ability of a claimant to take judicial review proceedings to challenge a proposed variation. In ***R(Chandler) v Camden*** LBC Arden LJ took a very restrictive view of what a claimant must show to demonstrate he has standing to take judicial review proceedings: [[6]](#footnote-6)

*77 …. an individual who has a sufficient interest in compliance with the public procurement regime in the sense that he is affected in some identifiable way, but is not himself an economic operator who could pursue remedies under regulation 47 , can bring judicial review proceedings to prevent non-compliance with the 2006 Regulations or the obligations derived from the Treaty, especially before any infringement takes place: see generally* ***Mass Energy Ltd v Birmingham City Council[[7]](#footnote-7)*** *cf* ***Kathro****'s case,[[8]](#footnote-8) where Richards J held that the claimants were not affected in any way by the choice of tendering procedure. He may have such an interest if he can show that performance of the competitive tendering procedure in Directive 2004/18 or of the obligation under the Treaty might have led to a different outcome that would have had a direct impact on him. We can also envisage cases where the gravity of a departure from public law obligations may justify the grant of a public law remedy in any event. However, while the court is in general bound to ask itself why a public law remedy is necessary when private law remedies are available, once permission to bring judicial review proceedings has been given, then, unless it is appropriate to deal with standing as a preliminary issue, there is likely to be little point in spending valuable court time and costs on the issue of standing. In that situation, we would not encourage the court to embark on a complex argument about standing. This will especially be the case where standing is a borderline issue.*

*78 However, in this case the observations of Richards J in* ***Kathro****'s case are particularly apposite. Ms Chandler states in her witness statement that she is sceptical about academy schools. She fears that they select the most gifted children as pupils. She is concerned that academy schools are run more like businesses than schools. Her first choice would be for her children's school to be run by the local education authority. What Ms Chandler wants to happen is that there should be a competition to determine who should run the new school in Camden and she suggests that she should have the right to be consulted if the public procurement regime applied. In fact there would be no consultation of the kind she seeks. Ms Chandler is not challenging the Secretary of State's decision because of any interest that she has in the observance of the public procurement regime but because she is opposed to the institution of academy schools. She is thus attempting, or seeking, to use the public procurement regime for a purpose for which it was not created. In all the circumstances, it would, in our judgment, be outside the proper function of public law remedies to give Ms Chandler standing to pursue her claim.*

1. In ***Gottlieb*** the claimant was a local Councillor and a leading member of the Winchester Deserves Better Campaign which opposed a development scheme and the question of his standing was not challenged.
2. However, in ***Wylde v Waverley BC*** the standing issue was disputed where council tax payers and members of local authorities and civic societies judicial reviewed a local authority's decision to vary a condition precedent in a development agreement, so that the court had to determine as a preliminary issue the standing of the claimants to apply for judicial review of a decision by the local authority to amend a development agreement with the interested party.[[9]](#footnote-9)
3. Dove J decided that the Regulations' purpose was, firstly, to provide for a transparent system for the competition for public contracts to secure a fair and efficient market for them, and secondly, to provide a bespoke system of remedies for parties participating in the market for such contracts and directly competing for them. That regime was tightly focused on those directly engaged with and actively seeking the benefit of obtaining public contracts falling within the scope of the Regulations. Public interest was served by the aims and objectives of the Regulations, but that was different to saying that any member of the public therefore had an interest in the Regulations' enforcement which should be recognised by granting standing in judicial review. It was consistent with the Regulations' purpose to confine standing in any judicial review claim brought outside the range of remedies available to economic operators, and by someone who was not an economic operator, to only those who could show that performance of the competitive tendering procedure might have led to a different outcome that would have had a direct impact on them.
4. He took the view that a council tax payer, concerned local resident, or member of the local authority could not, without more, bring themselves within the test in ***Chandler*** because there was no direct impact upon them as a consequence of an alleged failure in any procurement requirements.
5. Nevertheless, the scope for making contractual variations remains an important issue, particularly in relation to the difficult question concerning whether development agreements can be structured so as to avoid the effect of the Regulations.[[10]](#footnote-10)

**The 2015 Regulations**

1. Regulation 72 explicitly covers contractual variations and states:

*(1) Contracts and framework agreements may be modified without a new procurement procedure in accordance with this Part in any of the following cases:—*

