



# **EU Developments – Brexit and Public Procurement & Recent Procurement Cases in Luxembourg**

**Chair:** Michael Bowsher QC

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Philip Moser QC

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Rob Williams QC

# Public Procurement and the Future Relationship: *Quo Vadis?*

Philip Moser QC

Monckton Chambers

7<sup>th</sup> May 2020

# UK Procurement Law 2020

- Public Contracts Regulations 2015
- Utilities Contracts Regulations 2016
- Contracts Regulations 2016
- Defence and Security Public Contracts Regulations 2011

# UK to have procurement law after Brexit

'Base position' – "Brexit on WTO terms" – GPA –  WORLD TRADE ORGANIZATION

- WTO's Government Procurement Agreement (GPA)
- "UK set to become a party to the Government Procurement Agreement in its own right" upon end of transition period:  
[https://www.wto.org/english/news\\_e/news19\\_e/gpro\\_27feb19\\_e.htm](https://www.wto.org/english/news_e/news19_e/gpro_27feb19_e.htm)
- UK to all intents and purposes already treated as a party to GPA
- Provides *inter alia* for
  - publication of a notice of procurement
  - rules requiring "open, fair and transparent conditions of competition"
  - "a timely, effective, transparent and non-discriminatory administrative or judicial review procedure"

# Article 50 Agreement and Declaration

- Withdrawal Agreement has its own Title on Procurement during transition: Title IX
- Ditto the Political Declaration: Part VIII (emphases supplied)

## VIII. PUBLIC PROCUREMENT

46. Noting the United Kingdom's intention to accede to the WTO Government Procurement Agreement (GPA), the Parties should provide for mutual opportunities in the Parties' respective public procurement markets *beyond their commitments under the GPA* in areas of mutual interest, without prejudice to their domestic rules to protect their essential security interests.

47. The Parties should also commit to standards based on those of the GPA ensuring transparency of market opportunities, public procurement rules, procedures and practices. *Building on these standards*, the Parties should address the risk of arbitrary behaviour when awarding contracts, and make available remedies and review procedures, including before judicial authorities.

# UK-EU FTA Negotiations

- UK Mandate: Procurement is not included in the mandate. (UK policy: to develop a separate and independent policy for public procurement.)
- EU Mandate: Includes procurement. The EU wants to negotiate an agreement that goes beyond the GPA, e.g. to include other sectors such as utilities, but *de facto* would like to aim for something close to the existing law.
- Desired scope of FTA: The EU wants the final deal to cover public procurement; the UK does not.
- Current position in the negotiations: far apart



# UK Objectives

A formal written statement to the House of Commons by the Prime Minister on 3 February 2020 set out in broad terms what the UK is seeking in the future relationship:

*“The Government wishes to see a future relationship based on friendly cooperation between sovereign equals for the benefit of all our peoples....”*

[comprising of (a) things that need formal agreement in the FTA, and (b) things that do not. Things that do not include (emphasis supplied):]

*“Future cooperation in other areas does not need to be managed through an international Treaty, still less through shared institutions. The UK will in future develop separate and independent policies in areas such as (but not limited to) the points-based immigration system, competition and subsidy policy, the environment, social policy, **procurement**, and data protection, maintaining high standards as we do so. Cooperation on foreign affairs and related issues is of course likely to be substantial, but does not in itself require a joint institutional framework.”*



# EU Objectives

- The EU seeks to go beyond the commitments on public procurement in the WTO GPA (Mandate, paragraphs 51-52; draft Articles)
- The EU aims to negotiate access to wider procurement markets, incl. e.g. at all levels of government; to include the utilities sector; continued commitments on transparency of market opportunities, sustainability, regulations and procedures.



