THE EU PROCUREMENT REGIME AND S106 AGREEMENTS PROVIDING FOR AFFORDABLE HOUSING

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Introduction

That a local authority must comply with the public procurement rules if it wishes to let a construction contract is uncontroversial.[1] What is controversial is that so-called 'development agreements' concluded between local authorities and developers may also be regulated by the public procurement rules.

Since the infamous *La Scala*[2] and *Roanne*[3] decisions, it has dawned upon the English legal system that a 'public works contract', as interpreted by the European Court of Justice (the 'ECJ'), embraces other types of arrangements, which prior to the above cases were just not thought of as works contracts. In applying the principles underlying the Directive, the ECJ has interpreted a 'public works contract' so broadly that a statutory planning agreement could itself be one. This might have huge implications for developers (because established procurement procedures are rooted in the planning system) and for both developers and public authorities (because the new procurement remedies might affect the validity of a development agreement itself).

In this paper I will consider whether an English s106 Agreement providing for affordable housing could be covered by the public procurement rules.

The procurement regime

The public procurement rules apply whenever a contracting authority[4] and an economic operator[5] enter into a public contract, the estimated value of which exceeds the threshold.[6]

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1 Directive 2004/18/EC on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts ('the Directive') and related EC law, implemented in the UK by the Public Contracts Regulations 2006 as amended by the Public Contracts (Amendment) Regulations 2009 ('the Regulations') (together 'the public procurement rules' or 'the procurement regime').

2 *Ordine degli Architetti v Comune di Milano (La Scala)*, [2001] EUECJ C-399/98, [2001] ECR I-5409.

3 *Jean Auroux v Commune de Roanne* (*Roanne*), [2007] EUECJ C-220/05, [2007] ECR I-385, [2007] All ER (D) 100.

4 The Directive, note 1, Article 1(9) defines contracting authorities as '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'.

Public contracts are defined as:

> 'contracts for pecuniary interest concluded in writing ... and having as their object the execution of works, the supply of products or the provision of services ...'[7]

Public works contracts are public contracts having as their object either:

- '... the execution, or both the design and execution, of works ...'[8] (the first variant);
- '... the execution, or both the design and execution ... of a work ...'[9] (the second variant); or
- '... the realisation, by whatever means, of a work corresponding to the requirements specified by the contracting authority' (the third variant).[10]

A public works concession contract is 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.'[11]

Where a contracting authority is seeking a public works concession contract it must advertise the opportunity in the Official Journal of the European Union (the 'OJEU'),[12] but otherwise it is free not to apply the public procurement rules.

Some contracts are wholly excluded from the application of the public procurement rules (excluded contracts), such as contracts for the purchase of immovable property (land transactions).[13]

The first time the ECJ gave its interpretation of what is meant by a public works contract was in *La Scala*. The court held in that case that a planning agreement rooted in statute was not enough *per se* to exempt it from the procurement regime. To bring it under the control of the public procurement

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5 The Directive, note 1, Article 1(8) defines an economic operator as either a contractor, supplier or service provider which offers on the market, respectively, the execution of works and/or a work, products or services.

6 The Directive, note 1, Article 7 sets out the thresholds applicable to each type of public contract. Article 7(c) sets the threshold for a public works contract at EUR 5,000,000 (about £4,350,000).

7 The Directive, note 1, Article 1(2)(a).

8 'Works' include the construction-type operations set out in Annex I of the Directive.

9 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 Directive, Article 1(2)(b)).

10 The Directive, note 1, Article 1(2)(b).

11 The Directive, note 1, Article 1(3).

12 The Directive, note 1, Article 58 (the contracting authority would also have to observe the requirements in Article 60 which deals with subcontracting arrangements and of course carry out the procurement in the light of the free movement and transparency principles).

