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TCC Claims No: HT-2022-000113 HT-2022-000420

**IN THE HIGH COURT OF JUSTICE**  
**KING'S BENCH DIVISION**  
**BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES**  
**TECHNOLOGY AND CONSTRUCTION COURT**

Royal Courts of Justice, Rolls Building  
Fetter Lane, London, EC4A 1NL

Date: 28/07/2023

**Before:**

**LORD JUSTICE COULSON**

**Between:**

<b>(1) International Game Technology PLC</b>	<b><u>Claimants</u></b>
<b><del>(2) IGT Global Services Limited</del></b>	
<b>(3) IGT Global Solutions Corporation</b>	
<b>(4) IGT (UK 3) Limited</b>	
<b>(5) IGT UK Interactive Limited</b>	
<b>(6) IGT UK Limited</b>	
<b>- and -</b>	
<b>The Gambling Commission</b>	<b><u>Defendant</u></b>
<b>-and-</b>	
<b>(1) Allwyn Entertainment Ltd</b>	<b><u>Interested</u></b>
<b>(2) Allwyn International A.S.</b>	<b><u>Parties</u></b>

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Hearing Dates: 26-28 June 2023

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**Approved Judgment**

This judgment was handed down remotely at 10.30am on 28 July 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives



## **LORD JUSTICE COULSON:**

### **1. INTRODUCTION**

1. These proceedings are concerned with a procurement challenge arising out of the Competition for the Fourth Licence to run the National Lottery. This Judgment is confined to the Preliminary Issue ordered by O’Farrell J at the Case Management Conference held on 3-4 May 2023. It is designed to resolve the question of the standing of the IGT Claimants (to whom I shall collectively refer as “IGT”). The Defendant, the Gambling Commission (“the Commission”) and the Interested Parties (to whom I shall collectively refer as “Allwyn”) both say that, because IGT did not bid for the Fourth Licence, and were instead at best sub-contractors to Camelot (one of the unsuccessful bidders), they have no standing to bring this claim. This is an issue on which there is no authority directly in point, and its resolution may have an impact beyond the confines of this case.
2. There are Agreed Facts concerned with the status and role of each of the IGT companies. Although some further written evidence on the same topic was adduced by IGT, save for one discrete point, its relevance was unclear and no specific factual issues were identified to which that material might have gone. Accordingly, save for that one point (addressed in paragraphs 181-184 below), I consider that, for the purposes of this judgment, it is unnecessary to go outside the Agreed Facts.
3. As is often the case in procurement challenges, it is necessary to have in mind issues of confidentiality. However, I have concluded that there is nothing in this Judgment which is confidential. The only relevant matter which had been suggested as being confidential, namely the number of sub-contractors identifiable in the Camelot bid, cannot be confidential, and that became common ground at the hearing. I have therefore referred to those numbers below. I have not identified the particular items of equipment or services which the various IGT Claimants were to provide to Camelot if their bid was successful, because I am told that that information too is confidential. Although I consider that such a suggestion borders on the absurd, nothing turns on those details.
4. I am extremely grateful to counsel for all three parties for the clear and comprehensive nature of both their written and oral submissions.

### **2. THE FACTUAL BACKGROUND**

#### **2.1 The Competition for the Fourth Licence**

5. The Commission commenced a Competition for the Fourth National Lottery Licence on 31 August 2020, by way of a concession notice inviting expressions of interest, published in the Official Journal of the European Union. An Invitation To Apply (“ITA”) was published on 26 October 2020. The relevant Regulations governing that competition are the Concession Contracts Regulations 2016 (“CCR16”). Following Brexit, the CCR16 were amended<sup>1</sup> with effect from the Implementation Period (“IP”) completion day on 31 December 2020. As the date of the Competition preceded the IP completion date, all parties are agreed that the unamended CCR16 apply to this case.

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<sup>1</sup> Public Procurement (Amendment etc.) (EU Exit) Regulations 2020/1319.

6. The ITA divided the procurement into two Phases, “in order to provide all applicants with an equal opportunity to refine their Application...”. Applicants were “required to provide a full response to the ITA at both phases”. During Phase 1, applicants received briefings, clarification sessions and feedback and were required to submit a qualitative and financial response, a Phase 1 presentation, a proposed game portfolio, feedback on the proposed form of licence and feedback on the implementation and transition documents. During the Phase 1 process, applicants made presentations and received written feedback.
7. There were four applicants. One was Camelot UK Lotteries Ltd (“Camelot”) who at the time of the competition was the incumbent provider of the National Lottery pursuant to the Third National Lottery Licence. Another was The New Lottery Company (“TNLC”); another was Allwyn and the final applicant was Sisal. IGT was not an applicant.
8. During the Phase 2 response period, the four applicants were entitled to raise and receive clarifications, and were required to submit another qualitative and financial ITA response, a Phase 2 presentation, a proposed game portfolio, a submission on ancillary activities and a completed long form trust deed.
9. Finally, the applicants were required to execute a Deed of Commitment. This contained binding commitments in the event that the particular applicant’s application was successful. This obliged them to “enter into the Proposed Licensee Enabling Agreement and Cooperation Agreement...relating to the implementation of the Application”. They were required to irrevocably undertake to the Commission that unless and until the competition lapsed, their proposals would remain valid and open for acceptance for a period of 12 months. There were also various obligations which were triggered “in the event of an award notification”.
10. On 15 March 2022, the four applicants were notified of the outcome. Allwyn was the winner. Camelot was the second-placed bidder.

## **2.2 The IGT Claimants**

11. As I have said, none of the IGT Claimants submitted a Phase 1 or a Phase 2 Application for the Fourth National Lottery Licence. The Agreed Facts in respect of each of the Claimants are set out in paragraphs 12, 13, 14, 16 & 17 below. C2 is no longer a party to these proceedings.

### ***(a) The First Claimant: International Game Technology PLC (“C1”)***

12. C1 is established and incorporated in the United Kingdom and is registered in England and Wales. It is the parent company of the IGT group. It directly owns C4 and indirectly owns all of the other Claimants. C1 does not provide any services under the Third National Lottery Licence and it was not intended that C1 would provide services to Camelot under the Fourth Licence. Income streams from, and costs incurred by, the other Claimants are consolidated in C1’s consolidated accounts.