# ...Meanwhile across the pond:

- Formal negotiations launched 5<sup>th</sup> May 2020
- UK policy: to “seek new and more secure access to the US procurement market, based on clear and enforceable rules, that will allow more UK firms to bid for US Government contracts *at all levels of Government*” and to “Secure access that *goes beyond the level set in the [GPA]*”
- Full case: DIT publication: “UK-US Free Trade Agreement”, p.21

# Stop Press: A vital national interest

- S.13A European Union (Withdrawal) Act 2018: if the European Scrutiny Committee considers that EU legislation (*in casu* the Council Decision establishing the EU's mandate) “*raises a matter of vital national interest*” it can require a HoC debate and vote within 14 sitting days
- 6<sup>th</sup> May 2020: ESC identified a “*vital national interest*”, noting lack of transparency around the UK divergence from the Political Declaration:  
<https://www.parliament.uk/business/committees/committees-a-z/commons-select/european-scrutiny-committee/news-parliament-2017/negotiations-with-eu-report-published-19-21/>
- ESC report is at:  
[https://publications.parliament.uk/pa/cm5801/cmselect/cmeuleg/333/33304.htm#\\_idTextAnchor001](https://publications.parliament.uk/pa/cm5801/cmselect/cmeuleg/333/33304.htm#_idTextAnchor001)
- Annexed summary of select committee responses: under “*Public procurement and State Aid*” (Treasury) - “*Scope to prioritise UK companies if not included in an EU/UK trade agreement, but risk for UK companies bidding for public contracts in the EU27 and possibility of retaliatory measures to counter unfair subsidies.*”

# Post-transition Procurement Law

- “Copyout” implementation of GPA & remedies?
- Opportunity to reimagine UK procurement law
- Principal objective of EU procurement law is “to ensure the free movement of services and the opening–up to undistorted competition in all the Member States” (see Case 26/03 *Stadt Halle and RPL Lochau* [2005] ECR-1, paragraph 44)
- What should be the principal objective of UK procurement law? Why not Value for Money and Prevention of Corrupt Practices?

# Professor Arrowsmith's "seven core principles" (submitted to the Cabinet Office)

- an open contracting approach
- a single and uniform regime for the Westminster jurisdiction
- significant legislative simplification involving "a shift from hard law to soft law"
- use of familiar concepts, rules and terminology where appropriate
- a rebalancing of interests and related shift in regulatory strategy towards entity flexibility
- a more effective and balanced integrated approach to enforcement
- a common framework across the UK jurisdictions

# ....with eight 'key objectives'

- value for money
- integrity
- accountability
- equal treatment
- fair treatment of suppliers
- effective implementation of industrial, social and environmental objectives
- opening markets
- an efficient procurement process

# UNCITRAL

- UNCITRAL Model Law on Public Procurement 2011
- [https://uncitral.un.org/en/texts/procurement/modellaw/public\\_procurement](https://uncitral.un.org/en/texts/procurement/modellaw/public_procurement)
- International model law

# Remedies

- High Court vs Review Body or specialist tribunal?
- Damages: GPA Art. XVIII.7(b) allows compensation to be limited to “either the costs for the preparation of the tender or the costs relating to the challenge, or both” (ditto UNCITRAL)
- GPA no “modern” remedies: notification and standstill obligation, automatic suspension, ineffectiveness and related financial penalties, contract-shortening (UNCITRAL has e.g. standstill)

# Thank You

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# Public Procurement, State aid and Brexit

George Peretz QC

Monckton Chambers

May 2020

# Topics covered

- Transition
- The transition out of transition
- Post-transition: the Ireland/Northern Ireland Protocol and the future UK State aid regime; negotiations with the EU (and US)

# Transition

- Articles 127-128 WA
- Art.127(3): EU law produces “in and in respect of the UK the same legal effects as those which it produces within the [EU]”
  - “in”: Procurement/State aid law applies in the UK
  - “in respect of”: UK to be treated as a Member State by other Member States
- No UK say in legislation/advisory committees etc.
- UK courts can make Art 267 references up to end of transition – and ECJ can rule after transition and ruling binding