13 The Directive, note 1, Section 3 (Articles 12 to 18), for example, listing specific exclusions, Article 16(a).

rules it had to give a wide reading to the concepts of 'contract' and 'pecuniary interest'.[14]

In *Roanne*, the ECJ interpreted the third variant so widely it appeared that the whole land development sector was due to be opened up to competition.[15] But in *Helmut Müller* the court limited the potential reach of *Roanne* by holding that 'requirements specified by a contracting authority' pursuant to the *mere* exercise of planning powers is not covered by the procurement regime.[16]

La Scala *(2001)*[17]

In the early nineties a consortium of developers led by Società Pirelli requested planning permission to develop an area of Milan. In exchange for planning permission the City of Milan secured provision of a multi-communal structure in the area. In 1996, and as part of the Scala 2001 Project, the City entered into a development agreement with Pirelli to (amongst other things) refurbish the Teatro alla Scala and build another theatre on the site (owned by Pirelli) reserved for the multi-communal structure.

Under Italian planning law, planning permission is conditional on either the payment of a financial contribution equal to the actual cost of the works related to the proposed development, or the provision of an in-kind contribution in the form of carrying out the works.[18] Pirelli undertook to design and build the outer shell of the new theatre in lieu of paying the mandatory financial contribution.

The ECJ held:

- The fact that the public contact is rooted in urban planning law is not sufficient to exclude it from the scope of the Directive where the contracting authority acquires a legal right over the use of the works to ensure that they are available to the public;[19]
- There was pecuniary interest by result of the fact that the city was releasing a debt which Pirelli had to pay under Italian planning law;[20] and
- Where a developer holds the building permit and has to carry out the work, the City could have discharged its obligations under the Directive by delegating compliance to Pirelli.[21]

14 *La Scala*: note 2.
15 *Roanne*: note 3.
16 *Helmut Müller GmbH v Bundesanstalt für Immobilienaufgaben* (*Helmut Müller)* [2010] EUECJ C-451/08, para [69]; also [2010] 14 EG 109 (CS), [2010] 3 CMLR 18, [2011] PTSR 200.
17 *La Scala*: note 2.
18 Article 12 of the Lombard Regional Law No 60 of 5th December 1977.
19 *La Scala*, note 2, paras [66] and [67].
20 *La Scala*, note 2, para [84].
21 *La Scala*, note 2, para [100].

The conclusion reached by the ECJ was that the Directive did apply and the development agreement should either have been advertised in accordance with the Directive or compliance with the Directive delegated to Pirelli.

Roanne *(2007)*[22]

The Commune entered into a development agreement with another contracting authority (SEDL) involving the building of a leisure centre that had to include a cinema, shops, a car park and open spaces. The car park and open spaces were to be acquired by the Commune whereas the rest was to be sold on the open market. The Commune not only contributed substantially to the development of the leisure centre, it also underwrote the entire deal.

The ECJ held:

- The fact that the majority of the leisure centre was intended to be sold to third parties is not determinative;[23]
- As the construction of the leisure centre included shops and commercial activities it was regarded as fulfilling an economic function and as such was to be regarded as a 'work';[24]
- Because the development agreement itself referred to the construction of a leisure centre (and because the Commune sought to regenerate the area) the work corresponded to the requirements specified by the contracting authority;[25] and
- The development agreement was for pecuniary interest as not only did the Commune pay for the car park and contribute to the development, SEDL was also 'entitled to obtain income from third parties as consideration for the sale of the works executed'.[26]

In essence the ECJ ruled that for the procurement rules to apply the contracting authority need not *acquire* any works; it only needs to *specify* its requirements and the work must be capable of fulfilling an economic or technical function.

Helmut Müller *(2010)*[27]

The German federal agency (the Bundesanstalt) put up for sale some of its old barracks, which were situated in the area administered by the Wildeshausen planning authority (WPA). The Bundesanstalt undertook not to sell the barracks before WPA approved the winning tenderer's plans for use of the land, the submission of which was part of the tender exercise. Gut Spascher Sand Immobilien GmbH (GSSI) not only submitted the highest bid for the land, but its plans were also preferred by WPA. The land was then sold to GSSI. (The conveyance making no reference to GSSI's plans of use.)

