

Avoidance of the Public Contract Regulations and Recital 5 of Directive 2014/24/EU

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Directive 2014/24/EU, recital (5)

“... nothing in this Directive obliges Member States to contract out or externalise the provision of services that they wish to provide them-selves or to organise **by means other than public contracts within the meaning of this Directive**”

How far does the ability to organise extend?

Approach to PWCs in the land use context

- **Auroux** C-220/05 [2007] ECR I-385 – relatively broad approach to application of the directive and PWC
- Subsequent narrowing of that broad approach?
 - **Helmut Müller** C-451/08 [2011] P.T.S.R. 200 required a legally enforceable contract, binding under national law, to provide specified works – regulatory requirements insufficient
 - **Commission v Spain (Re award of urban development contracts in Valencia region)** C-306/08 [2011] 3 C.M.L.R. 43 - AG Jääskinen [70]-[75] suggested a more restrained approach to land use agreements
- **City of Flensburg** (IP/08/867) Commission satisfied not PWC since land transaction which only required the land to be repurchased by the City if the works to provide a building were not undertaken. Measures to encourage performance falling short of contractual obligation insufficient.

CJEU and the Commission

- ***Helmut Müller GmbH*** at [63] – to be a PWC the relevant agreement must impose a legally enforceable obligation on an economic operator to undertake works. An agreement that does not impose such an enforceable legal obligation is not a PWC and is not subject to procurement – the exercise of planning regulatory powers to require works is not sufficient so a local authority that merely requires works by imposing requirements in a planning permission is not caught
- AG Mengozzi at [78]
 - “a public works contract is to all intents and purposes a contract, that is to say, a legal document which, in all the variety of national legal systems, is by nature binding at all times and in all circumstances. ... in order for there to be a public works contract, the contractor must be under a contractual obligation to provide the specified service. However, the consequences of any failure to fulfil obligations are a matter of national law....”

CJEU and the Commission

- ***Commission v Spain (Valencia)*** C-306/08. AG Jääskinen [70]-[75] on land-use agreements –
 - “73. In considering what fits the public procurement frame the Court’s case law to date has adopted a relatively broad, public procurement-friendly approach. This has given rise to a debate as to whether land-use agreements are or should be classified as public contracts or more precisely as public works contracts as they often involve, directly or indirectly, the execution of public works by the developer or the landowners...”
 - “75. ... in my opinion the Court should exercise a certain restraint if a broad interpretation of an EU law concept seems to lead, in practice, to an instrument of national law losing its *raison d’être* or a detailed EU legislative act becoming applicable to phenomena that have not been considered by the EU legislature during the legislative process.”

Anti-avoidance

- **Commission v Austria** C-29/04 [2005] ECR I-9705 (**Mödling**) – artificially constructed series of contracts to award a contract for waste disposal but to avoid procurement with a company which was wholly owned by the municipality at the time of the contract with a transfer of 49% of shares into private ownership shortly afterwards -
 - “40. Thus, it is not disputed that, by means of an artificial construction comprising several distinct stages, namely the establishment of AbfallgmbH, the conclusion of the waste disposal contract with that company and the transfer of 49% of its shares to Saubermacher AG, a public service contract was awarded to a semi-public company 49% of the shares in which were held by a private undertaking.
 - 41. Accordingly, the award of that contract must be examined taking into account all those stages as well as their purpose and not on the basis of their strictly chronological order as suggested by the Austrian Government.”