# Extending Transition beyond 31.12.2020

- Art 132(1) - Joint Committee decision
  - For “up to 1 or 2 years”
    - Art 132(2)(c): looks as if non-whole years extension possible
  - Decision must be taken before 1.7.2020
  - Only one extension
  - Money – to be agreed (Art 132(3)(a)) – and as part of extension decision
- Section 15A Withdrawal Act 2018

# Politics of extending transition

- UK Government still maintaining extension will not be agreed
- Transition is “pay, obey, no say”
- BUT
  - Business/government tied up with Covid-19: can they realistically also prepare for new trading arrangements with EU (infrastructure/recruitment/procedures)?
  - Negotiation by video link sub-optimal
  - Trade deal requires political focus and wide consultation
  - Meaningful trade deals with US, others look unlikely while world focus is on Covid-19
  - Many Brexiters relaxed about extension
- BUT where do you hide a murder? In a battlefield.

# Transition out of transition: procurement (1)

- Articles 75-78 WA
- Art 75 – “relevant rules” are listed out but include “any other specific provision of [EU] law government public procurement procedures” – so everything
- Art 76 “relevant rules” apply to all procedures that are “launched” before end of transition date (ETD) and not “finalised” before ETD

# Transition out of transition: procurement (2)

- “Launched” – call for competition/invitation to tender or (where those n/a) when operators contacted
- “Finalised” – contract award notice or (where n/a) date of contract or date decision not to award communicated
- Framework awards – “relevant rules” apply to contracts awarded under f/w agreement concluded before ETD but still in force on ETD or where “launched” before ETD.

# Transition out of transition

## State aid

- Art 92 WA – Commission remains competent for all matters given a case number before end of transition (complaints/notifications/own initiative inquiries)
- Commission can start new procedure any time before 4 years after end of transition in relation to State aid granted before end
- All such decisions bind UK – appeal to GC and ECJ



# Role of UK courts after transition

- After ETD UK courts lose power to refer under Article 267 TFEU to CJEU\*
- So where EU rules apply (pre-transition or run-off case) they are on their own
- \*But see citizens rights provisions or (more relevantly) NI Protocol

# Ireland/Northern Ireland Protocol: State aid

- Article 10: -

*“The provisions of Union law listed in Annex 5 to this Protocol shall apply to the United Kingdom ... in respect of that trade between Northern Ireland and the Union which is subject to this Protocol”*

- Annex 5 lists all the State aid rules
- “that trade ...” is goods (and electricity)
- Apply “to the United Kingdom”

# Enforcement of Article 10

- Art 12:
  - in relation to Art 10 “the institutions, bodies, offices and agencies of the Union shall in relation to the United Kingdom and natural and legal persons residing or established in the territory of the United Kingdom have the powers conferred on them by Union law.”
  - acts of those institutions etc. “shall produce in respect of and in the United Kingdom the same legal effects as those which they produce within the Union and Member States.”
- The Protocol has direct effect in the UK (Art 4 WA; s.7AEU Withdrawal Agreement Act 2018)

# House of Lords EU Committee (2.4.20 letter to BEIS)

*“It is troubling that no one we heard from thought that the UK Government had a clear understanding of what state aid provisions it had signed up to in the Protocol, and that the regions and devolved nations we heard from were not clear on how the Protocol might affect them.”*

*“We agree that it should be a key UK priority to renegotiate provisions on state aid in the Protocol as part of the future relationship agreement with the EU, or negotiate alternative arrangements for Northern Ireland-Republic of Ireland trade, as envisaged in the previous Withdrawal Agreement, which would replace the Protocol entirely.”*

# Post-transition (State aid)

- UK Government: new regime based on WTO SCM regime (though unclear on critical issue of enforcement); no commitment to EU on content
- EU – UK must adopt EU State aid rules, with Commission enforcement and ECJ (NB not even Ukraine, accession states accept that)
- But
  - UK will/should want to renegotiate NI Protocol – means commitments to the EU
  - UK wants an anti-subsidy regime for domestic purposes
  - Agreement on substance (same effect as State aid rules) if not form?