22 *Roanne*: note 3.
23 *Roanne*, note 3, para [39].
24 *Roanne*, note 3, para [41].
25 *Roanne*, note 3, para [42].
26 *Roanne*, note 3, para [45].
27 *Helmut Müller*, note 16.

Although WPA did not undertake, in a legally binding way, to adopt GSSI's plans for the barracks site, it revoked the consultation exercise it had already commenced to prepare a statutory development plan for the area and began drawing up a development plan corresponding to GSSI's plans.

Helmut Müller (a failed bidder) thought that the tender exercise disguised a two-phase award procedure: a land sale followed by the letting (by WPA) of a works concession contract, which should have been advertised. So it commenced proceedings.

The ECJ distinguished the relationship between the Bundesanstalt and GSSI, which fell within the land transaction exemption[28] and that between GSSI and WPA. Looking at the latter relationship alone, the ECJ held that for the relationship to constitute a public works contract:

- A local planning authority ('LPA') must obtain a 'direct economic benefit' from the work provided by the developer;[29]
- An LPA does not obtain a direct economic benefit by the mere exercise of land planning powers to give effect to the public interest;[30]
- The economic operator must be under a direct or indirect obligation to carry out the work;[31] and
- An LPA must take measures to define the type of work or at the very least have a decisive influence on the design of the work in order for 'requirements to be specified by the contracting authority'.[32]

The ECJ concluded that on the facts of the case GSSI was under no enforceable obligation to execute any work.

Analysis of the definition of a public works contract

There is a tension between interpreting the definition by emphasising the buying element of public procurement, and interpreting it only in the light of opening up public procurement to competition (the underpinning principle of the Directive[33]*).* For example, commentators who see public procurement as a purchasing exercise argue that pecuniary interest has to be a monetary payment made by the contracting authority. Those who argue that the Directive should apply whenever a contracting authority generates an opportunity in which economic operators may be interested, give pecuniary interest a much wider meaning.

28 See note 13 and linked main text; *Helmut Müller*, note 16, para [41].
29 *Helmut Müller*, note 16, para [49].
30 *Helmut Müller*, note 16, paras [57] to [58].
31 *Helmut Müller*, note 16, para [63].
32 *Helmut Müller*, note 16, para [67].
33 The Directive, note 1, Recital (2).

The contractual requirement

In *La Scala*, the Advocate General argued that the reason why the Directive adopted the concept of a contract was because there is an element of choice associated with entering into contracts. If there is an element of choice then there is a risk of favouritism, which is the mischief that the Directive seeks to neutralise. If there is no scope for favouritism then one should query whether the relationship is of a contractual nature, and why one would want the Directive to apply.[34] National planning law obliged the City to enter into the building contract with Pirelli before the City could grant planning permission.[35] In such circumstances there is no freedom of choice.

Rejecting this argument, the ECJ put forward three reasons why the relationship was contractual:

- the City could have chosen to accept the infrastructure contribution and to use that to procure the works;[36]
- the City had agreed to invite tenders to fit out the theatre[37] (thus suggesting that it was feasible to carry out a tender); and
- the terms of the contract incorporated construction-type obligations.[38]

By pointing out that the City did have a choice (albeit an uneconomical one), the ECJ was happy to apply the Directive to the development agreement in issue. Recognising situations where the relationship between the contracting authority and the developer 'chooses itself', the ECJ held that in such cases the authority can delegate its tendering obligations to the developer.[39]

Pecuniary interest

The Advocate General also argued that pecuniary interest must be provided by the contracting authority to the developer in exchange for carrying out the works,[40] a feature lacking in the *La Scala* development agreement.

There were two legal relationships in *La Scala*: that of employer / builder and that of planning applicant / local planning authority. These relationships were linked by a provision in the national planning laws that allowed the City to require the works to be carried out in lieu of the infrastructure contribution.