*(a) where the modifications, irrespective of their monetary value, have been provided for in the initial procurement documents in clear, precise and unequivocal review clauses, which may include price revision clauses or options, provided that such clauses—*

*(i) state the scope and nature of possible modifications or options as well as the conditions under which they may be used, and*

*(ii) do not provide for modifications or options that would alter the overall nature of the contract or the framework agreement;*

*(b) for additional works, services or supplies by the original contractor that have become necessary and were not included in the initial procurement, where a change of contractor—*

*(i) cannot be made for economic or technical reasons such as requirements of interchangeability or interoperability with existing equipment, services or installations procured under the initial procurement, or*

*(ii) would cause significant inconvenience or substantial duplication of costs for the contracting authority,*

*provided that any increase in price does not exceed 50% of the value of the original contract;*

*(c) where all of the following conditions are fulfilled:—*

*(i) the need for modification has been brought about by circumstances which a diligent contracting authority could not have foreseen;*

*(ii) the modification does not alter the overall nature of the contract;*

*(iii) any increase in price does not exceed 50% of the value of the original contract or framework agreement.*

*(d) where a new contractor replaces the one to which the contracting authority had initially awarded the contract as a consequence of—*

*(i) an unequivocal review clause or option in conformity with sub-paragraph (a), or*

*(ii) universal or partial succession into the position of the initial contractor, following corporate restructuring, including takeover, merger, acquisition or insolvency, of another economic operator that fulfils the criteria for qualitative selection initially established, provided that this does not entail other substantial modifications to the contract and is not aimed at circumventing the application of this Part;*

*(e) where the modifications, irrespective of their value, are not substantial within the meaning of paragraph (8); or*

*(f) where paragraph (5) applies.*

*(2) Where several successive modifications are made:—*

*(a) the limitations imposed by the proviso at the end of paragraph (1)(b) and by paragraph (c)(iii) shall apply to the value of each modification; and*

*(b) such successive modifications shall not be aimed at circumventing this Part.*

*(3) Contracting authorities which have modified a contract in either of the cases described in paragraph (1)(b) and (c) shall send a notice to that effect, in accordance with regulation 51, for publication.*

*(4) Such a notice shall contain the information set out in part G of Annex 5 to the Public Contracts Directive.*

*(5) This paragraph applies where the value of the modification is below both of the following values:—*

*(a) the relevant threshold mentioned in regulation 5, and*

*(b) 10% of the initial contract value for service and supply contracts and 15% of the initial contract value for works contracts,*

*provided that the modification does not alter the overall nature of the contract or framework agreement.*

*(6) For the purposes of paragraph (5), where several successive modifications are made, the value shall be the net cumulative value of the successive modifications.*

*(7) For the purpose of the calculation of—*

*(a) the price mentioned in paragraph (1)(b) and (c), and*

*(b) the values mentioned in paragraph (5)(b),*

*the updated figure shall be the reference figure when the contract includes an indexation clause.*

*(8) A modification of a contract or a framework agreement during its term shall be considered substantial for the purposes of paragraph (1)(e) where one or more of the following conditions is met:—*

*(a) the modification renders the contract or the framework agreement materially different in character from the one initially concluded;*

*(b) the modification introduces conditions which, had they been part of the initial procurement procedure, would have—*

*(i) allowed for the admission of other candidates than those initially selected,*

*(ii) allowed for the acceptance of a tender other than that originally accepted, or*

*(iii) attracted additional participants in the procurement procedure;*

*(c) the modification changes the economic balance of the contract or the framework agreement in favour of the contractor in a manner which was not provided for in the initial contract or framework agreement;*

*(d) the modification extends the scope of the contract or framework agreement considerably;*

*(e) a new contractor replaces the one to which the contracting authority had initially awarded the contract in cases other than those provided for in paragraph (1)(d).*

*(9) A new procurement procedure in accordance with this Part shall be required for modifications of the provisions of a public contract or a framework agreement during its term other than those provided for in this regulation.*