### ***(b) The Third Claimant: IGT Global Solutions Corporation (“C3”)***

13. C3 is a company established and incorporated in and has its registered address in the state of Delaware, USA, and its principal business office in Providence, Rhode Island, USA. It is a Key Sub-contractor under the Third National Lottery Licence. It was identified as a Key Sub-contractor in Camelot's Phase 1 and Phase 2 Applications, was a party to the Heads of Agreement with Camelot dated 25 September 2020, as subsequently amended and supplemented ("HoA") and was to sell equipment to Camelot under the Fourth Licence.

*(c) The Fourth Claimant: IGT (UK3) Limited ("C4")*

14. C4 is established and incorporated in the United Kingdom and is registered in England and Wales. As required under the Selection Questionnaire it was formed as a special purpose entity for the purposes of bidding as an applicant to be an operator of the National Lottery in the Competition. C4 registered its interest and received a copy of the Selection Questionnaire, published on 28 August 2020. C4 submitted a Selection Questionnaire response as an Applicant and duly pre-qualified, meaning that C4, taking account of the identity and role of Persons Relevant, was evaluated by the Commission as having the appropriate technical and professional capability, and financial and economic standing, to be an operator of the Fourth Licence. On 20 October 2020 C4 was sent the ITA by the Commission. C4 withdrew from the Competition on 5 February 2021, prior to the stage at which initial Phase 1 applications were submitted for the Fourth Licence. C4 was not intended to provide services to Camelot under the Fourth Licence.
15. There was some further material, relevant to C4 which was outside the Agreed Facts but which was relevant to one way in which Mr Moser KC put the case during his oral submissions. I deal with that issue in paragraphs 181-184 below.

*(d) The Fifth Claimant: IGT UK Limited ("C5")*

16. C5 is a company established and incorporated in the United Kingdom and is registered in England and Wales. It was identified as a Key Sub-Contractor in Camelot's Phase 1 and Phase 2 Applications, and was a party to the HoA and was to provide services to Camelot under the Fourth Licence.

*(e) The Sixth Claimant: IGT UK Limited ("C6")*

17. C6 is a company established and incorporated in the United Kingdom and is registered in England and Wales. It was not identified as a sub-contractor in Camelot's bid.
18. There was a good deal of debate about the position of C6 in the inter-solicitor correspondence, as well as some limited evidence in the second statement of Tracey Robinson dated 2 June 2023. The short point was that C6 was not known to the Commission (because it was not identified as a sub-contractor in the Camelot bid) and, although it was asserted that it was intended that C6 would continue to play the same inter-company role in respect of the Fourth Licence as they apparently play in the Third Licence, there was no documentary material to support that assertion. So the highest that it can be put is that there was an unwritten intention that C6 would have been a sub-sub-contractor, probably to C3 and/or C5.

*(f) "Key Sub-Contractors"*

19. As noted above, C3 and C5 were identified as “key sub-contractors” in Camelot’s failed bid. Key Sub-Contractors were defined in the ITA as those identified by the applicant in question as entering into a Key Sub-Contract. A Key Sub-Contract was defined as “any Lottery Sub-Contract: (a) which relates to any Critical Function; (b) is with a party with whom the Commission specifies any Lottery Sub-Contract will be a Key Sub-Contract; or (c) is otherwise specified by the Commission to be a Key Sub-Contract”. Applicants were obliged to provide “evidence of [their] ability to source supply from a different supplier in the event of a Key Sub-Contractor failure”.
20. Camelot’s bid identified 26 Key Sub-Contractors, a further 3 “designated Sub-Contractors” and 25 further named Sub-Contractors not characterised as “Key” within the meaning of the ITA. It appears clear that the 54 Sub-Contractors referred to in the Camelot bid were legal entities which, at least in some cases, would have been providing services by way of sub-sub-contractors. C6 are an example of that: see the statement of Tracey Robinson dated 25 November 2022 at paragraph 6.

### **2.3 The Procurement Challenge**

21. On 31 March 2022, Camelot brought a procurement challenge in the TCC alleging breaches by the Commission of the CCR16. They sought an order setting aside the Commission’s decision to award the Fourth Licence to Allwyn. In a judgment dated 29 June 2022, O’Farrell J lifted the automatic suspension preventing the Commission from entering into the proposed contract with Allwyn. Camelot was granted permission to appeal against that decision but, shortly before the expedited appeal was due to be heard in September 2022, Camelot withdrew that element of their challenge.
22. IGT commenced their own claim against the Commission on 1 April 2022. Much of that adopted Camelot’s original complaints about breach of the CCR16. Following Camelot’s decision to withdraw their challenge to the lifting of the suspension, IGT did likewise. In this way, the claims by Camelot and IGT then continued as claims for damages for breach of the CCR16. A third challenge, brought by TNLC, has been stayed since 27 July 2022.

### **2.4 Subsequent Developments**

23. In February 2023, Allwyn’s parent company purchased Camelot. Camelot discontinued its claim against the Commission on 16 February 2023. This meant that only the IGT Claimants remained in these proceedings. That threw into stark relief a point which the Commission had originally taken at paragraph 3 of their Defence, namely that IGT had no standing to make the claim at all, because none of the IGT Claimants had submitted a bid in the Competition for the Fourth Licence.

## **3. THE PRELIMINARY ISSUE**

24. The Preliminary Issue ordered by O’Farrell J was designed to address this issue of standing. It is in the following terms:

“Whether the Claimants, or any of them, lack standing to bring a claim under the Concession Contract Regulations 2016 (“CCR16”) and/or are not economic operators to whom a duty is owed under Regulation 50 CCR16 and/or (in the case of the Third Claimant) Regulation 51 CCR16 (as in force at the time of

the Competition) for the purpose of the Competition (paragraphs 3 and 6 of the Re-Re-Amended Defence). (The question of whether or not the Claimants (or any of them) have suffered or risk suffering loss or damage (Regulation 52 CCR16) is not part of the Preliminary Issue.)”