The ECJ took the first step away from the orthodox view taken by the Advocate General by accepting (as pecuniary interest) debts arising from other legal relationships with the authority.

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34 *La Scala*, Opinion of AG Léger, paras [68], [70] and [78].
35 *La Scala*, AG's Opinion, note 34, para [17].
36 *La Scala*, note 2, para [70].
37 *La Scala*, note 2, para [72].
38 *La Scala*, note 2, para [71].
39 *La Scala*, note 2, para [100].
40 *La Scala*, AG's Opinion, note 34, paras [101] to [102].

In *Roanne* the ECJ had distanced itself even further from the orthodox view of pecuniary interest by holding that the income payable from third parties to the developer for parts of the leisure centre is also a form of pecuniary interest.[41]

Commission v Germany[42]

Commission v Germany is a Grand Chamber judgment and a seminal case on pecuniary interest. The case was about a collective agreement between a federation of local authorities and a public sector union that implemented an employee's statutory right to have part of his future earnings converted into pension savings. The collective agreement appointed an insurer to manage the conversion and the funds without a call for tenders. Germany argued that there was no pecuniary interest flowing from the employer to the insurer; the only thing the employer did was deduct an amount from wages, which it forwarded (on behalf of its employees) as insurance premiums to the insurer.

The ECJ held that because the employer had a statutory duty to implement and guarantee the right of an employee to convert a percentage of earnings to pension savings, and did so by entering into an arrangement with an insurer, the employer received a service from the insurer[43] (and therefore a direct economic benefit[44]) which permitted the ECJ to classify the retirement benefits as a pecuniary interest.[45]

It is not clear why the ECJ held that the retirement benefits constituted the pecuniary interest rather than the premiums (in the form of the salary deductions), but what is clear is that the orthodox view on pecuniary interest is dead and buried.

The requirements of the contracting authority

The third variant is engaged whenever a contracting authority indirectly procures a work that corresponds 'to the requirements specified by the contracting authority',[46] while the equivalent provision in the Regulations says that the work must 'correspond to specified requirements'.[47]

The Directive states that the contracting authority must do the specifying, whereas in the Regulations it does not matter who does so. Furthermore, the Regulations use the phrase 'specified requirements' suggesting that it must contain some level of detail. The term 'requirements' in the Directive is not so qualified, and the word 'specified' is to clarify that the input must come from the contracting authority.

In either case the degree of specificity of the requirement is vague, but possibly it does not have to be specified in as much detail as Regulation 2(1)

41 *Roanne*, note 3, para [45]; see note 26 and linked main text.
42 *European Commission v Germany* [2011] EUECJ C-54/08, [2011] 4 CMLR 19.
43 *Commission v Germany*, note 42, para [79].
44 *Commission v Germany*, note 42, para [75].
45 *Commission v Germany*, note 42, para [80].
46 The Directive, note 1, Article 1(2)(b) (see note 10 and linked main text).
47 Public Contracts Regulations 2006, Regulation 2(1).

(or the UK Government[48]) suggests that it ought to be. Most commentators seem to have assumed that 'specified requirements' in the Regulations means a detailed technical specification, whereas the term 'requirements' in the Directive suggests more of a high level brief.

The first occasion the ECJ had to look at what this element of the third variant meant was in *Roanne*. The development agreement in *Roanne* referred to constructing a leisure centre with a multiplex cinema, service premises and a car park. Expressing a requirement in those high level terms was enough to regard the work '... as corresponding to the requirements specified by the municipality of Roanne ...'[49]

In *Helmut Müller* the ECJ was asked whether an LPA in its regulatory role is specifying its requirements.[50] It held that:

- to specify means the authority must have taken measures;[51] and
- a requirement means to define the type of the work or, at the very least, have had a decisive influence on its design.[52]

Helmut Müller did not overrule the paragraph that dealt with this element of a public works contract in *Roanne*. So it is possible to infer that the 'requirement' in the *Roanne* development agreement is consistent with defining the 'type of the work'. On the other hand by interpreting a contracting authority's requirement as (at the lowest possible level) meaning that it must have had a decisive influence on the design of the works, suggests a more detailed requirement than that accepted in *Roanne.*

The Müller *ingredient*

Roanne established the proposition that it is immaterial who acquires the work[53] provided the contracting authority specified the work (the aim of which was to economically regenerate an area[54]). This proposition spooked the land development sector because it meant that development agreements could be classified as public works contracts even where none of the works ended up in the hands of the contracting authority.

