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1 & 2 Raymond Buildings, Gray's Inn, London, WC1R 5NR

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Case C-406/08 Uniplex

Ewan West

February 2010

Introduction

On 28 January 2010 the European Court of Justice handed down its long-awaited judgment in Case C-406/08 *Uniplex (UK) Ltd v NHS Business Services Authority*. The judgment is likely to have profound implications not just for challenges brought under the Public Contracts Regulations 2006 ("the 2006 Regulations") but also for applications for judicial review, both in relation to alleged breach of obligations arising under Community law and otherwise.

The reference from the Queen's Bench Division of the High Court arose out of a challenge by Uniplex (UK) Ltd ("Uniplex"), the sole distributor of the relevant products in the United Kingdom for Gelita Medical BV, to a procurement for the supply of haemostats conducted under the restricted procedure by the NHS Business Services Authority. Uniplex was informed on 22 November 2007 that it was not one of the three tenderers to whom the NHS Business Services Authority proposed to admit to a framework agreement.

The next day, Uniplex requested a debrief. On 13 December 2007, the NHS Business Services Authority replied providing details of its approach to the evaluation of the award criteria as to characteristics and relative advantages of the successful tenderers. As part of the information supplied by the NHS Business Services Authority, Uniplex was told that it had been given a score of zero for price and other costs effectiveness factors because it had submitted list prices as part of its bid whereas other tenderers had offered discounts on their list prices. Uniplex was also informed that with respect to the delivery performance and capability criterion, it had received a score of zero for the sub-criterion relating to customer base in the United Kingdom.

On 28 January 2008, Uniplex sent a letter before action to the NHS Business Services Authority alleging a number of breaches of the 2006 Regulations. In that letter, Uniplex claimed that time for the bringing of proceedings did not begin to run until 13 December 2007.

On 13 February 2008, the NHS Business Services Authority replied to Uniplex's letter before action denying the alleged breaches. It also informed Uniplex that one of the originally successful tenderers had been found to have submitted a non-compliant bid and had been replaced on the framework agreement by another tenderer. In that letter the NHS Business Services Authority also claimed that, for the purposes of Regulation 47(7)(b) of the 2006

Regulations governing the time limits within which a challenge had to be brought to a procurement conducted under the Regulations, time had began to run not from the date when Uniplex had been provided with details of the characteristics and relative advantages of the successful tenderers, i.e. 13 December 2007, but from the date when Uniplex had been informed that it was not to be included on the framework agreement for the supply of haemostats, i.e. 22 November 2007.

Regulation 47(7)(a) Public Contracts Regulation 2006

Regulation 47(7)(b) of the Public Contracts Regulations 2006 provides that proceedings under the Regulations must be brought promptly and in any event within three months from the date when grounds for bringing them first arose unless the Court considers there is a good reason to extend that period. *may be brought.*" These provisions substantially reflect those of r.54.5 CPR in relation to applications for judicial review.

The practical difficulties to which Regulation 47(7)(b) gives rise are readily apparent. If the *"grounds for bringing proceedings"* are said to arise when the contracting authority breaches (or is alleged to have breached) a provision of the 2006 Regulations, it might well be the case (particularly in complex or drawn-out procurements) that grounds for challenge arise without a tenderer being aware of them until after the three-month longstop has expired. In those circumstances, a challenge can only be brought if the Court exercises its discretion to extend the longstop date, a risk that some potential challengers may not be willing to run.

Similarly, while the requirement to act *"promptly"* has obvious commercial and practical justification as far as the contracting authority is concerned, it creates considerable uncertainty for a potential challenger. Even if a challenge is brought within the three-month longstop, it might be still be found by the Court to be time-barred if the challenger is deemed not to have acted with sufficient promptness.

Given these uncertainties, to which they give rise, it is not surprising that the provisions of Regulation 47(7)(b) have been the subject of a reference to the European Court of Justice. Indeed, the only surprise is that it has taken so long for a reference to be made in relation to such an important element of the domestic procurement regime.

Questions referred

The referring High Court asked the ECJ to consider two questions relating to the compatibility of the provisions of Regulation 47(7)(b) with Articles 1 and 2 of the Directive 89/665/EC as well as Community law principles of equivalence, equal protection and/or effectiveness.

First question

By its first question, the High Court was seeking to ascertain the date from which time should be taken to run for the purposes of a procurement conducted under domestic law implementing the provisions of Directive 2004/18/EC on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts.

In view of the difficulties alluded to earlier, the suggestion that knowledge should be the appropriate trigger, rather than date of breach, was an understandable suggestion upon which the ECJ seized. Referring to its earlier case-law, the ECJ confirmed that the detailed national procedural rules governing remedies that were intended to protect rights conferred on candidates and tenderers must not compromise the effectiveness of Directive 89/665 (the Remedies Directive). The fact that a candidate or tenderer might know that its application or tender had been rejected would not put it in a position effectively to bring a claim, as it would not have sufficient information to establish whether there were any grounds for commencing proceedings.

