MONCKTON CHAMBERS

Procurement Futures: what lies ahead for procurement law? What will be the effects on future plans and challenges?

Speakers:

Ewan West

Ben Rayment

Michael Bowsher QC

George Peretz QC

Thomas Sebastian

Azeem Suterwalla

Litigating in the post-Referendum world

Ewan West and Ben Rayment
Barristers
Monckton Chambers

Procurement Law in the EEA: How, if at all, is EEA Procurement Law different from that in the EU?

Michael Bowsher QC
Barrister
Monckton Chambers

Brexit means Brexit

- Is the EEA Brexit?
  - Superficially yes,…
  - But was Free Movement of Persons/Workers on the ballot paper?

Substantive Public Procurement Law in the EEA

- EEA Agreement incorporates the elements of Single Market Law
- EU legislation incorporated into EEA law by being added to the relevant annex for each subject
- Annex XVI deals with Procurement
- By Decision of the EEA Joint Committee of 29 April 2016 all the current substantive and procedural Directives are now EEA law and must be implemented by EEA states
    - Some points of detail arise on transfer but essentially direct transfer

MONCKTON CHAMBERS

Sectoral Adaptations

- For the purposes of applying the directives there shall be free access for employees of contractors who have been awarded public works contracts, and access to work permits (given current state of EEA free movement law, may add nothing)
- Issues as to language of OJEU Notices (no EFTA language permitted)

Principles

- The Principles of Procurement Law are already in the Directives
- The principle of homogeneity derived ultimately from Article 1 of the EEA (and elsewhere in EEA):
  - *"The aim of this Agreement of association is to promote a continuous and balanced strengthening of trade and economic relations between the Contracting Authorities with equal conditions of competition, and the respect of the same rules, with a view to creating a homogeneous European Economic Area, hereinafter referred to as the EEA"*

Recent Decisions of the EFTA Court

- E-24/13, *Casino Admiral AG v Egger*
  - Application of *Telaustria* principles
  - Application of principle of effectiveness outside field of directives
- E-1/13, *Míla v EFTA Surveillance Authority*
  - Application of State Aid rules in tender
- E-9/14, *Otto Kaufmann AG*
  - Obligation on Member States to provide relevant information regarding criminal convictions relevant to competence and reliability of legal persons

Practical or Procedural Differences

- Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice (SCA) provides for enforcement procedures
  - EFTA Surveillance Authority is obliged under Article 37 SCA to take action with respect to infringement of EEA or legislation
  - But not enforceable by private party – E-2/13 *Bentzen Transport*
- And national remedies under the existing directives may be little different
  - But the EFTA court may be better able to deal with a preliminary reference promptly

So not much real change?

- As a price of access to the single market
- No real change in substance for now: but less control over the content of the legislation in future
- And potential for more enforcement by “unelected” foreigners!

Michael Bowsher QC

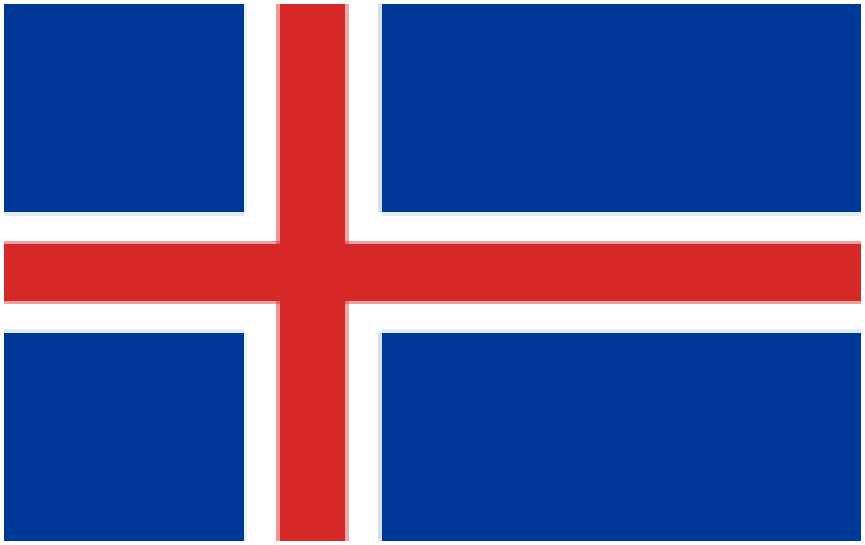
mbowsher@monckton.com

State aid post-Brexit

George Peretz QC
Barrister
Monckton Chambers

Brexit

The Iceland option



Article 61 EEA Agreement

61. Save as otherwise provided in this Agreement, any aid granted by EC Member States, EFTA States or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Contracting Parties, be incompatible with the functioning of this Agreement.

