



Deloitte Legal Newsflash

Public law, Regulatory & Permits Team

CJEU rules on lease by public authorities of office buildings before construction

On 22 April 2021, the Court of Justice of the European Union (CJEU) rendered a noteworthy judgment related to public procurement. The CJUE analysed in particular the question as to whether the lease of a building before construction by a public authority constitutes a public works contract.

The acquisition or the lease of existing buildings is, in principle, excluded from the scope of public procurement legislation. However, a discussion has been going on these past few years concerning the concept of "existing buildings", particularly in the context of the lease by public authorities of buildings before they are built. The question arose as to whether this type of transaction falls outside the scope of public procurement law or whether it should be regarded as a public works contract on the grounds that it relates to the construction of a building based on requirements set by the contracting authority which, therefore, has a decisive influence on its design. For example, in 2018, the Belgian Council of State requalified the Brussels-Capital Region's lease of the Silver Tower as a public procurement contract. The Council of State considered that the Region's influence had been decisive in the design of the building, even though the building to be built was a « standard » office building that could meet the needs of both public and private renters and even though the Region had clearly indicated in its market consultation that the building could be an existing building or a project for which a definitive permit had been obtained.

With its recent judgement, the CJEU softens exception boundaries relating to such transactions giving contracting authorities more flexibility.

Facts of the case and CJEU reasoning

In 2012, the city of Vienna concluded a long-term lease agreement for an office building that had not yet been built without launching a competitive tender or a tender notice. The European Commission then launched an infringement procedure against Austria, in which the Commission considered that this transaction constituted a public works contract.

In its judgment, the CJEU clarifies the exceptions to the application of public procurement rules to the acquisition and lease by public entities of buildings yet to be built. More specifically, the CJEU considers that public procurement rules do not apply to these transactions, provided that (1) the public authority does not exercise any decisive influence on the architectural structure of the building, such as its size, its external walls and load-bearing walls, and provided that (2) the public authority limits itself to making requests relating to the interior fittings, which are neither too specific nor too extensive - in other words, requests that do not go beyond what a lessee or a purchaser might normally ask of a conventional office building.

The CJEU also identifies some elements that may or may not lead to the requalification of such transactions as a public works contracts, such as the fact that, at the time of the negotiations for the conclusion of the lease contract, the architectural design of the building is fully completed or not. The CJEU also considers that the absence of a building permit at the time of the conclusion of the lease contract is not necessarily an indication for requalifying the lease as a public works contract since large-scale architectural projects are often leased out long before the detailed construction plans are finalised. It is interesting to note that the CJEU does not turn a blind eye on the common practice that such large-scale real estate projects are not constructed purely at risk.

Even if the CJEU did not rule on the general principles of European law – such as transparency, equality and competition principles – which require the organisation of a competitive tender procedure even for contracts that are not considered as public procurement contracts, the Court provides contracting authorities with more flexibility through its judgment and reasoning. It will also be important to closely monitor how national courts will apply this new case law in the future.

Contacts

If you have any questions concerning the items in this newsflash, please get in touch with your usual Deloitte Legal - *Lawyers* contact at our office in Belgium or:

- Kathleen De hornois, kdehornois@deloitte.com, +32 2 800 70 60
- Wim Naudts, wnaudts@deloitte.com, +32 2 800 70 92
- Laura Legardien, llegardien@deloitte.com, +32 2 800 71 15
- Claire Devillez, cdevillez@deloitte.com, +32 2 800 71 74

For general inquiries, please contact:
bedeloittelegal@deloitte.com, +32 2 800 70 00

Be sure to visit us at our website: <http://www.deloittelegal.be>

Legal - Lawyers collaborates closely with other professions (e.g. tax, financial advisory, accountancy, consulting), and with a select group of law firms all over the world.

Deloitte Legal - *Lawyers* provides thorough and practical solutions tailored to the needs of clients ranging from multinational companies, national large and medium-sized enterprises, financial institutions, government bodies to private clients.

More information: www.deloittelegal.be

© 2021, Deloitte Legal – *Lawyers* - The content and layout of this communication are the copyright of Deloitte Legal – *Lawyers* or its contributors, and are protected under copyright and other relevant and intellectual property rights laws and regulations. No reproduction in any form or through any medium is allowed without the explicit consent of Deloitte Legal – *Lawyers* or its contributors.

[Subscribe](#) | [Unsubscribe](#)