Helmut Müller qualified that proposition by emphasising a little more the 'purchasing' aspect of public procurement as follows: it is immaterial that

48 *Public Procurement Rules, Development Agreements and s106 'Planning Agreements'; Updated and Additional Guidance* (OGC Information Note 12/10, June 201), para [29]. (The OGC website ceased to exist on 1st October 2011; all the information is now available on the National Archives website at http://webarchive.nationalarchives.gov.uk/20100503135839/http://www.ogc.gov.uk/index.asp.)

49 *Roanne*, note 3, para [42].

50 *Helmut Müller*, note 16, para [33(6)].

51 *Helmut Müller*, note 16, para [67].

52 *Helmut Müller*, note 16 , para [67]; see note 32 and linked main text.

53 *Roanne*, note 3, para [47].

54 *Roanne*, note 3, paras [41] and [42]; see notes 24 and 25 and linked main text.

someone else ultimately owns the work provided that the contracting authority obtains a 'direct economic benefit' from it.[55]

A 'direct economic benefit' includes the contracting authority:

- becoming the owner of the work;[56] (the first limb)
- holding a legal right over the use of the work so that it can be made available to the public;[57] (the second limb)
- deriving economic advantages from the work such as the future use or transfer of the work, or where it has contributed financially to the work or assumed economic risks in case the work is an economic failure[58] (the third limb).

The planning exception

Helmut Müller provides for an exception to the public procurement rules where an LPA is acting pursuant to the mere exercise of planning powers.[59] Would this exception confer a general exemption for any contract entered into in the planning context? I would argue that the ECJ is making a distinction between the passive role an LPA has in overseeing land development and a more active role, which is triggered whenever the LPA specifies a requirement and receives a 'direct economic benefit'.

Section 106 Agreements and the procurement regime

S106 Agreements are statutory contracts entered into between persons with an interest in land[60] and LPAs[61] that:

- restrict development or use of the land;
- require operations or activities to be carried out in, on, under or over the land;
- require the land to be used in any specified way; or
- require payments to be made to the authority.[62]

Pursuant to these provisions, LPAs can prescribe the nature of the development – such as the delivery of affordable housing. S106 Agreements can be used by themselves to regulate development, but are often used in connection with the grant of planning permission, because, provided a s106 Agreement has some connection with the development which is not *de*

55 *Helmut Müller*, note 16, para [49]; see note 29 and linked main text.
56 *Helmut Müller*, note 16, para [50].
57 *Helmut Müller*, note 16, para [51].
58 *Helmut Müller*, note 16, para [52].
59 *Helmut Müller*, note 16, paras [57] to [58]; see note 30 and linked main text.
60 TCPA 1990, section 106(1).
61 Defined in Part 1 of the TCPA 1990.
62 TCPA 1990, section 106(1).

minimis,[63] it will be a 'material consideration' that the LPA must take into account when dealing with an application for planning permission.[64]

For the purposes of this paper I will assume that an LPA receives a planning application for permission to build affordable housing. The applicant (developer) owns the land but intends to lease the housing (once built) to an affordable housing provider ('AHP'). To secure the provision of affordable housing, the LPA and the developer sign a s106 Agreement on the same day planning permission is issued.[65]

The s106 Agreement includes an obligation requiring the AHP to grant to the LPA the right to nominate who can purchase or occupy the units. These nomination rights are then secured by the LPA by way of entering into a nominations agreement with the AHP.