25. The Commission, supported by Allwyn, say that the IGT Claimants lack standing and/or are not economic operators to whom a duty was owed by the Commission under Regulation 50 of the CCR16. That is essentially because none of them bid for the Fourth Licence: they were, at best, sub-contractors to Camelot. The Commission say that, under European law, it is only bidders (or those who are prevented from bidding by reason of discriminatory provisions in the tender documents) who have the standing to bring a procurement challenge. They argue that there was nothing in the domestic legislation, and in particular the CCR16, which suggested that the UK intended to expand the pool of persons eligible to pursue a procurement challenge beyond that limited group.
26. There is an additional issue in relation to C3 because, not only did they not bid for the Fourth Licence, but they are also a US Company who could only bring a claim (under Regulation 51 of the CCR16) if the procurement was covered by the Government Procurement Agreement (“GPA”) with the USA. The Commission say that the relevant GPA does not cover either Services Concession Contracts or Lottery Services, so it is said that no duty was owed to them in any event.
27. The IGT Claimants say that a duty was owed to each of them because they were “economic operators”. They argue that the position in EU law is immaterial, and that what matters is the simple interpretation of the definition of “economic operator” now used in the CCR16. They submitted expressly that, when making and passing the CCR16, the UK expanded the pool of those with standing to bring a procurement challenge. As to the GPA issue, they say that C3 would have been providing goods and services to Camelot, and that such provision was caught by the terms of the GPA.
28. Through no fault of counsel, therefore, there was a certain mismatch between the parties’ submissions: the Commission and Allwyn approached the Preliminary Issue from the direction of Europe, whilst IGT came at it focussed on the few words that mattered in the CCR16. So in order to try and address the Preliminary Issue in what I hope is a logical manner, and to ensure that I have dealt with all the arguments advanced by each party, I have concluded that I should approach the Preliminary Issue in stages, by asking myself these five questions:
  - (a) Question 1: Does the Remedies Directive (89/665/EEC) (“the Remedies Directive”), as amended, impose an obligation on the UK to give the necessary standing to bring a procurement challenge to a wider group than simply unsuccessful bidders, including (but not limited to) potential sub-contractors and sub-sub-contractors? (“The EU Law Position”).
  - (b) Question 2: If not, did the UK decide to “gold plate” the Remedies Directive by conferring such standing on that wider group by enacting the CCR16? (“The Domestic Law Position”).
  - (c) Question 3: Regardless of the answers to Issues 1 and 2, does the proper interpretation of “economic operator” in CCR16 include this wider group, including

(but not limited to) potential sub-contractors and sub-sub-contractors? (“The Definition of ‘Economic Operator’”).

(d) Question 4: In the light of the answers to the foregoing questions, do C1, C3, C4, C5 and C6 or any of them have the necessary standing to bring these claims? (“The Standing of C1-C6”).

(e) Question 5: Does the GPA on which C3 relies cover this procurement? (“The GPA Issue”).

I turn to address each of those questions.

#### **4. QUESTION 1: THE EU LAW POSITION**

##### **4.1 The Remedies Directive**

29. The Remedies Directive sets out the detailed provisions in respect of remedies available in procurement challenges. Article 1(3) provides that:

“Member States shall ensure that the review procedures are available, under detailed rules which the Members States may establish *at least to any person having or having had an interest in obtaining a particular contract* and who has been or risks being harmed by an alleged infringement”. (My emphasis).

Although the Remedies Directive was amended by Remedies Directive 2007/66/EC, it is common ground that the amendments do not affect the issues in this case.

30. Guidance as to the proper interpretation of “*at least to any person having or having had an interest in obtaining a particular contract*” can be found in various places, as set out in greater detail in Sections 4.3-4.5 below.

31. I should add that there are a number of EU Procurement Directives dealing with the substantive rights, obligations and procedures in relation to public procurement. However, those Directives do not address remedies: that was the sole province of the Remedies Directive (as amended). IGT do not suggest otherwise. That separation was recently confirmed by Recital 122 of Directive 2014/24/EU<sup>2</sup> (“the Procurement Directive”), Recital 81 of Directive 2014/23/EU (“the Concessions Directive”) and Recital 128 of Directive 2014/25/EU (“the Utilities Directive”)³.

##### **4.2 Natural Meaning**

32. I should start by setting out my interpretation of the words in Article 1(3): “*at least any person having or having had an interest in obtaining a particular contract*”, before going on to the authorities. I consider that the key word is “obtaining”. That must limit

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<sup>2</sup> Recital 122 states: “[the Remedies Directive] provides for certain review procedures to be available at least to any person having or having had an interest in obtaining a particular contract [...] *Those review procedures should not be affected by this Directive*” (My emphasis).

<sup>3</sup> I note for completeness that the Utilities Directive refers to a different Remedies Directive from 89/665/EEC. It is Directive 92/13/EEC which provides the Remedies regime for entities operating in the water, energy, transport and telecommunications sector. The point remains that there has been a separation of substantive rights and remedies provisions in EU directives.



those who can bring a challenge or seek a remedy to those who had tendered unsuccessfully for the particular contract in question. It is not enough to have an interest in the *award* of a contract to X (which, for example, a sub-contractor to X would have); the challenger must have an interest in *obtaining* the contract itself. What matters, therefore, is not, as Mr Moser suggested, an interest in the outcome of the procurement; it must be an interest in obtaining the contract to which the procurement process relates.

33. The next question is whether that natural meaning is confirmed or contradicted by the other admissible material and the subsequent authorities. In my view, it is unequivocally confirmed by both.

#### **4.3 The Travaux Préparatoires**

34. Since one of the issues in this case is the meaning of the words “*at least any person having or having had an interest in obtaining a particular contract*”, it is appropriate to look at the *travaux préparatoires* (“*the travaux*”) for guidance. It is well-established in the CJEU caselaw that *the travaux* can be used as an aid to construction of Directives: see, in a procurement context, *ISE v Stadt Kolnn* (Case C-796/18) and *Makedoniko Metro and Michaniki AE v Elliniko Dimosio* (Case C-57/01), opinion of AG Stix-Hackl, paragraph 74. The *travaux* in respect of the Remedies Directive appears to show the following history.
35. The original text was proposed by the Commission. The draft suggested that remedies would be available to “any contractor or supplier taking part in a procedure for the award of public supply or public works contract” (see the EU Commission’s proposal of 1 July 1987). On 3 February 1988, that was amended by the European Parliament’s Committee on Economic and Monetary Affairs and Industrial Policy, which sought to widen those with standing to make a claim to “any aggrieved third person entitled by Community rules on public procurement to tender for such an award”.
36. The Commission amended that proposal so as to confer standing on “any third person entitled to tender for such an award”: see the amended proposal of 19 January 1989. However, on 24 July 1989, the Council subsequently issued a ‘Common Position’ with an amended draft Directive. Article 1(3) of that draft was much narrower, proposing to limit standing to “any person having or having had an interest in obtaining a public contract” (in other words, the reference to “any aggrieved third person” was deleted).
37. In October 1989, the European Parliament issued a recommendation in respect of the Common Position. Paragraphs 10 and 11 of the Explanatory Statement explained that the European Parliament agreed with the Council, that standing should not be conferred upon “any third person entitled to tender” (which had of course been the wording originally proposed by the Commission) because the Council’s Economic Affairs Group considered that the phrase lacked definition and clarity. The European Parliament preferred the wording that was subsequently adopted in Article 1(3).
38. Importantly for present purposes, the Explanatory Statement at paragraph 10 went on to say that Member States could “...go one stage further than the Directive, as the Commission suggests, *for example by offering sub-contractors the option of submitting their claims along with those of the principal contractor*” (my emphasis). Two points should be made about that suggestion.

