

Meaning of ‘contracts for pecuniary interest’ (Tax-Fin-Lex d o o v Ministrstvo za notranje zadeve)

Public Law analysis: Tax-Fin-Lex d o o (TFL), a Slovenian company, tendered for a public contract concerning access to a legal information system. It tendered a price of €0. It did so on the basis that winning the contract would potentially open up new markets for it. In a preliminary ruling, the Court of Justice decided that a contract for no identifiable, financial consideration did not fall within the definition of a contract ‘for pecuniary interest’ within the meaning of Article 2(1)(5) of the Public Contracts Directive. Written by Jonathan Lewis, barrister, at Henderson Chambers.

Tax-Fin-Lex d o o v Ministrstvo za notranje zadeve, Case [C-367/19](#)

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What are the practical implications of this case?

While this decision of the Court of Justice (Fourth Chamber) was made in the context of Slovenian public procurement rules, it has some relevance for UK practitioners. This is because the definition of ‘public contracts’ in [Article 2\(1\)\(5\)](#) of the Directive 2014/24/EU (the Public Contracts Directive) is almost identical to that found in the implementing Public Contracts Regulations 2015 (PCR 2015), [SI 2015/102, reg 2\(1\)](#). Domestic courts might therefore be inclined to find that, unless there is some form of identifiable, financial benefit conferred by a contracting authority on an economic operator in return for its services, there will not be a public contract within the meaning of PCR 2015, [SI 2015/102](#).

What was the background?

In June 2018, the Slovenian Ministry of the Interior (the Ministry) published a contract notice, divided into two lots, for the award of a public contract concerning access to a legal information system for a period of 24 months. The estimated value of the contract was €39,959.01 (being below the threshold of [Article 4](#) of the Directive 2014/24/EU). The Ministry received two tenders for the first lot in the time period prescribed. TFL’s tender proposed a price of €0. In January 2019, TFL was informed that its tender had been rejected on the ground that its price was contrary to the rules on public procurement and that the contract had been awarded to the second tenderer. TFL challenged that decision.

Given that Slovenian law’s definition of public contract largely mirrored that of the Public Contracts Directive, even though the latter did not apply as the threshold had not been met, the domestic court referred a question to the Court of Justice as to whether a contract may be classified as a ‘contract for pecuniary interest’ within the meaning of Article 2(1)(5) of the Public Contracts Directive, where ‘the contracting authority is not obliged to provide any consideration to the other party to the contract but where the latter, by reason of the contract, obtains access to a new market or to new users and therefore to references, which may constitute a future economic benefit for it’ (at para [15]).

The key issue was therefore whether:

‘...the sole fact that receiving the public contract is itself of economic value to the economic operator, even if it is not possible to express that value in monetary terms at the time the contract is awarded or concluded, may be sufficient for the contract to be characterised as a contract for pecuniary interest....’

What did the court decide?

Article 2(1)(5) of the Public Contracts Directive defines ‘public contracts’ as ‘contracts for pecuniary interest concluded in writing between one or more economic operators and one or more contracting authorities and having as their object the execution of works, the supply of products or the provision of services.’ Article 4 of the Public Contracts Directive sets out the financial threshold amounts.

The court held that, according to EU caselaw, the usual legal meaning of ‘for pecuniary interest’ designates a contract under which each of the parties undertakes to provide one form of consideration in exchange for another (relying upon *IBA Molecular Italy*, Case [C-606/17](#) (at para [28])). It therefore held that the ‘synallagmatic’ nature of the contract is an ‘essential element of a public contract’ (at

para [25], relying upon *Remondis*, Case [C-51/15](#) (at para [43]), *Informatikgesellschaft für Software-Entwicklung*, Case [C-796/18](#) (at para [40]) and *Porin kaupunki*, Case [C-328/19](#) (at para [47])).

The court further reasoned that, even if the consideration provided need not necessarily consist of the payment of a sum of money, so that the supply of the service is compensated for by other forms of consideration, such as reimbursement of the expenditure incurred in providing the agreed service, ‘the fact remains that the reciprocal nature of a public contract necessarily results in the creation of legally binding obligations on both parties to the contract, the performance of which must be legally enforceable’ (at [60], relying upon *Helmut Müller*, Case [C-451/08](#)). Hence, the court concluded that a contract under which a contracting authority is not legally obliged to provide any consideration in return for that which the other party to the contract has undertaken to provide does not fall within the concept of ‘contract for pecuniary interest’ (at para [27]).

The court noted that in all public procurement procedures, the award of the contract could be of economic value to the tenderer in that it would open up access to a new market or enable the tenderer to receive references and held that that fact is too uncertain and is therefore insufficient to characterise the contract as a contract for pecuniary interest (at [28]).

However, Article 2(1)(5) of the Public Contracts Directive defines the concept of ‘public contracts’ merely for the purposes of specifying when the Public Contracts Directive applies (at para [29]). Hence, if a procurement was not covered by the Public Contracts Directive (because it fell below the relevant financial threshold), Article 2(1)(5) of the Public Contracts Directive cannot constitute a legal basis capable of justifying the rejection of a tender which proposes a price of €0—that provision does not permit the automatic rejection of a tender submitted where an economic operator offers to supply a contracting authority with the works, supplies or services which that authority wishes to purchase, without seeking consideration (at para [30]).

Case details

- Court: Court of Justice (Fourth Chamber)
- Judges: M Vilaras, S Rodin, D Šváby, K Jürimäe and N Piçarra
- Date of judgment: 10 September 2020

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