# Post transition (procurement)

- §46 Political Declaration:

“Noting the United Kingdom's intention to accede to the [GPA] the Parties should provide for mutual opportunities in the Parties’ respective public procurement markets beyond their commitments under the GPA in areas of mutual interest, without prejudice to their domestic rules to protect their essential security interests.”

- EU position: detailed text (22 Articles of draft text) additional to GPA
- UK position: GPA is enough (not mentioned in EU negotiating mandate)

# Procurement agreement with US: UK demands

“The Government can endeavour to maximise UK access to US markets via a number of routes, ensuring that a UK-US FTA is mutually beneficial. This is likely to include seeking additional market access commitments from the US; addressing specific procurement trade barriers which the GPA does not already address to ensure greater access for UK businesses, for example the requirement to ‘Buy America’; and ensuring that the procurement process in the US is simple, fair, open, transparent and accessible for all potential suppliers, especially SMEs.

The UK’s obligations under the [GPA] do not apply to the procurement of UK clinical healthcare services. ... This will not change in any future trade deal.”

# Procurement agreement with US: US demands

“Establish fair, transparent, predictable, and non-discriminatory rules to govern government procurement in the UK, including rules mirroring existing U.S. government procurement practices ...

- Exclude sub-federal coverage (state and local governments) from the commitments being negotiated. Keep in place domestic preferential purchasing programs such as:

- Preference programs for small businesses, women and minority owned businesses (which includes Native Americans), service-disabled veterans, and distressed areas;

- “Buy America” requirements on Federal assistance to state and local projects, transportation services, food assistance, and farm support; and

- Key Department of Defense procurement.”



# Thank You

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The logo for Monckton Chambers is displayed within a dark red rectangular box. It features a large, white, serif letter 'M' on the left. To the right of the 'M', the word 'MONCKTON' is written in a smaller, white, serif, all-caps font. A thin white horizontal line is positioned below 'MONCKTON'. Underneath this line, the word 'CHAMBERS' is written in a white, serif, all-caps font, with a small white flourish at the end of the 'S'.

# Procurement law in the Courts after Brexit: Freeing Hulk from the manacles?

Rob Williams QC

7<sup>th</sup> May 2020

# The English Courts 2021?



# Four categories of case

- (1) Expanding the scope of procurement law from first principles
- (2) Filling in the gaps
- (3) A distinct English law perspective?
- (4) Where might we see a rowing back from CoJ?
- NB Impact of codification

# Expanding from First Principles

- CoJ cases expanding the regime – service concessions, old “Part B”, low value
- Single market an overriding goal
- Such judicial legislation unlikely in a domestic regime
- BUT now (mostly) in legislation
- Will we have a new driving policy?

# “Interpreting” the limits of the law

- Tendency towards expansion/prescription on matters of “interpretation” - examples:
  - weightings/sub-criteria
  - material change
  - Alcatel
- English Courts likely to be more conservative? (cf abnormally low)
- Possible test areas: frameworks, lots, contract conditions, concessions, defence
- Strict approach to exceptions (see later)

# A Distinct English Perspective?

- Hard to know – no domestic procurement law (JR squeezed out)
- Hard and novel cases decided on orthodox principles (*JBW, Risk Management, Faraday, Ocean*)
- Courts have mainly fashioned principles in litigation arena:
  - Default to familiar English law concepts (manifest error v *Wednesbury; American Cyanamid*; reasons)
  - Distinct procedure has evolved (*Roche* disclosure; suspension)
  - Legacy of automatic suspension
- Culture of “effective remedy” to remain?

# Rowing back?

- Procurement to be balanced against other public goals and policies
- Strictness of exceptions
  - Direct awards – greater pragmatism (*Gritting*)?
  - Similarly development agreements
- Exhaustive rules (exclusion; evidence)
- Strict criteria v proportionality (cf *Leadbitter*)
- Environmental and social criteria
- Procurement vs other policies - *Chandler*



# Thank You

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