39. First, it puts it beyond doubt that the Remedies Directive expressly did *not* give sub-contractors standing: hence the suggestion that Member States should consider going “one stage further” by offering them such standing. The suggestion would be nonsensical if sub-contractors already had the necessary standing. Secondly, it is plain that even this suggestion of going one stage further was relatively limited. The option suggested was that of sub-contractors submitting their claims “along with” the claims of the principal contractor. On the face of it, therefore, even the suggested widening does not appear to go as far as embracing separate, standalone claims by sub-contractors.
40. Pausing there, it would seem incontrovertible that the European Parliament had drawn back from conferring standing to third parties or sub-contractors and had limited standing to unsuccessful bidders. However, they had made it clear that, when they enacted their own procurement rules, Member States could go one stage further and offer them that standing.

#### **4.4 CJEU Caselaw**

41. The CJEU caselaw confirms that interpretation. Thus, in *Grossmann Air Service Bedarfsflugunternehmen GmbH & Co v Austria* (Case C-230/02), the claimant, Grossmann, did not submit a bid, but challenged the outcome of a procurement for air transport services on the basis that the procurement documents had been biased towards the winning bidder. The question was whether Grossmann had standing to bring the proceedings. The CJEU agreed with the Commission’s general submission that “participation in a contract or procedure may validly constitute a condition that must be fulfilled before a person can show an interest in obtaining a contract”, and if that claimant has not submitted a tender, it would be difficult to show it has an interest in challenging the decision: see in particular [27].
42. However, the CJEU recognised that there might be exceptions to that rule, namely someone who wanted to bid, but could not do so as a result of discriminatory specifications in the tender documents themselves, which specifically prevented them from providing all the services requested. It was said that such a person could seek a review of those specifications at an early stage and would not be forced to submit a tender simply in order to have the necessary standing. Thus it was not black and white: although those who had not bid probably had no standing, there might be exceptional circumstances in which they would.
43. It is to be noted that, although Grossman fell into that exception, the claim was still not permitted because they had not challenged the tender documents at the appropriate time (namely when they decided not to bid). The CJEU pointed out at [37] that:
- “... the fact that a person does not seek review of a decision of the contracting authority determining the specifications of an invitation to tender which in his view discriminate against him, in so far as they effectively disqualify him from participating in the award procedure for the contract at issue, but awaits notification of the decision awarding the contract and then challenges it before the body responsible, on the ground specifically that those specifications are discriminatory, is not in keeping with the objectives of speed and effectiveness of Directive 89/665.”

At [38]-[40] the Court emphasised that a failure to challenge the legitimacy of the procurement before the contract was awarded impaired the effective implementation of the Remedies Directive.

44. The approach in *Grossmann* was confirmed in *Amt Azienda Trasporti e Mobilita v ATPL Liguria* (Case C-328-17) at [46]-[49]. Again, Amt did not submit a tender but challenged the invitation to tender. The court referred to *Grossmann* and stated that participation in a tender procedure may validly be required before an entity can show an interest in obtaining a contract, but that there might be exceptional circumstances which would justify a claim such as the impossibility of submitting a tender. The court stated at [53] that:

“...since it is only in exceptional cases that a right to bring proceedings is given to an operator which has not submitted a tender, it cannot be regarded as excessive to require that operator to demonstrate that clauses in the call for tenders make it impossible to submit a tender”.

45. Accordingly, the CJEU caselaw makes plain that the only person with standing to challenge a public procurement is the unsuccessful bidder(s). That is subject to the sort of limited exception discussed in *Grossmann* and *Amt*. Although prior to the hearing there was no suggestion that any such exception applied in the present case, a point did arise in that connection in respect of C4, and I address that separately in paragraphs 181-184 below.

#### **4.5 Other Caselaw**

46. The meaning of Article 1(3) of the Remedies Directive has been considered in other jurisdictions. In particular, there are a number of cases from Ireland on the topic. Whilst the procurement regulations in Ireland replicate Article 1(3) precisely<sup>4</sup>, in a way which is not quite the case in the UK (see paragraphs 72-73 below), these decisions are still important because they inevitably focus on the words of Article 1(3).
47. In *Copymoore Limited & Ors v The Commissioner of Public Works in Ireland* [2013] IEHC 230, the claimants had not submitted a bid. The Irish High Court referred to and relied on *Grossmann* where, they said, “the very fact that no tender had been submitted by the parties seeking the review was regarded by the Court of Justice as well-nigh dispositive” ([21]). The judge went on to say that, in the light of *Grossmann*, the Remedies Directives “positively preclude” those who had not submitted a tender as having standing. Mr Moser argued that this was an error, because it ignored the fact that Member States could go further if they wish (see paragraph 38 above), but I think that is a different point. The court in *Copymoore* was dealing with the effect of the Remedies Directive as it is, not what Member States might choose to add on, and Ireland had chosen to add nothing.
48. In *Payzone Ireland Ltd v National Transport Authority* [2021] IEHC 212, the court held that Payzone was not “an eligible person” under the relevant Irish procurement rules because it had not made a bid in the procurement competition it was seeking to challenge. It was instead a sub-contractor. Mr Justice Brian O’Moore said at [41] that

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<sup>4</sup> The European Community (Public Authorities’ Contracts) (Review Procedures) Regulations 2010, at Regulation 4.

“the basic requirement (endorsed by Community law) of having an interest in obtaining the contract (or a version of the contract which is not skewed in favour of a rival) remains.” That is entirely consistent with my reading of Article 1(3).