As explained at paragraph 31 of the judgment, in the ECJ's opinion it would only be once a candidate or tenderer had been informed of the reasons for its elimination from the procurement that it could come to an "*informed view*" as to whether there had been any infringement and thus whether it would be appropriate to bring proceedings. Accordingly, at paragraph 32 of its judgment the ECJ confirmed that the objective of Article 1 of Directive 89/665 would only be fulfilled if the period within which proceedings should be commenced ran from the date "*on which the claimant knew, or ought to have known, of the alleged infringement*".

In reaching this conclusion, the ECJ also found support from the fact that Articles 42(1) and (2) of Directive 2004/18 require contracting authorities to notify unsuccessful candidates and tenderers of the reasons for the decision relating to them, stating that such provisions are consistent with a system of limitation periods under which time runs from when a claimant knew or ought to have known of the alleged infringement. Likewise, the ECJ considered such a conclusion would be consistent with Directive 2007/66/EC, the amended Remedies Directive, even though that legislation was not yet in force at the material time.

Second question

The first part of the second question asked whether a requirement that proceedings be brought "*promptly*" was consistent with the protections of Directive 89/665.

Here, the ECJ confirmed its earlier case-law that, in order to achieve an effective review of decisions that is as swift as possible as required by Article 1(1) of Directive 89/665, Member States may impose limitation periods for actions requiring tenderers to challenge promptly preliminary measures or interim decisions in public procurements.

However, that objective of rapidity must be implemented alongside compliance with requirements imposed by the need for legal certainty and the principle of effectiveness. The limitation periods set down in national law must not render impossible or excessively difficult the exercise of Community law rights.

Referring to the Opinion of Advocate-General Kokott, the ECJ held that a limitation period whose duration lay in the discretion of the national court was not predictable as to its effects and did not therefore effectively transpose Directive 89/665. A provision requiring proceedings to be brought "*promptly*" failing which they might be dismissed, was therefore precluded.

The second part of the second question sought clarity on the circumstances under which the national court might exercise its discretion to extend the limitation period. The ECJ held that it is for the national court to interpret domestic provisions for limitation periods in a way which will accord with the objective of Directive 89/665. Thus, the national court must, as far as is at all possible, interpret the national limitation provisions in such a way as to ensure that time did not begin to run until the claimant knew, or ought to have known, of the infringement. Should it not be possible to interpret the provisions in this way, the national court would be obliged to extend the time period provided for in domestic legislation so as to run from the date upon which the claimant knew, or ought to have known of the infringement.

Comment

It is in many respects unsurprising that the ECJ has now outlawed the requirement that proceedings in procurement actions be brought "*promptly*". Such a provision is difficult to interpret objectively and consistently and puts many challengers, however speedily they act, at the risk of being time-barred.

However, the requirement that time should run from when a candidate or tenderer "*knew or ought to have known*" of the alleged breach of the Regulations raises a new set of problems, particularly when allied to the existing limitation period of three months. While actual

knowledge may be capable of being established relatively easily, particularly if the contracting authority acts transparently, the concept of constructive knowledge is more difficult to apply. On what basis must it be demonstrated that the potential challenger *"ought to have known"* of the alleged infringement? There are many factors that may be relevant in this regard, including for example the previous practices of the contracting authority, the experience of the tenderer in similar procurements, the extent to which opportunities for clarification were not pursued during the procurement process, and any opportunities for bidder briefings that may not have been taken up.

Furthermore, the need for knowledge, whether actual or constructive, does not completely align with ECJ's observation at paragraph 31 of the judgment that *"It is only once a concerned candidate or tenderer has been informed of the reasons for its elimination from the public procurement procedure that it may come to an informed view as to whether there has been an infringement of the applicable provisions and as to the appropriateness of bringing proceedings."* Quite apart from the question of how informed an *"informed view"* needs to be for these purposes, the focus upon *"elimination"* suggests that even where a tenderer knows that a breach of the Regulations has been committed, it may wait until the breach results in that tenderer's actual elimination from the procurement.

What seems almost certain is that the Regulations will need to be amended in due course. Although it is possible, just, to interpret them in such a way as to be consistent with the ECJ's judgment, it would obviously be preferable to find more harmonious wording. Such legislative amendment would, of course, provide an opportunity to re-consider whether the limitation period itself should remain unchanged or whether, in the light of the ECJ's judgment, a different period may be appropriate. Finally, given the close similarity between the provisions of Regulation 47(7)(b) and CPR51.4, there are obvious implications beyond the field of challenges under the Regulations to any judicial review proceedings involving potential breach of Community law obligations or more generally.

Kassie Smith appeared for the UK in the European Court of Justice

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