- ***Remondis GmbH v Region Hannover*** C-51/15 (21.12.16). The transfer of waste treatment tasks to a public law entity created by agreement by 2 regional authorities to which powers for the performance of those tasks were transferred was not a public contract provided it was autonomous, the CJEU observing:
 - “37. For possible categorisation of a multi-stage operation as a public contract under that definition, the operation must be examined as a whole, taking account of its purpose.”
 - “43. Only a contract concluded for pecuniary interest may constitute a public contract ..., the pecuniary nature of the contract meaning that the contracting authority which has concluded a public contract receives a service which must be of direct economic benefit to that contracting authority The synallagmatic nature of the contract is thus an essential element of a public contract...”
- AG Mengozzi at [36] “an essential element of that concept [public contracts] is the creation of legally binding reciprocal obligations”

Midlands Co-Op v Birmingham CC

- **Helmut Müller** applied in **Midlands Co-Op** [2012] LGR 39 where a planning agreement between Tesco and Birmingham CC held not to be procurable. Hickinbottom J at [110]:
 - “At all material times, the “replacement community facilities” formed part of Tesco's planning permission and ... the section 106 agreement obliged Tesco to be responsible for all works of fitting out and re-location costs of “the Replacement Community Facilities” ... there is force in Mr Holgate's submission that, if and when the section 106 agreement in its current form is triggered, then there would be an obligation on Tesco to perform works, legally enforceable by the Council. The matter would legally, then, be out of Tesco's hands. However, Tesco was not ... (and, indeed, is not today) committed to any of the obligations ... Those obligations do not arise unless the planning permission is implemented (i.e. the development is started). That start is conditional on a variety of matters and, in any event, Tesco is not legally committed to start the development at all.”

Midland Co-Op v Birmingham CC

- Hickinbottom J. recognised the freedom of a local authority to choose whether to impose an obligation to provide works or to merely use its regulatory powers [116] –
 - “The advantage, from the Council's point of view, was that the onerous provisions of the procurement provisions would not apply to the sale of the land, and may not apply to any part of the arrangement. The disadvantage is that they lost the imposition of an obligation on the successful bidder to commit themselves to the development obligations. However, these are the different sides of the same coin: both derive from the presence or absence of contractual obligations to perform works.”