49. In *Word Perfect v The Minister for Public Expenditure and Reform* [2022] IECA 131, the Irish Court of Appeal considered both the CJEU and the Irish decisions. The Irish Court of Appeal said that, because there was nothing in the tender documents which prevented Word Perfect from submitting a bid, their failure so to do meant they did not have standing to challenge the procurement. They said at [177]-[178]:

“177. In summary, I have concluded that the judge was correct in his interpretation of Regulation 4 of the Remedies Regulations, which he derived from a well-established line of authority from the CJEU, including cases such as *Grossmann*, as applied by the High Court (Hogan J.) in *Copymoore (No. 1)* and in a number of subsequent judgments of the High Court, and most recently by the CJEU in *Amt*.

178. The judge was, in my view, correct to find that, in general, in order to be an “eligible person” within the meaning of that term in Regulation 4, in the sense of having an “interest in obtaining” the contract at issue in the public procurement tender procedure, and alleging harm or risk of harm by the alleged infringement of EU public procurement law, the applicant must have participated in the particular tender procedure by submitting a tender. That general principle or rule is subject to exceptions, the categories of which are not closed, but include where it was not possible for the applicant to put in a tender for various reasons, including (but not limited to) where the tender procedure was not properly advertised and also where, by reason of alleged discriminatory specifications or otherwise, it would have been impossible for the applicant to succeed in the tender procedure, and the tender would, therefore, have been pointless or doomed to fail. The scope of the range of possible exceptions to the general principle or rule was not at issue in this appeal as Word Perfect did not claim to be entitled to rely on any exception. Rather, it challenged the existence of any such general rule requiring an applicant to put in a tender in order to have standing to challenge the decision at issue.”

#### **4.6 Answer to Question 1**

50. In EU law, whether or not a person has standing to bring a public procurement challenge depends on whether they can demonstrate a right by reference to the Remedies Directive, as amended. On the wording of Article 1(3) of the Remedies Directive, an entity who did not seek to obtain the contract (i.e. a bidder) will generally not have the necessary standing to challenge the result of the procurement. That is the straightforward reading of the words (Section 4.2 above), and it is borne out by the *travaux*, the CJEU case law, and the Irish case law to which I have referred in Sections 4.3-4.5 above. It is a matter for Member States to consider going to the next stage and giving sub-contractors and others the necessary standing; it is not provided for in the Remedies Directive.
51. The position is not entirely black and white because if, for example, an entity can show that, but for the discriminatory provisions within the invitation to tender, they would

have tendered, then they may still have a right to challenge the legitimacy of the procurement, without going through the pointless process of submitting a “doomed tender” (per *Payzone* at [41]). But as *Grossmann* and *Amt* make plain, that is the exceptional position.

52. In the light of this analysis, the answer to the first question set out at paragraph 28(a) above is “No”. The Remedies Directive did not impose an obligation on the UK to provide standing to a wider group than unsuccessful bidders (including but not limited to sub-contractors and sub-sub-contractors). Ultimately, it did not appear that Mr Moser dissented from that proposition. That was important because it meant that, on behalf of IGT, he had to show that, at some point in time when implementing the EU Directives, the UK decided to expand (or “gold plate”) the pool of those with standing to raise a procurement challenge. I therefore turn to that second issue.

## **5. QUESTION 2: THE DOMESTIC LAW ISSUE**

### **5.1 General Principles as to the Implementation of EU Directives**

#### *(a) Transposition Guidance Note*

53. The second question is concerned with how the EU Directives have been implemented in domestic law. On behalf of the Commission, Ms Hannaford referred to the UK’s general policy, when it was a Member State, of implementing EU law by doing no more than the minimum. This is sometimes known as using the “copy out” technique, and sometimes as not “gold plating” EU Directives. That general policy can be found in the *Transposition Guidance*, first published in 2013. The relevant sections are:

“2.10 Government policy is that you should not go beyond the minimum requirements of European Directives, unless there are exceptional circumstances, justified by a cost benefit analysis and consultation with stakeholders. Any gold-plating, as defined below, must be explained in your impact assessment and will need to be cleared by the Reducing Regulation Committee. [...]

Guiding Principle: always use copy-out for transposition where it is available, except where doing so would adversely affect UK interests e.g. by putting UK businesses at a competitive disadvantage compared with their European counterparts. If departments do not use copy-out, they will need to explain to the RRC the reasons for their choice.”

54. Ms Hannaford KC argued that, in the light of the *Transposition Guidance*, the court should assume that, in the UK, EU law had not been ‘gold plated’ unless it was expressly identified as having been enhanced in some way. In response, Mr Moser argued that, since the *Transposition Guidance* was general, and did not relate to particular enactments, it was an unsafe guide to the interpretation of any particular enactment such as, in this case, the CCR16.
55. I think Mr Moser was right about that. The Explanatory Notes, the Explanatory Memorandum, and other such documents of similar type, are admissible in any consideration of the meaning of particular regulations, primarily because they identify their context. By contrast, I consider that the *Transposition Guidance* is not helpful

because it is too general, and provides no relevant context for the regulations being considered. I have not therefore relied on the Transposition Guidance when dealing with this second question, namely the issue of standing under UK domestic law. I consider that that is also consistent with the decision of the Court of Appeal in *R(Akinsanya) v SSHD* [2022] EWCA Civ 37; 2 W.L.R. 681 at [64], who in turn relied on Lord Mance in *United States of America v Nolan* [2015] UKSC 63; [2016] A.C. 463, where, in both cases, the view was expressed that there was no general presumption against “gold plating”; it depends on the legislation in question.

**(b) The Authorities**

56. Of much greater relevance, so it seems to me, are the two Supreme Court authorities at the heart of the written submissions of both Ms Hannaford and Mr Hollander KC. In my view, they are both of direct application to the potentially important issue of how UK legislation, which is the direct result of EU Directives, should be interpreted. They are also both concerned with the implementation of EU Procurement Directives.

57. In *Brent LBC v Risk Management Partners Limited* [2011] UKSC 7; [2011] 2 A.C. 34, the Supreme Court was addressing whether the *Teckal* exemption (which exempted certain contracts with companies controlled by the contracting authority from the requirements of Directive 2004/18/EC) should apply to the Public Contracts Regulations 2006 (“the PCR06”). The particular issue was whether the definition of “public contract”, which would on its face have included contracts with *Teckal* companies, should be read purposively so as to exclude such contracts. The Supreme Court concluded that the exemption should be implied, because the purpose of the PCR06 was to implement EU law, and there was nothing in the Regulations or the Explanatory Memorandum to indicate that Parliament intended to depart from the jurisprudence of the CJEU as to the scope of the Directives.