Clearance/enforcement

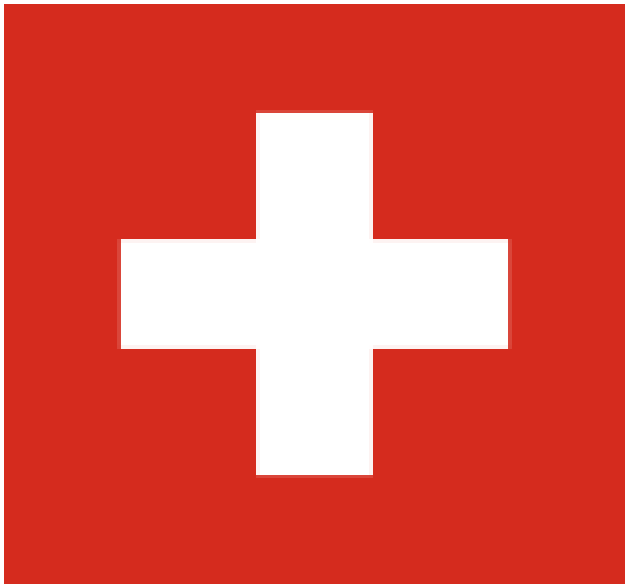
- Same as EU
  - See Article 62 EEA, Articles 5 and 24 of and Protocol 3 to Surveillance and Court Agreement
- EFTA Surveillance Authority = Commission
- EFTA Court = ECJ/General Court
- But fish products excluded

The Turkey Option

Turkey Accession Partnership Agreement

- Turkey required to set up internal State aid regime with enforcement mechanism
- Progress disappointing
- Similar provisions in Accession Partnership Agreements with Montenegro, Albania, Bosnia and Herzegovina, FYROM, and Serbia.

The Switzerland option



The Swiss “option”

- 1972 FTA – Art 23(1)(iii)
  - Vague provision
  - No enforcement mechanism
- 1999 Air Transport Agreement
  - Art 13 = Art 107 TFEU
  - But weak enforcement
- Is this an available option?

State aid – the future?

George Peretz QC

gperetz@monckton.com

Post-Brexit Procurement Law: Will the WTO regime apply?

Thomas Sebastian
Barrister
Monckton Chambers

Two Questions

(1) Will the UK be bound by the WTO Agreement on Government Procurement post-Brexit (the "**GPA**")?

(2) Is the WTO GPA materially different from existing EU procurement law?

Question 1: GPA and the UK

In broad terms, two different views about the UK's general WTO Membership

(1) Accession: The UK loses its WTO Membership post-Brexit and has to accede to the WTO afresh. This implies that 161 WTO Members have to agree before the UK can assume its place within the WTO

(2) Schedule modification: The UK remains a WTO Member but has to enter into discrete negotiations about the scope of its schedules. Even if those negotiations fail the UK could proceed to unilaterally modify "its" schedules.

Question 1(cont'd): GPA and the UK

In either case, the UK is likely to be in the WTO and the UK is likely to be bound by the GPA.

However, there may be issues of timing. If UK is subject to an accession negotiation then there may be a gap between when it leaves the EU and when it joins the WTO.

Question 2: GPA and EU law

The GPA has been amended (2012 Revised Agreement entered into force in 2014).

The Revised GPA and the existing EU law of public procurement are broadly similar. Indeed, the Revised GPA was modelled on EU law. Both contain transparency and non-discrimination requirements.

There are differences. For instance: (1) coverage (defence); (2) the absence of detailed criteria for the evaluation of bids under the GPA; and (3) weaker requirements on challenge procedures and remedies.

Thomas Sebastian

tsebastian@monckton.com

Post-Brexit Procurement Law: Does public law fill the gap?

Azeem Suterwalla
Barrister
Monckton Chambers

The Doomsday Scenario

(1) The Public Contracts Regulations 2015 are repealed

(2) No substitute legislation is put in place.

Does public law fill the gap?

The Headline Answer

- The case-law is mixed but there are glimmers of hope.

- Public-law *may* fill the gap but it will first require creative thinking and development of case-law by the Courts, in order to establish key principles.

Domestic-related case-law

- *R v Lord Chancellor's Deparment, ex p Hibbit and Sanders* 1993 (Divisional Court, Rose LJ and Waller J). A claim for judicial review against the award of a contract for the reporting of court proceedings. The Court held that the decision lacked a "sufficient public law element".

- *R v Legal Aid Board Ex p. Donn* [1994] All ER 1. By contrast, the Court found a contract award was amenable to judicial review. The award of the contract was in the vital "public interest".

Domestic-related case law (2)

- *Mass Energy Ltd v Birmingham City Council* [1994] Env. LR 298. A claim concerning tenders for a waste disposal contract under the Environmental Protection Act 1990. In the COA Glidewell J founds that where a council was acting pursuant to statutory powers this may supply the necessary public law element.

- *Cookson and Clegg v MoD* [2005] EWCA Civ 811 – a misunderstood decision of COA (Buxton LJ), with public law led - in the procurement context - down the wrong path?