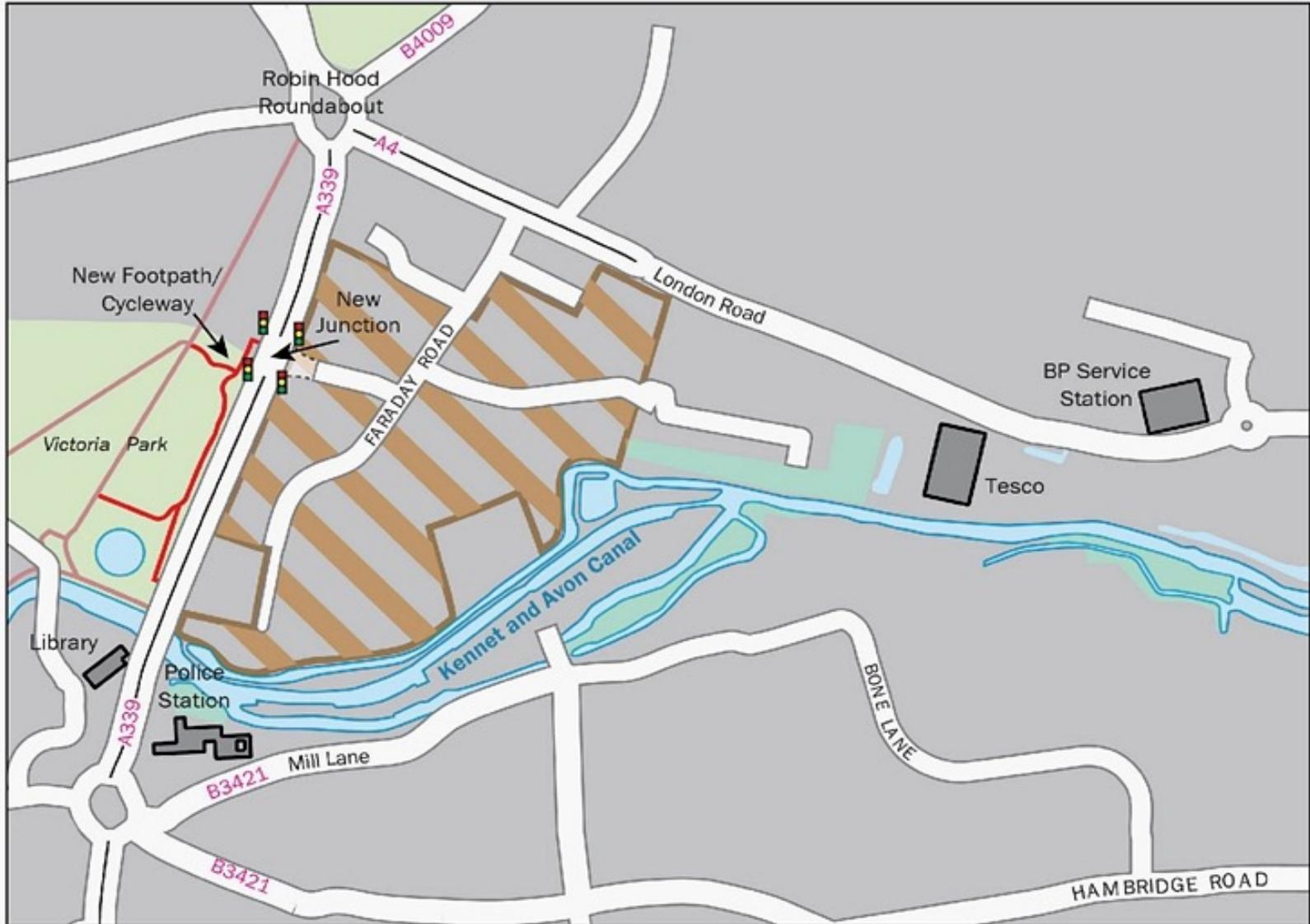
Midland Co-Op v Birmingham CC

- Some confusion in *Faraday* –
 - “39. ... This case was also quite unlike **Midlands Co-operative Society**. The development agreement was a very different sort of arrangement from the sale and purchase agreement between developer and local authority in that case, and the section 106 planning obligation. The court must ask itself whether this was a transaction in which the council entrusted the execution of public works to a developer. It was. The whole purpose of the development agreement was that St Modwen would carry out the works...”
 - “52. ... I would have seen nothing inconsistent with the outcome in Midlands Co-operative Society. The sale and purchase agreement in that case was a very different transaction from the development agreement here. ”
- But in *Müller* there was no agreement– and the planning obligation in **Midlands Co-Op** was an agreement that otherwise fulfilled PWC requirements. St Modwen did not bind itself to undertake the works.

Quidnet

- ***AG Quidnet Hounslow LLP v Hounslow LBC*** [2013] P.T.S.R. 828. Coulson J. was concerned with a development agreement that was deliberately structured so as not to impose an enforceable legal obligation to carry out works. The claimant recognised, as a consequence of ***Müller***, this meant the Directive did not apply, but nonetheless sought to contend that the agreement was subject to an equivalent requirement to conduct some form of transparent award procedure pursuant to EU General Treaty principles. This was rejected underlining the parties' freedom to choose:
 - “42 ... There is no express obligation on the part of L&G to develop the site or provide any services whatsoever. Whilst ... this was the deliberate result of careful drafting, so as to avoid the consequences of the 2006 Regulations, the fact remains that the heads of terms require no services to be provided by L&G. If L&G subsequently find themselves faced with the commercial necessity of developing the site ...then that is a matter for them.”

