

Public works contracts and decisive Influence— when a lease is not a lease (AG opinion: European Commission v Republic of Austria)

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Public law analysis: In this opinion, Advocate General (AG) Campos Sánchez-Bordona found that Austria had breached the requirements of Directive 2004/18/EC of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts. A public body linked to the City of Vienna entered into a contract with a private undertaking for the construction of an office building on the undertaking's land without complying with the provisions of Directive 2004/18/EC. The parties classified the contract as a lease whereby the public body would rent the building over more than two decades. Austria argued that the contract was therefore exempt from the requirements of Directive 2004/18/EC 2004 under Article 16(a). The AG rejected this argument on the basis that the public body had decisive influence over the planning and execution of the construction and the reality was that the contract was in fact a public works contract. Written by Jonathan Lewis, barrister, at Henderson Chambers.

AG opinion: *European Commission v Republic of Austria*, [Case C-537/19](#)

What are the practical implications of this case?

AG Sánchez-Bordona's opinion involved the interpretation and application of the provisions in Directive 2004/18/EC concerning the exemptions of certain types of arrangements from public procurement rules. However, those provisions are reproduced in materially identical terms in [Directive 2014/24/EU](#). Article 16 of Directive 2004/18/EC is found in [Article 10](#) of Directive 2014/24/EU, (which is implemented via the Public Contracts Regulations 2015 (PCR 2015), [SI 2015/102, reg 10](#)). The AG expressly recognised that [Directive 2014/24/EU](#) contains the same exclusion as that of Directive 2004/18/EC (at para [26]). Hence, this opinion is applicable to [Directive 2014/24/EU](#).

This opinion makes it clear that, in deciding whether a contract falls within an exemption to the requirements of public procurement law (for example, an exemption relating to leases), the Court of Justice will look beyond the labels used by the parties at the substance of the contract. The more that a public body exercises control over the design and construction of a building, the more likely it is that it will be found to have exercised a decisive influence over it such that the contract is classed as a public works contract, regardless of whether the contract is described as a 'lease' by the parties involved.

Practitioners should therefore be wary of advising clients that they can circumvent the requirements of the PCR 2015 by structuring a building contract as a lease. While public bodies must (in order to serve the general interest) have buildings that are suited to their needs, that does not mean that they can dispense with the public tendering procedure which would enable them, with the benefit of all relevant guarantees and in the light of the bids submitted, to undertake a comparison of the tenders and select the one most favourable to the public interest.

What was the background?

In 2012, Stadt Wien-Wiener Wohnen (WW), a public body linked to the City of Vienna, entered into a contract with a private undertaking without complying with the provisions of Directive 2004/18/EC. The contract concerned the construction of an office building on land owned by that undertaking. The parties classified the contract as a lease. It was not advertised. Austria initially conceded that it should have done so but later, without clear justification, resiled from this concession. It sought to rely upon Article 16(a) of Directive 2004/18/EC (specific exclusions), which provided that the Directive did not apply to public service contracts for 'the acquisition or rental, by whatever financial means, of land, existing buildings or other immovable property or rights thereon[...]'.

The Commission argued that the contract was not a 'normal' property lease, since WW supervised the execution of the work in the same way as a developer would. Further, the contract contained specifications which go far beyond what is usually agreed in a lease agreement (at paras [33]–[38]).

Austria sought to diminish the degree of control that WW did in fact exert over the planning and construction of the building (at paras [39]–[56]). It argued that most of the negotiations concerned rent amounts and that the building was planned with no particular group of tenants in mind (at paras [46]–[51]).

What did the court decide?

The AG made clear that the court's role encompassed working out how the facts came about and what type of contractual relationship was actually in place (at para [18]). He suggested that it was doubtful whether the exclusion under Article 16(a) of Directive 2004/18/EC would apply to the leasing of buildings which had yet to be built (at para [30]). He was concerned with the mischief of a contracting authority concealing a direct commission to construct a building which meets its requirements in which it plays a significant role in the design and execution under what appears to be a long-term lease agreement (at para [31]).