**The Supreme Court decision in *Edenred***

1. On 1 July 2015 in ***Edenred v HM Treasury*** the Supreme Court specifically considered the impact of Reg 72.[[11]](#footnote-11) The case concerned a non-ministerial government department offered retail savings and investment products to United Kingdom customers and provided support functions to other public bodies. From 1999 it outsourced its operational services to private sector providers and in 2014 entered into a contract with Atos, following a procurement process which complied with the requirements of European Union law. The services provided by Atos included customer service, transaction management, printing, accounting and IT development and management. In July 2014 on the advice of HMRC the Government decided to use the non-ministerial government department to deliver its tax-free childcare scheme, which was designed to replace the existing scheme of employer-supported childcare. The Treasury allocated money to the HMRC to administer the scheme. The arrangements between for its delivery were set out in a memorandum of understanding setting out the HMRC’s requirements, and the non-ministerial government department proposed to modify its existing contract with Atos to include the services necessary to meet those requirements. The claimants, the provider of services under the earlier scheme and a trade association for providers of childcare vouchers, began proceedings against the defendants, the Treasury, HMRC and the non-ministerial government department, claiming that the proposed modification of the existing contract to Atos would be substantial in breach of the EU Directive as implemented by the 2015 Regulations, particularly Reg 72.
2. The Supreme Court, therefore, held that a fresh procurement was not required where the modification was not substantial, within the meaning of Reg 72(1)(e) and (8); and that the prohibition in regulation 72(8)(d) on modifying a contract to encompass services not initially covered did not prohibit modification which extended the contract services beyond the level of services initially provided for if the advertised initial contract and related procurement documents envisaged such expansion, committed the economic operator to it and required it to have the resources to do so. When assessing that issue the Court had to look at the advertisement notice, the other procurement documents and the invitation to tender in order to ascertain the nature, scale and scope of the operational services that the contract was set up to provide. The Supreme Court found that that the procurement process in respect of the original contract with Atos was to provide the non-ministerial government department with operational services that would enable it to perform its established functions and to expand its B2B services; that the proposed modification did not, therefore, alter the economic balance of the contract or increase the profit margin to Atos; that the proposed amendment to enable the non-ministerial government department to provide the TFC services would not considerably extend the scope of that contract in terms of regulation 72(8) ; and that, accordingly, no substantial modification, in terms of regulation 72(1)(e) of the 2015 Regulations, was involved.
3. Lord Hodge also made some important observations concerning Reg 72(1)(a), which follows the wording of Article 72(1)(a) of the 2014 Directive:

*Contracts and framework agreements may be modified without a new procurement procedure in accordance with this Part in any of the following cases: (a) where the modifications, irrespective of their monetary value, have been provided for in the initial procurement documents in clear, precise and unequivocal review clauses, which may include price revision clauses or options, provided that such clauses— (i) state the scope and nature of possible modifications or options as well as the conditions under which they may be used, and (ii) do not provide for modifications or options that would alter the overall nature of the contract or the framework agreement …*

1. Lord Hodge pointed out that:

*39 …. The regulation appears to draw* ***on Commission of the European Communities v CAS Succhi di Fruitta*** *(Case C-496/99P) [2004] ECR I-3801 , in particular at paras 111 and 118. But it is not simply a codification of prior CJEU case law.*

*40 There are four matters in this regulation which merit comment. First, as in regulation 72(1)(e) , the monetary value of the modifications is irrelevant. Secondly, the modifications must have been provided for in “the initial procurement documents”. Thirdly, the review clauses which authorise the modifications must achieve a required degree of specificity. Fourthly, the review clauses cannot authorise modifications that would alter the overall nature of the contract.*

*41 No more need be said about the first matter. In relation to the third matter, it seems to me that where, as in this case, the contracting authority has adopted the competitive dialogue procedure under regulation 18 of the 2006 Regulations (or now regulation 30 of the 2015 Regulations), the initial procurement documents include the documents which were issued to the selected bidders. The definition of “procurement document” in regulation 2 of the 2015 Regulations includes the proposed conditions of contract and the epithet “initial” in regulation 72(1)(a) is in my view simply a reference to the procurement documents which were available in the initial procurement of the contract which is the subject of the modifications. The fourth matter, the requirement that the overall nature of the contract is not altered, which is a formula used also in regulation 72(1)(c) and 72(5) , appears as a matter of language to be a more liberal test than the test in regulation 72(8)(d) of extending considerably the scope of the contract. But the two tests could overlap if the extension of scope was of such an extent that it altered the overall nature of the contract.*