***R (Faraday Development Ltd) v
West Berkshire Council***
[2018] EWCA Civ 2532



R (Faraday) v West Berkshire: facts

- WBC wished to secure “the comprehensive development ... for the purposes of regeneration and maximising income” of a 10 ha industrial estate in Newbury
- Development agreement (DA) awarded following a lengthy public process from 2011-14, ending in tenders, which made it clear was intended to fall outside the procurement regime
- Complex DA which only imposed obligation on development St Modwen to undertake certain preliminary planning services (held not to be relevant) but no obligation to undertake works until a procedure had been followed with regard to design, planning and viability assessment and, even then, the developer had an option not an obligation. The obligation to undertake works specified by WBC only arose if it drew down the land under the DA.
- Details of the DA are set out in Annex to the CA judgment

R (Faraday) v West Berkshire: High Court

- Holgate J rejected a best consideration challenge under the Local Government Act 1972 and also held that the DA was not a PWC within the 2006 Regulations because the developer decided whether or not to trigger the works obligations
- It was not a public services contract since the services were subordinate to the main purpose of the DA which was the securing of works to regenerate the site
- He rejected any suggestions that an abuse of rights or anti-avoidance policy should apply to the DA
- The VEAT notice issue was not pursued in the High Court (though it was before the Court)

R (Faraday) v West Berkshire: Court of Appeal

- [2018] EWCA Civ 2532 14.11.18. Reversed Holgate J. , held the VEAT notice to be invalid, made a DoI and imposed a token civil penalty. Critical to Lindblom LJ’s view were the following:
 - It was necessary to look at the substance of the contractual arrangements [60]
 - although it was not sufficient to make the agreement a PWC that only WBC had committed itself contractually, and the developer could walk away, nonetheless “once it has drawn down the land, will be bound to develop it in accordance with the development agreement” [50]
 - WBC had done all that it could and “committed itself to procuring the development from St Modwen. The development agreement constitutes a procurement in its result, and a procurement without a lawful procurement procedure... The procurement crystallizes when St Modwen draws down the land.” [61]

R (Faraday) v West Berkshire: Court of Appeal

- Moreover -
- “If the development agreement was not a “public works contract” on the day it was entered into, because St Modwen was not then under an immediately enforceable obligation to carry out development, it will nevertheless become a “public works contract” once the option is exercised, the land is drawn down, and binding obligations, for consideration, are triggered.” [57].
- “it was only at that stage, at the time when the development agreement was being entered into, that the council had to consider whether it was under a duty to conduct a regulated procurement – because otherwise a timely procurement procedure, or any procurement procedure, was going to be impossible. The touchstone, then, is whether, in substance, the agreement in question, at the date it is concluded, provides for a relevant procurement.” [60]

R (Faraday) v West Berkshire: Court of Appeal

- “By entering into the development agreement, therefore, the council effectively agreed to act unlawfully in the future. In effect, it committed itself to acting in breach of the legislative regime for procurement.” [62]
- “The only other possibility would be that a contracting authority is at liberty to construct a sequence of arrangements in a transaction such as this, whose combined effect is to constitute a “public works contract”, without ever having to follow a public procurement procedure. That would defeat the operation of the legislative regime.” [62]
- The authorities required the court “to look at the real substance of the transaction, and to view the several stages of a “multi-stage” process as a whole. In this case that entails not only a first stage, comprised in the development agreement itself, but also a second stage provided for in it, which is initiated when the option is exercised and land is drawn down by the developer...” [63]

R (Faraday) v West Berkshire: Court of Appeal

- “In that second stage the developer’s obligation to execute the works is effective, and the public works performed. Inherent in this two-stage process is a public procurement. The breach of the 2004 Directive and the 2006 regulations occurs when the land is drawn down by St Modwen. At that point the council retains its contractual control over the content of the works, but has no further control over the award of the contract for their execution. Once the option is exercised, the council is obliged to enter into a long lease, and St Modwen is obliged, under both the lease and the development agreement, to bring the works to fruition.” [63]
- Accepted that a contingent obligation did allow the developer to “walk away” without assuming works obligations to the extent that it chose not to exercise the entitlement to draw down land [48].
- In that respect similar to **Midlands Co-Op**? Tesco there could choose not to implement the permission and trigger the obligation