58. The kernel of the decision can be found at [24] of the judgement of Lord Hope:

“24. It is true that section 2(2) of the European Communities Act 1972 is in wide terms. It does not confine any measures made under it to doing the minimum necessary to give effect to a Directive. But, if it is to be within the powers of the subsection, the measure has to arise out of or be related to an EU obligation. As Waller LJ said in *Oakley Inc v Animal Ltd (Secretary of State for Trade and Industry intervening)* [2006] Ch 337, para 39, the primary objective of any secondary legislation under section 2(2) must be to bring into force laws which, under the Treaties, the United Kingdom has agreed to make part of its laws. There is nothing in the explanatory memorandum to the Regulations that was prepared by the Office of Government Commerce and laid before Parliament to indicate that it was intended to depart from the jurisprudence of the court as to the scope of the Directive. In paras 7.2—7.4 of the memorandum it was stated that the change to the legislation was necessary to implement the new public procurement Directive, that it clarified and modernised the previous texts and that the simpler and more consistent public sector text should reduce the burdens involved under the EU rules. If the *Teckal* exemption were to be held not to apply to the 2006 Regulations, it could only be because the purpose of the Regulations was to apply the public procurement rules to relationships that fell outside the regime provided for by the Directive.

But that would not be consistent with the memorandum, and it would not be a permitted use of the power.

25. As for the meaning and effect of the 2006 Regulations, I think that it would be wrong to apply a literal approach to the words and phrases used in it, such as in the definitions of “public contract” and “public service contract”. A purposive approach should be adopted. As Lord Diplock in *Kammins Ballrooms Co Ltd v Zenith Investments (Torquay) Ltd* [1971] AC 850, 881 indicated, this means that regard must be had to the context in which the Regulations were made, to their subject matter and to their purpose. Would it be inconsistent with the achievement of that purpose if the *Teckal* exemption were not to be held to apply to them? Was this an exemption to which Parliament must have intended them to be subject? Having regard to the background of EU law against which the Regulations were made, the definitions in the Regulations can be taken to express the same idea as those in the Directive. Thus something which amounts to a contract in domestic law can nevertheless be held, without doing undue violence to the words of the Regulations, not to be a relevant contract for the purpose of the public procurement rules.

26. I would hold accordingly that the *Teckal* exemption does apply to the 2006 Regulations. By implication, the rules that it lays down do not apply to contracts between a public authority and a person which is legally distinct from it if, but only if, the control and function tests identified in *Teckal* [1999] ECR I-8121 are both satisfied.”

59. Accordingly, although the contract of insurance in question was undoubtedly a legally binding contract falling squarely within the natural and ordinary meaning of the definition of “public contract” contained in the PCR06, the Supreme Court nonetheless held that the PCR06 should be construed in such a way that their scope was no broader than that which was required by EU law.
60. Similarly, in *EnergySolutions v Nuclear Decommissioning Authority* [2017] UKSC 34; [2017] 1 W.L.R. 1373, the Supreme Court had to consider whether the *Francovich* condition, namely that a breach of the procurement rules had to be “sufficiently serious” in order to justify an award of damages, applied to breaches of the Public Contract Amendment Regulations 2009 (“the PCAR09”). Lord Mance, with whom the other members of the Court agreed, said:

“28. This is a domestic law issue. The question is whether the UK legislator has, by the 2006 Regulations, gone further than European law requires, by making any contracting authority breaching the Regulations liable for any damages thereby caused, irrespective of whether the breach would under the second *Francovich* principle be sufficiently serious to require domestic law to make available a remedy in damages. [...]

33. The Court of Appeal dealt with this issue quite shortly. It noted that the 2009 Amendment Regulations had been preceded by an Explanatory Memorandum and a Transposition Note as well as a Consultation Document of April 2009, “all of which [it said] make it reasonably clear that the

Government's intention was to do only what was necessary to implement the Remedies Directive without any 'gold plating' save where such was expressly identified": para 17. But it viewed the claim provided by the 2006 Regulations, as amended in 2009, as an ordinary private law claim for breach of statutory duty, to which no restrictive condition applies under English law, and saw it as irrelevant in this context whether or not the legislator intended to 'gold plate' the EU law on public procurement when introducing the Regulations: para 67.

34. The Court of Appeal was right in [2016] PTSR 689, para 17 to identify the legislator's intention in 2009 as having been not to gold plate. The Explanatory Note to the 2009 Amendment Regulations said that "except where otherwise stated" (none of the respects so stated being presently relevant) the Regulations implemented the Directive. The Explanatory Memorandum laid before Parliament referred to the Regulations as implementing articles in the Directive "that need to be transposed" and to the amendments to the 2006 Regulations as "needed to implement" the Directive. The Impact Assessment, prepared by the Office of Government Commerce ("the OGC") and attached to the Explanatory Memorandum, concluded by saying that the OGC had adhered to guidance including "avoidance of 'gold-plating' and taking a minimalist approach to implementation . . . in so far as is possible within the context of this implementation" and that the impact assessment had "examined, article by article, the choices available for the UK and identified a range of options", "invariably" selecting those which "represent the least cost and greatest benefit within the confines of the mandate laid down in the Directive": para 72. The Impact Assessment contained a detailed account of the choices available and made. None relates to or suggests a choice in 2009 to implement the Directive by introducing domestic liability for damages in circumstances not required under EU law.

35. The Explanatory Note, the Explanatory Memorandum and the Impact Assessment are all potentially admissible as aids to the understanding of the legislator's intentions in 2009, on the principle identified by the House of Lords in *R v Montila* [2004] 1 W.L.R. 3141, para 35. However, ATK submits that 2009 is not the relevant date. It points out that, although regulations 47A through to 47P (Part 9) of the 2006 Regulations as amended by the 2009 Amendment Regulations were introduced as a complete substitute for the previous section 47 (Part 9) and were the product of extensive rewriting of previous text with many new elements, the bare outline of regulations 47A to 47C, 47I and 47J can still be detected in the much more limited language of regulation 47(1), (6), (8) and (9) of the earlier 2006 Regulations, which can in turn be traced back to the Public Services Contracts Regulations 1993 (SI 1993/3228), regulation 32(1), (2), (4) and (5). ATK submits that there is no reason to suggest that the legislator in 2009 intended any different approach to the damages recoverable under the earlier 1993 and 2006 Regulations, and that there is no material to show that avoidance of 'gold-plating' had the same weight at those earlier dates. As to this, it is true that there is no material bearing directly on the legislator's intentions at those earlier dates (though there is equally nothing to show that it was necessarily any different). But in my view it is unrealistic, when construing regulations 47A through to 47P, to ignore the legislator's intention in 2009 to introduce a whole new package of substituted



provisions which should, save where a deliberate choice to the contrary appeared, have no greater force than EU law requires. What happened in 2009 was effectively a new start, based on the Remedies Directive. [...]