The contracting parties

LPAs are contracting authorities[66] and an economic operator would cover any developer with an interest in land in the area of an LPA.

A contract

Although s106 Agreements are creatures of statute,[67] according to *La Scala* that of itself is not conclusive to exempt it from the procurement regime.[68] Even if a contract is not a contract in domestic law, the definition of a contract for the purposes of the Directive is a matter for Community law.[69] And if the ECJ classified the development agreement in *La Scala* as a contract (the terms of which were non-negotiable), it is difficult to see how s106 Agreements, which are more consensual in nature, cannot be a contract.

In the context of a grant of planning permission, a s106 Agreement will only be used if the person entering into the Agreement has an estate or interest in the land. This feature brings into play the argument that the Advocate General made in *La Scala* about whether there can be a contractual relationship if the parties 'choose themselves'.[70]

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63 *Tesco Stores Ltd v Secretary of State for the Environment* [1995] 1WLR 759 (HL); [1995] 2 All ER 636, 93 LGR 403.

64 TCPA 1990, section 70(2).

65 Planning permission can be refused, granted unconditionally, or granted subject to such planning conditions as the LPA thinks fit (TCPA 1990, section 70(1)). An LPA could technically impose a planning condition to secure affordable housing, but a condition is not recommended where the LPA needs to control matters such as tenure, price or ownership (paragraph 97 of Circular 11/95 ('The use of conditions in planning permissions') – precisely the features on which LPAs want certainty from developers in relation to affordable housing.

66 The Directive, note 1, Article 1(9); see note 4.

67 TCPA 1990, section 106, 106(A) and 106(B).

68 *La Scala*, note 2, para [66].

69 *Roanne*, note 3, para [40].

70 *La Scala*, note 2, para [68].

The TCPA 1990, section 106(1) gives an LPA the freedom to negotiate either in-kind or financial contributions (or a combination of both). The UK Government advises LPAs that if there are circumstances where an alternative provider is better placed to deliver the obligation, then the LPA should extract a financial contribution from the developer and hire the better placed provider.[71] 'Better placed' could mean cheaper, better qualified, or selected in accordance with the public procurement rules.

Like the City of Milan, an LPA could bargain for the financial contribution and then carry out a separate procurement for the affordable housing. There seems to be no reason why an LPA could not obtain under the s106 Agreement:

- a transfer of the land to the AHP;
- a restriction on the use of the land for affordable housing; and
- a sum of money to build the affordable housing.

A feature of s106 Agreements is that they confer a right to enforce their provisions against successors in title[72] together with the statutory machinery to enforce those rights,[73] which means that obligations in s106 Agreements effectively turn into property rights which bind the land similarly to restrictive covenants.[74] This feature of a s106 Agreement could engage the land transaction exemption. Yet the third variant covers a procurement of a work 'by any means'. 'Any means' could include by way of property right or statutory mechanism, whether the work is carried out by third parties or not.

The LPA's requirements

The way the third variant has been transposed in the Regulations has spread a perception that the contracting authority has to provide a conventional specification to go with the works contract, whereas in my view the third variant is capable of covering a situation where the contractor prepares the technical specification in response to a high level requirement expressed by the contracting authority. For example, a s106 Agreement that specifies a requirement to provide a number of low cost housing units could meet the test set out in *Roanne*[75] and the first part of the test set out in *Helmut Müller.*[76]

In *Wychavon v Westbury Homes*, Boggis J held that a s106 obligation to provide seven low cost affordable housing units was an enforceable obligation

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71 Department for Communities and Local Government; Planning Obligations: Practice Guidance (1 August 2006) paragraph 2.5**.** http://www.communities.gov.uk/archived/publications/planningandbuilding/circularplanningobligations.

72 TCPA 1990, section 106(3).

73 The enforcement measures include an injunction (s106(5)) and an LPA right of entry to carry out the operations itself and recharge the developer (s106(6)); anyone impeding such entry is liable on summary conviction to a fine (s106(8)).