R (Faraday) v West Berkshire: Court of Appeal

- The CA rejected the contention that the approach of WBC was to be struck down because it was a deliberate abuse of rights or on grounds analogous to the UK tax avoidance cases
- “It cannot be said that the underlying purpose of the option provisions in the development agreement, or of the development agreement as a whole, was an unlawful purpose, even if the development agreement itself ought to have been the subject of a procurement process in accordance with the legislative regime. It is perfectly possible in principle for the purpose of the development agreement, namely the development of the land by St Modwen in accordance with the objectives declared in its recitals, to be lawful, but the development agreement itself to be unlawful for the council’s failure to undertake a lawful procurement process.” [68]
- Not suggested St Modwen would go ahead come what may

R (Faraday) v West Berkshire: Court of Appeal

- No discussion of recital (5) though –
 - “It was not unlawful for the council to put in place a contractual relationship with a developer, or with St Modwen in particular, to secure the regeneration of the industrial estate. Nor was it inherently unlawful for the council to seek to achieve, if it could, a lawful contractual relationship with St Modwen, or any other developer, that fell outside the reach of the public procurement regime. It was lawfully entitled to attempt to find such an arrangement, without at any stage intending the arrangement to be unlawful.” [69]
 - This was not a case such as Case C-29/04 *Mödling* [2005] ECR I-9705 - “There is ... no suggestion, of the council having acted at any stage in bad faith, or with any motive to create a mistaken understanding of its objectives in entering into the development agreement or of the “economic and commercial reality” of the transaction” [70]

R (Faraday) v West Berkshire: Court of Appeal

- The CA also rejected the VEAT notice of 14.8.15 on the basis that it did not comply with the requirements in the light of Case C-19/13 **Ministero dell'Interno v Fastweb SpA** [2015] P.T.S.R. 111 focusing on the strictness of the requirements [80] since the notice incorrectly or misleadingly
 - described the DA as an “exempt land transaction” [89] which “was more than mere over-simplification” [89]
 - referred to there being “...“no binding obligation” on St Modwen, even if read as meaning “no immediately enforceable binding obligation”, still leaves too much unclear” [90]
- This was reinforced, by reference to “the council has “not specified the requirements for any works” and “does not exercise a decisive influence (nor indeed any influence) on the type or design of any works”. It may be that neither of those propositions can be said to be inaccurate, as far as it goes. But they do not alert a third party to the real nature of the transaction.”

Where does the Court of Appeal's judgment in *Faraday* leave the freedom “to organise by means other than public contracts within the meaning of this Directive”?

Where does that leave the freedom to organise?

- Recital (5) is fine so far as it goes, but it begs the question of whether the agreement falls within the autonomous meaning of a PWC and in that respect what was meant in **Müller** “is by nature binding at all times and in all circumstances” [AG 78] and **Remondis** “an essential element of that concept is the creation of legally binding reciprocal obligations” [AG 36].
- CA in **Faraday** did not reject the proposition that it was not open to a public authority to choose whether or not to enter into a PWC. It concluded that the choice had to be examined to see if the agreement properly fell outside the PWC regime which it did not
- On this basis, even though an economic party only binds itself to provide the public works specified by the authority if it chooses to do so at a future date, and following the satisfaction of certain conditions, this is sufficient to bring it within the PWC regime

Where does that leave the freedom to organise?

- Where does the judgments leave the distinction between **Midland Co-Op** type of option and the DA option in **Faraday**? Does it turn on the fact one was a planning obligation when in **Müller** decided on the basis of no agreement at all (just the use of regulatory powers) rather than it being a land-use agreement? Should it matter that the option process is formally set down in a DA as opposed to being a simply condition precedent controlled by the economic operator?
- Will any agreement otherwise fulfilling PWC requirements be sufficient if in some form it recognises the developer may at some stage undertake works or is the line drawn if there is a mechanism to allow the developer to choose to undertake the works?
- What about the *in terrorem* provisions in **Flensberg**?
- The line between the WBC DA, and those in the **Midlands Co-Op** and **Flensberg** cases, is a fine one.
- The ability to arrange matters to fall outside the PC regime clearly requires considerable caution.