39. The scheme of the Remedies Directive is a balanced one. The *Francovich* conditions represent the Court of Justice's conclusion as to the appropriate minimum protection by way of damages which an economic operator can expect. Although there is no *Marleasing* imperative to construe the scheme so far as possible consistently with the *Francovich* conditions, it is I think a natural assumption that the UK legislator will not go further than required by EU law when implementing such a scheme, without considering this and making it clear. That is fortified by the legislator's clear intention not to gold plate when substituting the new Part 9 scheme for the old in 2009. In these circumstances, I consider that the 2006 Regulations as amended in 2009 should be read as providing for damages only upon satisfaction of the *Francovich* conditions. That is also consistent with the use of the word "may" which otherwise seems to me to have no real significance."

61. The Supreme Court therefore concluded that the Court of Appeal erred in their conclusion that it did not matter that the UK legislator had not intended to "gold plate" what EU law required. As the Supreme Court explained, in the context of construing domestic regulations made to give effect to the UK's obligations as a member of the EU, that was a fundamental error of law. The position in EU law had to be considered first, and the position in domestic law considered then in that context. In the result, although there was no mention of the "sufficiently serious" qualification in the PCAR09, the Regulations had to be construed purposively in accordance with EU law.
62. In my view, *Risk Management* and *EnergySolutions* are of direct application to the dispute in this case. In EU law, as explained in answer to Question 1 above, the only parties who have standing to bring a procurement challenge are unsuccessful bidders, subject to the limited *Grossmann* exception. That is therefore how the CCR16 must be construed, because they too are giving effect to EU Procurement Directives, unless it can be shown that the UK legislator has gone further than EU law requires. If that "gold plating" cannot be demonstrated, the necessary standing in the UK is no different to that which pertains under EU law.
63. Mr Moser suggested that this case was different because *EnergySolutions* was concerned with how the word "damages" was to be interpreted, and there was already EU law on the topic of *Francovich* damages. He said that this was not the sort of luxury this court enjoyed, because there was no relevant EU definition, and no authority addressing the definition of "economic operator", the key part of Regulation 52 of the CCR16 at the heart of this case. I disagree with that analysis. There is a clear definition of who has standing in Article 1(3). And there is a clear interpretation of that definition in practice in *Grossmann* and *Amt*. So as I have said, the only question is whether that definition and that interpretation has been departed from, and the position "gold plated", at some stage during the UK's implementation of the various EU Procurement Directives.
64. The two Supreme Court authorities also address and confirm the admissibility of Explanatory Notes, Explanatory Memoranda and the like when considering the CCR16. In summary, I consider that the position is this:

- i) *Bennion, Bailey and Norbury on Statutory Interpretation 8<sup>th</sup> Edn.* (“*Bennion*”), para 24.14, states that Explanatory Notes to an Act may be used to understand the background to and context of the Act and the mischief at which it is aimed.
- ii) Lord Steyn in *R (Westminster City Council) v National Asylum Support Service* [2002] 1 W.L.R. 2956 at [5] – [6] confirmed that Explanatory Notes are “always admissible aids to construction” in so far as they cast light on the contextual scene of the statute.
- iii) Brooke LJ in *Flora v Wakom (Heathrow) Ltd* [2006] EWCA Civ 1103; [2007] 1 W.L.R. 482 added that the text of an Act does not have to be ambiguous before a court may be permitted to consider an Explanatory Note in order to understand the contextual scene of the statute. The Explanatory Note does not form part of the statute reflecting the will of Parliament and cannot be used to supplant the language of the legislation itself (see also *Aspinalls Club Ltd v Revenue and Customs* [2013] EWCA Civ 1464, [2015] Ch 79 at [22]).
- iv) The admissibility of explanatory material has been recently confirmed by the Supreme Court in *R (on the application of O) v Secretary of State for the Home Department* [2022] UKSC 3 at [30]. Lady Arden added at [60] that the Select Committee responsible for the introduction of Explanatory Notes in 1997 expressly recognised that courts might wish to use Explanatory Notes as a guide to Parliament’s intentions in passing a particular piece of legislation.
- v) *Bennion* (para. 24.14) states that there is no reason for Impact Assessments and Explanatory Memoranda to be treated any differently from Explanatory Notes. Indeed, courts have previously used these as aids to construe legislation: see *Islington London Borough Council v Unite Group plc* [2013] EWHC 508 (Admin); [2013] P.T.S.R 1078 at [25].
- vi) In looking to see whether the UK legislator did go further than required by the EU, both *Risk Management* and *EnergySolutions* confirmed the admissibility of Explanatory Notes, Explanatory Memoranda and the like to explain the context of the regulations in question.

Accordingly, I now turn to consider the detailed implementation of the EU Procurement Directives into UK domestic law, having regard, where relevant, to the explanatory material.

## **5.2 The Implementation of EU Procurement Directives in the UK**

### ***(a) Three General Observations***

65. Three general observations need to be made at the outset. First, where UK legislation is made in order to give effect to EU law, regard should be had to that fact when interpreting the legislation. Where the court considers that the legislative intention was to comply with EU law (and to do no more than that), this is likely to have a significant effect on the interpretation of the UK legislation; see *Bennion* at paragraph 28.3, *Risk Management* and *EnergySolutions*.