74 Section 106(3) overcomes the limitations of privity of contract and restrictive covenant law by placing the LPA in the same position as a landowner entitled to enforce a covenant against a successor.

75 *Roanne*, note 3, para [42]; see footnote 25 and linked main text.

76 *Helmut Müller*, note 16, para [67]; see footnote 32 and linked text.

to provide the housing of the type required for social lettings.[77] The developers had argued that the LPA could not enforce the obligation because 'low cost affordable housing' had no ascertainable meaning. The judge on the other hand held that the term has a sufficiently clear and certain meaning to be enforceable, and granted an injunction restraining the developers from selling the low cost housing to first time buyers.

This case can support a contention that a s106 Agreement that provides for affordable housing, even if not accompanied by any technical specification, has the specificity required to be capable of enforcement under English law.

The direct economic benefit

The nomination rights provide for the LPA to hold a legal right over who can occupy or purchase the affordable housing, and on what terms. Those rights appear to satisfy the second limb of the 'direct economic benefit' requirement.

The pecuniary interest

Taking the approach the ECJ took in *Commission v Germany*,[78] the nomination rights reserved by the LPA can establish the necessary direct economic link to the work which would unlock the pecuniary interest received by the developer from the AHP for the lease of the affordable housing.

A public works concession contract

A fundamental feature of a concession contract is that the economic operator not only assumes the construction risks but also the economic risks inherent in operating the work.[79] If the developer is solely responsible for arranging the funds to construct the affordable housing and for procuring an AHP to agree to buy the lease, a s106 Agreement could be classified as a public works concession contract.

In *Helmut Müller*, the ECJ held that if the right to exploit the work derives only from the developer's ownership of the land, in principle it is impossible for an LPA to grant a concession relating to that exploitation because it must first itself be in a position to exploit the work.[80] Then, if this possible s106 public works concession contract is in respect of land which the developer owns and is entitled to exploit exclusively, according to *Helmut Müller* it ceases to be a public works concession contract (and therefore wholly unregulated by the procurement regime).

However, if there is a direct economic benefit to the contracting authority in the form of the right to become the owner of the work at some time in the future (first limb), or a legal right over the use of the work (second limb), then I would argue that, notwithstanding that the developer owns the land, this goes

77 *Wychavon DC v Westbury Homes (Holdings) Ltd* [2001] PLCR 13 (ChD).
78 *Commission v Germany*: note 42.
79 *Commission Interpretative Communication on Concessions under Community Law* 2000/C 121/02 (Official Journal C 121, 29th April 2000), para [2.1.2].
80 *Helmut Müller*, note 16, para [74].

back to being a public works concession contract and not an excluded contract.

The implications

Typically developers are required to provide 40% affordable housing when they intend to build residential developments of more than 15 dwellings. In these cases the private housing development (excluded contract) is the principal purpose of the whole residential development,[81] and provided that the social housing is technically and economically inseparable from the private housing, the whole deal may not be covered by the public procurement rules.[82]

In terms of economic interdependence, the developer will allocate any profit from the private development to subsidise the building costs of the affordable housing. In addition, the developer may be obtaining, directly or indirectly, social housing grants and other subsidies to make the scheme viable.

In mixed residential schemes, technical interdependence may be required since affordable housing must be provided on site 'so that it contributes to a mix of housing'.[83] With mixed residential schemes where the proportion of affordable housing is less than that of the private housing, the whole development would appear to be inextricably linked.

The greater the proportion of affordable housing required by the LPA, the less developers can rely on allocating their development gain to cross-subsidise the construction of the affordable housing and the more dependent they will be on government subsidies. This shift in economic balance makes predominantly affordable housing schemes less dependent on the private development, and are at most risk of falling foul of the public procurement rules.

Whether a developer approaches an LPA alone or together with a builder and a resourced AHP, the point at which planning permission is granted represents the least worst point in time to consider interposing a public procurement procedure. (Once the developer gets planning permission and has executed a s106 Agreement, neither the builder nor the AHP has much choice but to deal with the developer.)

