

COULD AN EXPANDED DEVELOPMENT AGREEMENT BE DECLARED INEFFECTIVE UNDER PROCUREMENT LAW? NOT IF IT'S CONNECTED TO A PRIOR OJEU NOTICE

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Legal Briefings

In [AEW Europe LLP v Basingstoke and Deane BC \[2019\] EWHC 2050 \(TCC\)](#), the High Court refused to grant a declaration of ineffectiveness under the procurement regulations in relation to a contract for redevelopment of a leisure park because the council had published a valid prior OJEU Notice. Although the concluded contract was much broader in scope than the scheme foreseen in the OJEU Notice, the Court accepted that the OJEU Notice had sparked the competition and was closely related to the contract ultimately entered into by the council.

Key points:

- A "mechanistic" test will be applied under the procurement regulations when deciding whether a contract has been awarded without publication of an OJEU Notice.
- This test involves taking a pragmatic and realistic approach in deciding whether to make a declaration of ineffectiveness, bearing in mind the draconian nature of this remedy.

- It is not correct that a declaration of ineffectiveness is only relevant where a contracting authority fails to publish an OJEU Notice at all.
- However, where there is a "reasonably close relationship" between the OJEU Notice and the contract subsequently entered into, no declaration of ineffectiveness will be made, even if the contract varies materially from the description in that notice.

BACKGROUND

Under the Public Contracts Regulations 2015 (the "**PCRs**"), a notice must be published in the Official Journal of the European Union ("**OJEU Notice**") whenever a public authority intends to enter into a contract for the procurement of works, supplies or services. The first ground for making a declaration of ineffectiveness is that a contract has been awarded without prior publication of an OJEU notice. When a declaration of ineffectiveness is made, the contract is considered ineffective prospectively and any remaining obligations are not to be performed.

Basingstoke and Deane Borough Council ("**Basingstoke**") published an OJEU Notice in 2013 seeking bids relating to the regeneration of a leisure park. The only bidder to submit a final bid was Newriver Leisure Ltd ("**NRL**"). Basingstoke and NRL proceeded on the basis of an exclusivity agreement. However, NRL then proposed that a bolder scheme could be developed which would involve a complete regeneration and expansion of the leisure park. A development agreement was then entered into between Basingstoke and NRL in March 2018 (the "**Development Agreement**") on the basis of this proposal.

The Claimants were owners and managers of an existing set of retail investment properties in Basingstoke. They sought, amongst other things, a declaration of ineffectiveness in respect of the Development Agreement. The Claimants asserted that Basingstoke was prohibited from contracting on the basis of any bid that involves any material change from the scope of the works or services described in the OJEU Notice. The Claimants argued that the original OJEU Notice only permitted retail development at the leisure park which was "minor and ancillary" to the construction and operation of a leisure facility and did not permit regeneration and expansion. As a result, they argued that Basingstoke had breached procurement law in that the Development Agreement departed from the contract sought by the tender process to such an extent that it was a materially varied contract which was not the subject of the OJEU Notice and which required a fresh tender process.

Basingstoke argued that there should be no declaration of ineffectiveness because the Development Agreement was advertised and a tender process had ensued, so that the contract was awarded pursuant to the publication of an OJEU notice.

Here, the Technology and Construction Court considered the preliminary issue of whether, assuming the breach of procurement law alleged by the Claimants had taken place, the facts were capable of giving rise to grounds for a declaration of ineffectiveness (the "**Preliminary Issue**").

JUDGMENT

The Court held that the declaration of ineffectiveness was not available to the Claimants, even when making the assumption required by the Preliminary Issue: namely, that the Development Agreement departed from the contract sought by the OJEU notice to such an extent that it was a materially varied contract.

Sir Robert Akenhead stated that the PCRs do not specifically legislate for what is to happen when there is a valid OJEU Notice (as there was here) but the contract which is let nominally pursuant to the procurement process goes beyond what is set out in the OJEU Notice. However, he held that [Alstom Transport v Eurostar International Limited \[2011\] EWHC 1828 \(Ch\)](#), albeit relating to a qualification system under the Utilities Contracts Regulations 2006, was based on the same principles and practice as would be applicable in relation to a tender process for a contract under the PCRs.

Following *Alstom*, the principles to be applied were:

1. there has to be an effective notice which is capable of being related to the procurement procedure and the contract awarded;
2. regard should be had to the fact that the OJEU notice sparked the competition; and
3. the PCRs operate by looking to the existence or absence of an OJEU Notice, which involves the application of a "mechanistic test", which has the benefit of being easier to apply if the remedy is to operate sensibly in a commercial context.

The key reason for using the mechanistic test is pragmatism: the declaration of ineffectiveness is a draconian remedy which brings an end to an otherwise lawful contractual relationship. This case itself was a good example of why it is legitimate to have regard to a realistic approach. The continuing litigation in respect of the leisure park would cost hundreds of thousands of pounds in legal proceedings and cause economic uncertainty as to when the leisure park will start to be redeveloped.

The Court also stated that the "mechanistic test" should involve a broad-brush approach. Basingstoke's argument that a declaration of ineffectiveness is only relevant where a contracting authority fails to make a call for a competition at all is incorrect. The Court gave the example that if Basingstoke had let a contract for 1,000 dwellings on the site, such a contract would go so far beyond the leisure-led scheme covered in the original OJEU Notice that it bore no relation to it at all and a declaration of ineffectiveness could be ordered.

On the facts of the current case, the Court held that there was a sufficient and close connection between the OJEU Notice and the Development Agreement. The OJEU Notice "sparked" the Development Agreement and there was "a reasonably close relationship" between the OJEU Notice and Development Agreement. For instance, it remained the case that the substantial majority of the proposed square footage of the development was devoted to leisure.

COMMENTS

Contracting authorities and their contractors are likely to welcome this judgment, as it limits the circumstances in which a declaration of ineffectiveness may be ordered where there has been a prior OJEU Notice.

There has been heightened concern about the risk of a declaration of ineffectiveness under the procurement rules, since the Court of Appeal issued this remedy for the first time last year in the case of [Faraday Development Ltd v West Berkshire Council \[2018\] EWCA Civ 2532](#). In the *Faraday* case, however, the authority had not published any prior OJEU notice.

The ruling in *Basingstoke* confirms that a declaration of ineffectiveness will not be available where the authority has published a prior OJEU Notice which triggers the competition and which bears a reasonably close relationship to the contract ultimately concluded, even if there is some significant divergence in the detail.

Contracting authorities should nonetheless remain vigilant on this issue. A declaration of ineffectiveness may still be granted if there is a substantial disconnect between the original notice and the eventual contract (for example, because what was described as a leisure-led scheme has become a retail-led scheme). It remains to be seen precisely how far the final contract may diverge from the description in the OJEU Notice before a court will be willing to order a declaration of ineffectiveness. In cases of doubt, it may be prudent for the authority to publish a voluntary *ex ante* transparency (VEAT) notice in the OJEU, describing the changes in question.

KEY CONTACTS

If you have any questions, or would like to know how this might affect your business, phone, or email these key contacts.



**ANDREW
LIDBETTER**
PARTNER, LONDON

+44 20 7466 2066
Andrew.Lidbetter@hsf.com



NUSRAT ZAR
PARTNER, LONDON

+44 20 7466 2465
Nusrat.Zar@hsf.com



ADRIAN BROWN
CONSULTANT,
BRUSSELS

+32 2 518 1822
adrian.brown@hsf.com

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