Domestic-related case law (3)

- *Menai Collect Ltd v Department for Constitutional Affairs* [2006] EWHC 724 (Admin). McCombe J surveys the previous authorities and gives a restrictive answer to the role of public law in public procurement.

- *Newlyn PLC v LB Waltham Forest* [2016] EWHC 771 (TCC). Decision of Coulson J. Is it the last word on public law in the procurement context?

The Privy Council

- *The Central Tenders Board v White (Montserrat)* [2015] UKPC 39. There is a *"general principle of public law that tenderers for public contracts should be afforded fair and equal treatment."*

Summary

- If there is statutory underpinning, it may be possible to argue all of the traditional grounds for JR where a decision to award a contract in a particular manner is taken.

- If there is no statutory underpinning, the case-law suggests that you are limited to arguing bad faith, fraud and corruption. But that (restrictive) principle is ripe for reconsideration.

Azeem Suterwalla

asuterwalla@monckton.com

What can the EU do to force open procurement markets – or force procurement law on everyone else!

Michael Bowsher QC
Barrister
Monckton Chambers

No More OJEU

- The week after: “why are my lawyers still telling me I have to fill in OJEU Notices?”
- Abolition of all procurement legislation
  - Is now the time for another reform of the NHS? Why not – we’ve got all that money to spend!
  - What would NAO, amongst others, say?
  - And what if we still want to benefit from, say, EIB loans?
- Or just put in very minimal WTO commitments
- Or maximise flexibility inherent in GPA
  - In procedures or criteria
  - Or limit remedies, such as damages
    - How might the EU react?

Trade in Utilities Procurement

- Provisions on relations with third countries in the context of utilities' procurement carried over from Directive 2004/17
- Now in Articles 85 and 86 of Directive 2014/25

Products

- Article 85 of Directive 2014/25 covers products from third countries with which EU has no agreement ensuring access to the markets of those countries
  - Tenders with more than 50% value from such third countries may be rejected
  - Where two or more tenders are equivalent in light of the contract award criteria (?) preference shall be given to those which may not be rejected as above. Prices shall be considered equivalent if the price difference does not exceed 3%
  - Various savings regarding technical issues

Article 86
Relations with Third Countries

- In short, the Commission can chase third countries to open up their procurement markets (only in utilities?)
- And propose an implementing measure regarding the award of certain service contracts
- Has this ever been used?

New tools to open up procurement markets

- 2012 Commission proposal for a Regulation of the European Parliament and of the Council on the access of third-country goods and services to the Union (the International Procurement Instrument)
- The Council “has not been able to arrive at a formal position on the Commission proposal”
  - Blocked by UK led minority

2016 Proposal

- Amended proposal for a Regulation of the European Parliament and of the Council on the access of third-country goods and services to the Union's internal market in public procurement and procedures supporting negotiations on access of Union goods and services to the public procurement markets of third countries (COM (2016) 34 final)
- A tool designed for an exiting UK

Strong Support from Commissioners

"..we want EU companies to be able to tap into this market outside the EU just as companies from outside the EU are able to benefit from our market. What we are doing today will open doors for our businesses and allow them to compete on an equal footing."

Application

- To the full scope of the 2014 Directives (including all concessions, save for water)
- Applies to “non-covered goods and services”
  - *“goods or services originating in a country with which the Union has not concluded an international agreement in the field of public procurement or concessions including market access commitments, as well as goods or services originating in a country with which the Union has concluded such an agreement but in respect of which the relevant agreement does not apply.”*
    - so where there is no agreed access, or not in commitments under GPA (or other agreement)

Centralised Investigation

- Commission investigates alleged “restrictive and/or discriminatory measures or practices”
  - *“Any legislative, regulatory or administrative measure, procedure or practice, or combination thereof, adopted or maintained by public authorities or individual contracting authorities or contracting entities in a third country, that result in a serious or recurrent impairment of access of Union goods, services and/or economic operators to the public procurement or concession market of that country”*
- Would lack of obligation to advertise be such a practice? How to challenge?

Procedures

- Proposed Regulation contemplates advertising the process
- And then inviting the country into consultations if the measures or practices are found
- If invitation declined – “appropriate action”
- Backsliding – “appropriate action”
- Consultations may be terminated
  - if the country accedes to GPA, concludes a bilateral agreement or expands market access commitments under either as appropriate
  - appropriate phasing out measures

Appropriate Action - Retaliation

- Price Adjustment Measures
- Nothing to do with actual price
- In carrying out the best price-quality ratio calculation the price is uplifted by the amount specified by the Commission which may be up to 20%

Scope of Retaliation

- Commission fixes level of adjustment
- Which EU/Member State authorities shall apply it
- Which contracts to apply it to
- It shall not apply to SMEs engaged in substantive business operations entailing a direct and effective link with the economy of at least one Member State (but if a SME will you qualify to bid anyway?)
- And only to contracts worth more than 5m euros

Will it happen?

- Why not?

Michael Bowsher QC

mbowsher@monckton.com


MONCKTON
CHAMBERS