If a public procurement is not feasible then what can LPAs do?

A number of commentators consider that *Roanne* undermined the option to delegate compliance with the Directive to a developer. In their defence, the ECJ in *Roanne* held that only the expressly mentioned exceptions in the

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81 To identify whether a mixed contract containing a public works contract and excluded contracts is one or the other, it is assessed by reference to the main object of the mixed contract: *Gestión Hotelera Internacional SA v Comunidad Autónoma de Canarias*, [1994] EUECJ C-331/92, [1994] ECR I-1329, para [26].

82 *Public Procurement Rules, Development Agreements and s106 'Planning Agreements'*, note 48, para [20(i)].

83 DCLG, 'Planning Policy Statement 3 (Housing)' [9th June 2003] [reissued 9th June 2011], para 29 (indent 4 & 5). http://www.communities.gov.uk/planningandbuilding/planningsystem/planningpolicy/planningpolicystatements/pps3/

Directive can apply to any procurement, and delegated compliance is not one of them. [84] The Advocate General in *Roanne* thought that the 'delegated compliance' exception was available but that the conditions were not satisfied in that case.[85]

In *Roanne*, SEDL was not the landowner and permit holder, and therefore was not the only economic operator with whom the Commune could have entered into the development agreement. So it is arguable that delegated compliance is available. In the case of a public works contract this would mean that the developer has to carry out a full procurement under the EU procurement regime. However, if I am right in thinking that a s106 Agreement providing for affordable housing is actually a public works concession contract, then this would only require the developer to advertise the opportunity in the OJEU. This does not seem very onerous.

The LPA could also rely on the exclusive rights exemption,[86] which has not been tested by the ECJ. This exemption was designed for public contracts that could only be awarded to a specific body because it held exclusive rights, but in fact it has been used outside that context where it is obvious that in practice no other body could perform the contract.

There is an overlap between the circumstances in which the exclusive rights exemption and delegated compliance are applicable. But if the ECJ was prepared to go only as far as delegated compliance in the situation in which the parties found themselves in *La Scala* (ie where the developer / landowner possessed the building permit), it is unlikely the ECJ would exempt (under the exclusive rights exemption) a public works contract in similar circumstances.

A wide reading of the planning exception could exempt all s106 Agreements from the procurement regime. A more narrow reading of the exception could expose a s106 Agreement that specified the quantity and quality of housing (from which it receives a direct economic benefit) to the public procurement rules, notwithstanding that it was also entered into pursuant to the mere exercise of planning powers.

Section 106(1) of the TCPA 1990 also allows a developer to enter into a unilateral undertaking.[87] Where the developer can ascertain the LPA's requirements in advance (due to pre-application negotiations for example) and where only the developer needs to be bound by the instrument, unilateral undertakings are useful to expedite the planning process.

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84 *Roanne*, note 3, para [59].

85 *Roanne*, AG's Opinion, paras [75] – [77].

86 'When … for reasons connected with the protection of exclusive rights, the [public] contract may be awarded only to a particular economic operator', a contracting authority does not need to publish a notice in the OJEU or follow any of the award procedures (The Directive (note 1), Article 31(1)(b)).

87 Where the LPA is unwilling to enter into a s106 Agreement and a planning condition could not be achieved because of the nature of the measure required, there would be no way for the Secretary of State (who is prepared to grant permission but only if a legitimate planning objection can be overcome) to grant planning permission on appeal. A unilateral undertaking can overcome an obstinate LPA.

A unilateral undertaking is usually submitted as part of a planning appeal process, which comes into force once the Secretary of State has accepted its provisions. But once it is in force, it is in all respects the same as a negotiated s106 Agreement.

Conclusion

The safest route for LPAs would be to either delegate compliance or insist on a transfer of the land and a financial contribution, and itself carry out the procurement. I also think the narrow interpretation of the planning exception will ultimately prevail, and that unilateral undertakings do not take us any further towards a solution.

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