*42 In my view the most significant restriction in this regulation is the degree of specification that it requires in the review clause. The formula, “clear precise and unequivocal” reflects the jurisprudence of the CJEU on what the principle of transparency requires:* ***CAS Succhi di Frutta*** *at para 111.*

*43 The Court of Appeal held that the contract amendment provisions in the draft contract which NS&I gave the three bidders and which ultimately appeared in the Atos contract were sufficiently clear, precise and unequivocal when construed in their context. The contract envisaged the extension of the operational services which Atos provides to NS&I to enable it to expand its B2B services to other public bodies. The restrictions in schedule 2.11 of the Atos contract (a) confined the B2B opportunities to those within the scope of the OJEU notice and (b) set out the principles that governed the incorporation of a new B2B service into the agreement, inter alia restricting any increase in Atos's profit margin and prohibiting the alteration of the allocation of risk. See para 13 above. I incline to the view that these restrictions, in their contractual context were sufficiently defined to meet this regulation 72(1)(a) criterion.*

*44 But the nature of the review clauses which the regulation covers is open to debate. Recital (111) of the 2014 Directive states:*

*“Contracting authorities should, in the individual contracts themselves, have the possibility to provide for modifications to a contract by way of review or option clauses, but such clauses should not give them unlimited discretion. This Directive should therefore set out to what extent modifications may be provided for in the initial contract. It should consequently be clarified that sufficiently clearly drafted review or option clauses may for instance provide for price indexations or ensure that, for example, communications equipment to be delivered over a given period continues to be suitable, also in the case of changing communications protocols or other technological changes. It should be possible under sufficiently clear clauses to provide for adaptations of the contract which are rendered necessary by technical difficulties which have appeared during operation or maintenance. It should also be recalled that contracts could, for instance, include both ordinary maintenance as well as provide for extraordinary maintenance interventions that might become necessary in order to ensure continuation of a public service.”*

*The recital gives as examples of the envisaged review clauses provisions allowing for price indexation, or adjustments for technological change and for maintenance. Those examples are not exclusive but they may indicate the general nature of the modifications that regulation 72(1)(a) envisages. It seems clear from the CJEU's judgment in* ***CAS Succhi di F****r****utta*** *at para 126 that the regulation would extend to a provision or clause such as for the substitution of fruit which was in issue in that case. The regulation also requires specification of the scope and nature of possible modifications and the conditions under which they may be used.*

*45 I am not persuaded that the nature of the review clauses is “****acte clair****”. But, for the reasons already set out, it is not necessary to decide these matters in order to determine the appeal.*

**(2) The impact of procurement law on regeneration/ development**

1. The following definitions contained in the 2015 Regulations in Reg 2 are of significance.

*“****public contracts****” means 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;*

*“****public works contracts****” means public contracts which have as their object any of the following:—*

*(a) ….*

*(b) …*

*(c) the realisation, by whatever means, of a work corresponding to the requirements specified by the contracting authority exercising a decisive influence on the type or design of the work;[[12]](#footnote-12)*

1. However, Reg 10(1)(a) states that the Regulations do not apply to a public works contract ‘*for the acquisition or rental, by whatever financial means, of land, existing buildings or other immovable property, or which concern interests in or rights over any of them*’.
2. 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***,[[13]](#footnote-13) ***Auroux v. Commune de Roanne***,[[14]](#footnote-14) ***Helmut Müller GmbH v. Bundesanstalt für Immobilienaufgaben***[[15]](#footnote-15) and ***European Commission v Netherlands (Re Public Works Concession)***.[[16]](#footnote-16)
3. In approaching the question of whether a transaction for the ‘*acquisition of land*’ under Reg 10(1)(a) is outside the scope of public works contracts, it is important to appreciate that a Court will take a broad purposive approach towards ensuring that the Regulations will achieve their purpose, so that it will lean against finding that a particular transaction is outside the scope of the Regulations.
4. As a result, in ***Auroux v Commune de Roanne*** the CJEU decided that the Procurement Directive applied to an agreement where 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.[[17]](#footnote-17) , The purpose of this project, was 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 CJEU considered that this arrangement was a public works contract because it involved required construction work in line with the authority’s requirement (ie the leisure centre as a whole including the multiplex cinema, service premises for leisure activities), car park and, possibly, an hotel).
5. The CJEU clearly considered it irrelevant that the car park was to be delivered to the authority only after being built and that the other works were owned by third parties- where the works in question were specified by the contracting parties.
6. However, Reg 10(1)(a) has a wider impact. In ***Helmut Müller*** the CJEU held that works built to an authority’s specifications on land which the authority will never own, provided that the ‘*economic benefit*’ test in ***Helmut Müller*** is satisfied.
7. The key issues to be considered in relation to development projects and procurement are:

* whether Requirements specified by the contracting authority; and
* the requirement for an economic benefit.

