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Real estate transactions and public procurement – Further guidance from the European Court of Justice on a difficult relationship

The ongoing discussion

In its most recent case law, the European Court of Justice (**CJEU**) provides further guidance on the demarcation between real estate transactions and the application of public procurement legislation to contracts for works. In this eAlert we provide a short summary and analysis of the case, and consider what this could mean for the case law of the Belgian State Council.

Article 16 of Directive 2004/18 of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (now replaced by Directive 2014/24 of 26 February 2014 on public procurement (the **2014 Directive**)) (the **2004 Directive**) states that:

"This Directive shall not apply to public service contracts for:

(a) the acquisition or rental, by whatever financial means, of land, existing buildings or other immovable property or 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"

Consequently, real estate transactions are not subject to the public procurement legislation. However, contracts for works are, of course, subject to public procurement legislation. For completeness sake, note that in principle, when awarding real estate contracts, contracting authorities should observe the principles of equal treatment, non-discrimination and transparency.

Parties are sometimes tempted to (creatively) interpret certain aspects of a transaction in order to qualify it as a real estate transaction, even though the contract also requires works to be carried out. However, if the real estate transaction is the main focus of the contract and also requires minor works to be done – its qualification as a contract for works (and thus the full application of the public procurement rules) seems disproportionate. However, in practice, it can be very difficult to determine (with certainty) whether or not a specific transaction qualifies as a real estate transaction (in relation to public procurement legislation).

The underlying facts

In a recent case before CJEU, the discussion over the qualification of a real estate contract took centre stage.

The European Commission (the **Commission**) started infringement proceedings against the Republic Austria for the non-application of public procurement legislation to a contract which the Commission qualified as a contract for works, while the Austrian contracting authority (Wiener Whonen) qualified the lease as a real estate transaction and hence was of the view that the public procurement rules did not apply.

The case concerned a lease (ie real estate transaction) that Wiener Whonen entered into for an indefinite term for the yet to be built office building known as 'Gate 2' (the **Gate 2 Building**), including an underground car park. Under the lease, it was clear that the landlord (Vectigal Immobilien GmbH & Co KG) and the owner of that plot of land had already decided to construct the Gate 2 Building.

The Republic of Austria found that at the time the lease was concluded, the prevailing legal opinion in Austria was that the article 16 exclusion in the 2004 Directive included the letting of office premises that had not yet been constructed but were already planned and ready to be built. As Wiener Wohnen wished to lease precisely such a building, it decided that Wiener Wohnen had acted in good faith. The Commission subsequently started infringement proceedings.

The Commission found that the conclusion of a lease between Wiener Wohnen and a private undertaking in respect of the unbuilt Gate 2 Building constituted the direct award of a works contract for the construction and lease of office premises, because Wiener Wohnen had an influence over the planning of the works relating to those premises which went far beyond the usual requirements of a tenant for a new building.

The findings of the CJEU

In its ruling, the CJEU reiterated that the parties' classification of the agreement as a "lease" was not decisive in determining whether or not public procurement legislation applied (because it was actually a contract for works).[1] The CJEU stated that "*where a contract contains both elements relating to a public works contract and elements relating to another type of contract, it is necessary to refer to the main object of that contract in order to determine its legal classification and the EU rules applicable*".[2] In this regard, the CJEU found that on the date on which the contract had been concluded, the works covered by that contract had not yet commenced. Consequently, the contract could not have had as its immediate object the lease of buildings. The object of that contract was the construction of those buildings which were subsequently required to be handed over to Wiener Wohnen under a 'lease' agreement.[3]

However, the CJEU also recognised that the exception provided for in article 16 of the 2004 Directive may extend to the leasing of non-existent buildings, that is to say, buildings that have not yet been built, as demonstrated in its own case-law.[4] In line with that case law, the contracting authority cannot rely on the exclusion laid down in article 16 where the execution of the planned work constitutes a 'public works contract', since that execution corresponds to the requirements specified by the contracting authority.[5] Such is the case where that authority has taken measures to define the characteristics of the work or, at the very least, has had a decisive influence on its design. That is the case, in particular, where the specifications requested by the contracting authority exceed the usual requirements of a tenant in relation to a building, such as the building complex concerned. As regards the proposed building complex, a decisive influence on its design may be identified if it can be shown that influence is exercised over the architectural structure of that building, such as its size, external walls and load-bearing walls. Stipulations concerning interior fittings may be regarded as demonstrating a decisive influence only if they are distinguished because of their specificity or scale.

In relation to these requirements in the current case, the CJEU found the following:

– The Commission did not claim that Wiener Wohnen had sought to exercise an influence on the plans before receipt, on 28 February 2012, of the site analysis.

– This 'site analysis' had been carried out by the surveyor that Wiener Wohnen had instructed, and identified 10 buildings that were free to let and concluded that the project for the construction of the Gate 2 building was the most suitable.

– The characteristics of the Gate 2 building had already been determined.

– In relation to the lack of a building permit, the CJEU noted that, according to standard commercial practice, large-scale architectural projects are let well before the detailed construction plans are finalised, so the owner of the site or the developer initiates the formal procedure for obtaining a building permit only when it has commitments from future tenants for a significant part of the space in the planned building. The fact that the building permit was not applied for and issued until after the date on which the lease in question was concluded does not prevent the conclusion that the Gate 2 building was, on that date, already planned and ready to be built.