Relying upon the decision in *Impresa Pizzarotti*, Case [C-213/13](#) (which concerned the lease of an as yet unconstructed building), the AG held that the court is not content simply to accept whatever classification the parties may give to their contractual relationship (at para [22]). Where a contract contains elements relating to different types 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 (at para [24]).

The court therefore had to determine whether the contract is caught by Directive 2004/18/EC. As stated in *Commission v Germany*, Case [C-536/07](#) (cited at para [23]), the definition of 'public works contract' '[...]includes all operations in which a contract for pecuniary interest, irrespective of its formal classification, is concluded between a contracting authority and a contractor and has as its object the execution by the latter of a 'work' within the meaning of [Article 1(2)(b)] of the directive'. Hence, it held that 'The essential criterion in that respect is that the work should be executed in accordance with the requirements specified by the contracting authority; the means of that execution are immaterial'.

The AG was clear that the legal test that he had to apply was whether WW 'exerted a "decisive influence" over the plan for the works that was finally approved and over the subsequent execution of the building, and whether that property was built in response "to the requirements specified by the contracting authority"' (at para [58]). This would determine whether the contract was a public works contract, in addition to the lease, for the as yet unconstructed building.

The AG upheld the action brought by the Commission (at para [104]). He found that Article 16(a) of Directive 2004/18/EC did not apply and that WW's actions should have been subject to the regulated procedure for the award of public works contracts. The following matters featured in his assessment.

At the time when the contract was concluded, the landowner had not started any construction work on the building (nor did it have the relevant permit), (at para [59]). The building's design was not final and WW's 'wishes had a conclusive bearing on the eventual configuration of that design and on the construction of the building' (at para [62]). Disagreeing with Austria, the AG found that WW effected 'significant modifications' to the plan (at para [63]) and imposed 'crucial conditions' in relation to the design of the building and had the power to decide upon its final structure (at para [64]). WW's wishes 'were thus instrumental, inasmuch as the building was built in the form and with the characteristics which it wanted' (at para [67]). WW 'had the ability to exert an influence[...]so decisive as to amend the initial plan of works by imposing the architectural changes which it considered desirable' (at para [69]).

An analysis of the documentation confirmed that WW's 'contractual position is not consistent with the typical position of a mere tenant but, rather, with that of an actual project owner who imposes his own solutions on the plans for the building and their execution' (at para [73]). The AG acknowledged that with large property developments, tenants might have some say as to how the building is adapted but found that 'the conditions imposed were so extensive' and WW's role 'so significant as to go beyond the customary scope of the landlord-tenant relationship' (at para [75]). This was confirmed by the fact that WW appointed its own operatives to supervise the execution of the project, in parallel with the owner (at para [76]). The fact that if the contract had not been signed, the building would not have been built, was an indication that the contracting authority's property requirements effectively took precedence over the execution of the works (at para [81]).

The AG considered four other arguments advanced by the parties. First, he agreed that one way of working out whether the contract was really a lease would be to do an economic analysis of how rent was paid to see whether this actually amounted to deferred payment for the building works themselves (at para [87]). However, on the evidence there was insufficient data produced to support the argument (at para [88]). Second, he noted that WW was to occupy effectively all of the building—the presence of other tenants was not sufficient to discharge WW’s effectively total occupancy (at para [92]). Third, the fact that no planning permit had been granted when the lease was signed was significant (at para [97]). Finally, the fact that Austria initially recognised its failings in relation to Directive 2004/18/EC and then subsequently retracted it would require greater justification than that provided. Otherwise, it is contrary to the principle of sincere cooperation between the Member States and the EU (at para [101]).

Case details

- Court: Court of Justice
- Judge: Advocate General Campos Sánchez-Bordona
- Date of Opinion: 22 October 2020

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