**‘Requirements specified by the contracting authority’**

1. Reg 2 states that a ‘***public works contracts****” means public contracts which have as their object …. the realisation, by whatever means, of a work corresponding to the requirements specified by the contracting authority exercising a decisive influence on the type or design of the work*’
2. Reg 2 will be clearly satisfied where the authority, itself, initiates and drafts a detailed specification of the requirements for the construction.
3. But there will be many cases where the authority’s role in initiating the process and/or in developing or approving the details design is more limited. Reg 2 now states that ‘*the contracting authority exercising a decisive influence on the type or design of the work*’. In ***Helmut Müller*** the ECT states that the ‘*mere fact that that a public authority in the exercise of its urban-planning powers examines certain building plans presented to it, or takes a decision applying its power in that sphere*’ is not sufficient.[[18]](#footnote-18) On the other hand, it is unclear from ***Roanne*** whether it is sufficient that the developer has an obligation to submit detailed plans for various construction works- which indicates that it is not essential for the authority to initiate the process.[[19]](#footnote-19)
4. Unfortunately, these decisions leave uncertain the following:

* the nature of the influence by the authority over work and how proactive it must be;
* the level of the detail.

1. It is therefore unwise to take the broad view that an authority’s role in exercising planning planning or approval powers can never amount to specifying requirements.
2. Adaption of existing powers in accordance with plans devised or approved by the authority might also potentially fall within the scope of a works contract, provided the adaptations are so extensive as to constitute a new work as a whole- which must be a matter of fact and degree.
3. In practice, it may not be known at the start of an award procedure what kind of solution will be provided ie new buildings in response to the contract notice, new buildings already under construction or new buildings about to be constructed. A contract will need to be classified for the purpose of the Regulations so it will often need to be advertised a public works contract.

**The requirement for an economic benefit**

1. A project will only be subject to the procurement regime if the subject of the contract is carried out for the authority’s immediate economic benefit.
2. An immediate benefit will arise if the authority:

* owns the work since future ownership is sufficient to satisfy this requirement;
* is to become an owner in the future,[[20]](#footnote-20) for example as in ***Roanne*** where work is to be built on land which is to be transferred in the future.[[21]](#footnote-21)

1. However, it is not necessary for a work to come within the actual ownership of the public sector to comprise a works contract. In ***Helmut Müller*** the CJEU held that a direct economic benefit would exist

* if an authority holds a legal right over the use of the work, in order to make it public;[[22]](#footnote-22)
* if the authority may derive economic benefits from the future use or transfer of the work;[[23]](#footnote-23)
* if the authority contributes financially to the realisation of the works;[[24]](#footnote-24) or
* if it assumes the risks if the work is an economic failure.[[25]](#footnote-25)

On the other hand, the economic benefit requirement is not satisfied merely by the authority exercising its planning powers to approve the work as being in the public interest.

1. ***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, which did not require any specific use of the land. The sale was challenged as breaching the procurement regime, based on the argument that effectively a procurement of works by the authority with the contractor being selected by the land transaction. The CJEU rejected the claim on the ground that the test of direct economic benefit had not been met: the authority neither owned the land nor obtained a direct economic benefit. The exercise of planning powers of approval was not enough. In addition, there was no legal obligation to carry out any works and no formal decision to award any contract at the time of the land sale, an intention to do so in the future was therefore insufficient.