– The CJEU also found that "*the exercise of a decisive influence on the design of the work in question cannot result from the absence of a comprehensive architectural project*".

– In relation to the Commission's argument that Wiener Wohnen commissioned a consultant to supervise and monitored the implementation and follow-up of the execution of the work, as a developer would have done, the CJEU found that it was not unusual for a tenant to take measures in order to ensure that the move into the premises could take place on the planned date, in particular, where a large-scale move was involved.

– In relation to the fact that some specifications were determined by Wiener Wohnen, the CJEU noted that it was apparent that the Gate 2 Building was designed as a traditional office building, ensuring that the interior configuration remains as flexible as possible and adapted to the needs of future tenants. It was necessary to determine whether the specifications set out by Wiener Wohnen were intended to satisfy stipulations that went beyond what a tenant of a building such as the Gate 2 Building might normally require and lead to Wiener Wohnen being regarded as having exercised a decisive influence on its design. The CJEU found that the specifications (such as the application of non-binding standards regarding energy performance, the requirement for the elevator to stop at all levels, etc), although very detailed, were not beyond what a tenant would normally require.

[1] CJEU (10 July 2014) C 213/13, Impresa Pizzarotti.
[2] CJEU (25 March 2010) C 451/08, Helmut Müller.
[3] CJEU (29 October 2009) C 536/07 Commission v Germany.
[4] CJEU (29 October 2009) C 536/07 Commission v Germany; (10 July 2014) C 213/13 Impresa Pizzarotti.
[5] CJEU (29 October 2009) C 536/07 Commission v Germany; (10 July 2014) C 213/13 Impresa Pizzarotti.

The CJEU thus found that the Commission did not demonstrate that the direct award of the lease breached the applicable public procurement legislation, and dismissed the case.

We wish to point out that the Advocate General, Campos Sánchez-Bordona, made a completely different assessment of the facts underlying the case. The Advocate General found that the fact that (i) the building permit had not yet been applied for; (ii) the plans had been drawn, but had not yet been finalised; (iii) the plans had undergone significant changes to adapt to the contracting authorities specifications; (iv) if the lease with Wiener Wohnen had not been signed, the Gate 2 Building would not have been built and (v) Wiener Wohnen had hired a project manager and acted as a 'project owner', led to the conclusion that the underlying contract should qualify as a contract for works and not a lease.

Our view

The current case is key in providing further guidance on the assessment of whether a specific contract qualifies as a real estate transaction or a 'contract for works'. The 'exclusion' provided for in article 16 of the 2004 Directive, is reiterated in the 2014 Directive and implemented in the Belgian public procurement legislation. The assessment of the qualification of a real estate and/or works contract is not always an easy one to make, as is also demonstrated by the fact that the Advocate General came to a very different conclusion, namely that public procurement legislation had been infringed and the lease qualified as a contract for works.

In Belgium, the State Council has also had various opportunities to assess these types of transactions.[6] In line with the approach of the CJEU, the Belgian State Council reviews and assesses all elements of the case and looks beyond the mere qualification of the contract by the parties. However, in its case law, the Belgian State Council found that a building that still needed to be constructed and where the public authority determined some of its specifications – even though the building to be constructed qualified as a "standard office" building" – qualified as a contract for works.[7] Although the underlying facts (and specifications requested by the contracting authority) differ from those in the case before the CJEU, it remains to be seen whether, in light of this judgment, the Belgian State Council will maintain its (slightly) stricter view.

Unfortunately, this case does not provide a clear roadmap for ensuring that a contract is not requalified as a works contract. However, it does demonstrate that (i) the actual qualification depends on the underlying facts and available documentation (eg in the case at hand, the site analysis) and (ii) the CJEU (and Belgian State Council for that matter) is willing to make a very detailed review and assessment of the various elements in play (eg in relation to what qualifies as exceeding the usual requirements of a tenant). For example, the fact that there has not yet been an application for an urban planning permit or the fact that the contracting authority issues a list with specifications does not automatically mean a contract qualifies as a contract for works. That said, it clearly states that (part of) the test of whether or not a contract qualifies as a real estate transaction is to establish whether the requests/ specifications from a contracting authority "*exceed what a tenant may normally require*" – a test which the Advocate General did not put at the centre of his opinion, but which clearly forms the basis for the judgment of the CJEU. *This test obviously leaves room for ample interpretation, because the CJEU does not explain what a tenant may "normally" require- what is "normal" in a plain vanilla lease agreement, may not be so "normal" for more complex agreements especially in a very sophisticated real estate market for offices like in Belgium, where the allocation of risks between lessee and lessor, price formulas, and detailed rules on fixtures and design, are quite "standard". It is likely that this 'test' will depend on the specific (national) market. Will the dictum by the CJEU require Belgian courts (like the Belgian State Council) to take into account (specific) market practice(s) to assess whether or not public procurement rules applies, or will they stick to a more basic review of what a tenant "may normally require"? Thus far it seems that the State Council has not been very eager to take into account any sort of market practice in its case law- it remains to be seen whether the CJEU's ruling will in fact lead to more clarity on the subject.*

While this case provides further guidance on this topic, we are certain that this will not be the CJEU's final say on the issue. To undoubtedly be continued...

[6] Belgian State Council, 30 November 2017, nr. 240.044 and 240.043; 23 October 2018, nr. 242.755 and 242.756; 17 February 2021, nr. 211.317; 12 July 2018, 242.094.
[7] Belgian State Council, 23 October 2018, nr. 242.755.