**The requirement for a legally enforceable obligation to undertake work**

1. The approach taken in ***Helmut Müller*** was extended in ***R (Midlands Co-Operative Society Limited) v. Birmingham City Council***.[[26]](#footnote-26) 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 s 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. Hickinbottom J found that Tesco was not under any legally enforceable obligation to perform any relevant works and that it was necessary to look at the arrangements as whole.[[27]](#footnote-27)
2. Holgate J recently considered whether there was a legally enforceable obligation in ***R(Faraday Development Ltd) v West Berkshire Council***.[[28]](#footnote-28) In ***Farada***y local planning authority made an agreement with a developer to facilitate the regeneration of a site owned by the local authority. The local authority wished to retain ownership of the site to generate income in the form of ground rents and to secure redevelopment of the site in order to enhance that income. The claimant, which held leases on several of the plots, was a special purpose vehicle incorporated in order to assemble land for redevelopment within the estate. Under the development agreement the developer was obliged to prepare project plans for the development but was not obliged to take on the obligations of acquiring a plot and carrying out the redevelopment; instead, it had a commercial incentive to draw down land because of its substantial commitment to the planning of the whole site and its preparation of development strategies for each plot, giving it an opportunity to carry out a profitable development.
3. Holgate J decided that the terms of the development agreement meant the development was outside the procurement regime- the developer was under no legal obligation to take a transfer or lease of any part of the site, nor did it become subject to an obligation to carry out "*works*". Any such obligation was entirely confined to any ground lease or freehold which the developer opted to take under the agreement. The development agreement was a contract to facilitate regeneration by the carrying out of redevelopment works and was intended to maximise the local authority's financial receipts. The provision of services under the agreement did not represent a main purpose in itself, but simply facilitated the financial and regeneration objectives.

**Procurement and s 106 agreements**

1. Section 106 agreements are not, as such, outside the scope of the procurement regime. In ***Order of Architects of the Provinces of Milan and Lodi v Commune of Milan*** the CJEU held that a public works contract is not necessarily precluded by the fact that the work is undertaken on the land of another and the fact that the work will not necessarily be transferred to the authority.[[29]](#footnote-29) Furthermore, the grant of planning permission can be regarded as giving rise to a contract for a ‘*pecuniary interest*’ within the meaning of a ‘*public contract*’ because this phrase is to be given a broad meaning.[[30]](#footnote-30)
2. Thus, Hickinbottom J in ***Midlands Co-Operative Society Limited*** did not take the view that there was anything intrinsic in the nature of a s 106 agreement, which prevented a public works contract arising; instead, he focused on the obligations on the particular s 106 agreement which did not chrystallise until Tescos commenced its development.
3. Consequently,, a s 106 agreement might be within the scope of a public works contract if:

* it imposes obligations in relation to socially affordable housing could well constitute an economic benefit, the more so if the local authority had rights to nominate tenants;
* if there is a contractual obligation to carry out the works: contrast ***Midlands Co-Operative Society Limited***;
* if the other elements of a public works contract are present. It is, therefore, necessary to examine closely the planning agreement to confirm that its main object is the stipulated works. Some planning agreements have, as their main object, the delivery of works with the exercise of planning policy, being a subsidiary element. Others do not and may not give rise to any direct economic benefit to the planning authority so that the agreement as a whole is not subject to procurement- provided the different elements cannot be considered as separable. But it is important to realise that there is considerable uncertainty as to assessing whether elements are to be considered as separable for the purposes of applying the main object test.

**Procurement arrangements which are part of a wider transaction**

1. The CJEU has considered this question in a number of cases: see ***Club Hotel Loutraki AE v Ethniko Simvoulio Radiotileorasis***,[[31]](#footnote-31) and ***Mehilainen Oy and another v Oulun kaupunki***,[[32]](#footnote-32) clarifying its approach in ***Gestion Hotelera Internacional***,[[33]](#footnote-33) and ***Roanne***.[[34]](#footnote-34) The CJEU has laid down the following principles:

* The procurement regime will not apply if the transaction contains different elements (as in ***Club Hotel Loutraki***) which are part of an indivisible whole ie they are not separable from one another and the procurement element (eg the works)) are not the main object of the arrangement.
* The procurement regime will apply if the procurement element and other elements are separable (as in ***Mehilainen***).
* The procurement regime will also apply if procurement element is the main object of the arrangement.

1. Unfortunately, however, the case law does not provide clear guidance on how to identify a ‘*separable*’ element of a contract. In principle, a court could take at least three different types of approach:

* elements are to be considered inseparable where there is a good policy reason (economic or otherwise) to put the two elements together;
* elements are separable whenever it is possible (or, perhaps, manifestly unreasonable) to award the elements separately; or
* elements are inseparable whenever there is a legitimate reason to join them together.

1. Unfortunately, the case law gives no indication in relation to what interpretation is correct, although the first interpretation would mean that the whole transaction would still be subject to transparency under EU law principles.

24 July 2017

1. [2011] 2 AC 34, para 10 [↑](#footnote-ref-1)
2. [2015] PTSR 1088 [↑](#footnote-ref-2)
3. Case C-454/06 ***Pressetext Nachrichtenagentur GmbH v. Republik Ös***terreich [2008] ECR I-4401 [↑](#footnote-ref-3)
4. [2015] EWHC 231 (Admin) [↑](#footnote-ref-4)
5. [2007] EWCA Civ 1264 [↑](#footnote-ref-5)
6. [2010] PTSR 749 [↑](#footnote-ref-6)
7. [1994] Env LR 298 , 306 [↑](#footnote-ref-7)
8. ***R(Kathro) v Rhondda Cynon Taff*** CBC [2001] 4 PLR 83 [↑](#footnote-ref-8)
9. [2017] EWHC 466 (Admin) [↑](#footnote-ref-9)
10. See eg ***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 Immobilienaufgabe***n (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; ***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 Hounslo***w [2013] 1 C.M.L.R. 25 (TCC). [↑](#footnote-ref-10)
11. [2015] PTSR 1088 [↑](#footnote-ref-11)
12. This new requirement reflects the case law, the CJEU decision in ***Helmut Müller GmbH v. Bundesanstalt für Immobilienaufgaben*** (C-451/08) [↑](#footnote-ref-12)
13. C-331/92) [1994] E.C.R. I- 1329 [↑](#footnote-ref-13)
14. C-220/05) [2007] E.C.R. I-385, [2007] All E.R. (EC) 918 [↑](#footnote-ref-14)
15. C-451/08) [2011] P.T.S.R. 200 [↑](#footnote-ref-15)
16. C-576/10) [2014] 1 C.M.L.R. 12. [↑](#footnote-ref-16)
17. C-220/05) [2007] E.C.R. I-385, [2007] All ER (EC) 918 [↑](#footnote-ref-17)
18. Above, para 68 [↑](#footnote-ref-18)
19. The CJEU did not discuss this point explicitly (para 42), whereas AG Kokutt stated that the works corresponded to the requirements laid down by the authority, but specifically referred to the fact that the plans were required to be submitted to and approved by the authority (para 33, n 23 of his Opinion). [↑](#footnote-ref-19)
20. ***Helmut Müller*** above, para 50 [↑](#footnote-ref-20)
21. The CJEU rejected the argument that the construction of a car park on land to be transferred later could not constitute the execution of a work. [↑](#footnote-ref-21)
22. Above, para 50. The same approach was assumed in ***Order of Architects of the Provinces of Milan and Lodi v Commune of Milan*** C-399/98 [2001] ECR I-05409 para 67 where the CJEU assumed (but did not discuss) its conclusion that a public works contract existed where work was to be done on a developer’s land, mentioning a right to ensure pubic availability of the works. [↑](#footnote-ref-22)
23. Above, para 52 [↑](#footnote-ref-23)
24. Above, para 52 [↑](#footnote-ref-24)
25. Above, para 52 [↑](#footnote-ref-25)
26. [2012] B.L.G.R. 393 [↑](#footnote-ref-26)
27. See to similar effect, ***AG Quidnet Hounslow LLP v. London Borough of Hounslow***[2013] 1 C.M.L.R. 25 (TCC) [↑](#footnote-ref-27)
28. [2016] EWHC 2166 (Admin) [↑](#footnote-ref-28)
29. Above [↑](#footnote-ref-29)
30. ***Order of Architects of the Provinces of Milan and Lodi v Commune of Milan***, above. [↑](#footnote-ref-30)
31. C-145/08 [2010] 3 C.M.L.R. 33 [↑](#footnote-ref-31)
32. C-215/09 [2010] ECR 1-13749 [↑](#footnote-ref-32)
33. Above. [↑](#footnote-ref-33)
34. Above. [↑](#footnote-ref-34)