66. Secondly, as I have emphasised above, in EU law, the substantive Procurement Directives are separate from the Remedies Directive. However, in the UK, the Regulations designed to set out the rules governing public procurement combine both the substantive rules and the remedies: a process which, when regulations are being changed, is described in the document referred to in paragraph 93 below as “sewing the existing remedies rules into the new procurement rules”. That difference needs to be kept continually in mind, particularly when considering the most recent EU Procurement Directives, which did not make any relevant changes to the Remedies Directive, and the subsequent UK Regulations, including in particular the CCR16, which was addressing both substantive procurement rules *and* remedies.
67. Thirdly, Mr Moser took the point, relying on *R v SoS for the Environment, Transport and the Regions, Ex Parte Spath Holme Limited* [2001] 2 A.C. 349, that it was ordinarily impermissible to construe a consolidating provision by reference to the enactments it replaced, except where the language of the provision was ambiguous or its purpose could only be understood by examining the context in which it had originally been used. The suggestion was, I think, that it was illegitimate to construe the CCR16 by making any reference to the earlier Regulations.
68. There are a number of reasons why I do not accept that argument. First, I consider that Mr Moser overstates the principle in *Spath Holme*. As Lord Sumption noted in *Manchester Ship Canal Co. Limited v United Utilities Water PLC* [2014] UKSC 40; [2014] 1 W.L.R. 2576 at [3], “this is not so much a rule of construction as a valuable warning against the over-ready assumption that a consolidating Act means exactly the same as the enactments which it replaces. There are, however, cases where a consolidating Act cannot be understood without reference to the state of the law as it was when it was enacted.” Indeed, *Manchester Ship Canal* was itself one such case.
69. Secondly, I do not consider that such a principle or assumption has any meaningful application when analysing how, over time, different EU Directives were implemented by different sets of UK Regulations. The evolving story is important to demonstrate what was done and why, so that when the most recent Regulations are considered – in this case the CCR16 – sense can be made of what was being “implemented”, what was being “re-enacted”, what was being “replicated”, and so on. It would be wrong in principle to ignore the previous iterations of the Regulations, particularly when they are expressly referred to in all the surrounding explanatory material. Thus, I have concluded that, in order to answer Question 2, a certain amount of regulatory archaeology is required.

**(b) The 2004 Directive**

70. The first EU Directives in respect of the procurement of public works contracts date back to the 1970s. For present purposes, it is convenient to start with Directive 2004/18/EC (“the 2004 Directive”) which dealt with three principal types of public contracts, namely services, goods and works. It only dealt in passing with concession contracts. Although the 2004 Directive dealt with the substantive rights, obligations and procedures in relation to procurement, it did not address remedies: as I have said, that was the sole province of the earlier Remedies Directive.

**(c) PCR06**

71. The 2004 Directive gave rise in the UK to the PCR06. They dealt with both the substantive rights set out in the 2004 Directive and the remedies available under the Remedies Directive. Under Regulation 46(1), a duty to comply with the PCR06 was owed to an “economic operator” and, pursuant to regulation 47(6), a breach of the duty was actionable by any “economic operator” which suffered, or risked suffering loss or damage.
72. An economic operator was defined in Regulation 4 as “a contractor, a supplier or a services provider”. Those are then separately defined in the definitions section in very similar terms. I take “contractors” as an example.

““Contractor” means a person who offers on the market work or works and –

(a) who sought, who seeks, or would have wished, to be the person to whom a public works contract is awarded...”

The definition of suppliers and service providers uses the same formula.

73. In my view, although this wording was slightly different to that in Article 1(3) of the Remedies Directive, this was a clear attempt to transpose what was said in Article 1(3) as to who could bring a procurement challenge, with a slight variation to encompass what I have called the *Grossman* exception. The emphasis is on the entity who sought/seeks/would have wished to be the entity to whom the contract was awarded: in other words, the unsuccessful bidder for the contract in question. On any view, this wording did not enact the option of “going one stage further”, so did not permit separate, standalone claims by sub-contractors.
74. This is confirmed by the Explanatory Note, which said that the PCR06 implemented the 2004 Directive and “also provide remedies for breaches of these Regulations in order to implement...the Remedies Directive...”. The Explanatory Memorandum said much the same thing at paragraph 2.1, where it expressly stated that the PCR06 “re-enact the provisions of [the Remedies Directive] on remedies for public sector procurement...these ‘remedies’ provisions are largely unchanged from those in the existing Regulations.”
75. My attention was also drawn to the Impact Assessment for the PCR06. Unsurprisingly, perhaps, such Impact Assessments use rather looser language than either the Explanatory Note or the Explanatory Memorandum. Paragraph 8 of the Impact Assessment for the PCR06 refers to “a tenderer who considers that a procurement has been conducted in breach of the EC procurement directives...”. In context, that is clearly a reference to an unsuccessful bidder.
76. Accordingly, pausing in 2006, there can be no doubt that those with standing in the UK to bring a procurement challenge were, subject to the *Grossmann* exception, limited to unsuccessful bidders, and no one else. By the end of the hearing, I did not understand that to be in issue.

**(d) PCAR09**

77. As noted above, the Remedies Directive was amended in 2007 by Directive 2007/66/EC, but the amendments are immaterial to the Preliminary Issue. They required a new set of UK Regulations, namely the PCAR09. These were the Regulations that were the subject of scrutiny in *EnergySolutions*. They retained the same definition of “economic operator” as in PCR06, as explained in paragraphs 72-73 above. The principal changes were the duty owed to economic operators, which was now set out in Regulation 47A, and the enforcement of those duties through the court in Regulation 47C. This was also the beginning of the regime whereby, pursuant to Regulation 47G, the making of the intended contract could be suspended by any challenge to the procurement, although the court could lift the suspension by making an interim order under Regulation 47H.
78. The Explanatory Note to the PCAR09 said that “except where otherwise stated below, these Regulations implement...Article 1 of [the Remedies Directive]”.
79. The Explanatory Memorandum to the PCAR09 stated at paragraph 2.1 that the PCAR09 implemented the requirements of the 2007 Remedies Directive on improving the effectiveness of review procedures concerning the award of public contracts. It stated that “the amendments enhance the legal review procedures and remedies available for breaches of the public procurement rules”. That appears to be a direct reference to changes, such as the new automatic suspension provisions. Paragraph 7.1 of the Explanatory Memorandum explained that the amendments “are needed to implement the legal provisions contained in the new Remedies Directive”.
80. Paragraph 7.3 of the Explanatory Memorandum said that “the amendments affect only a small number of the provisions in the 2006 Regulations overall i.e. those that are related to review procedures and remedies. Therefore, the vast majority of the 2006 Regulations, which cover the many procurement procedural rules, remain unchanged”. It then went on to identify the most significant changes. They were said to be the introduction of the new penalty of ineffectiveness, the introduction of two other new penalties, the automatic suspension of the contract award procedure, and minor procedural changes to the standstill period. There was no reference to any widening of the pool of those with standing to bring these challenges in the first place.
81. The Explanatory Memorandum is also noteworthy because, at paragraphs 7.4.4 and 7.4.5, there were references to “candidates and tenderers” and the obligation for them to be notified of the reasons for their elimination, and their own right to bring legal proceedings within certain timeframes<sup>5</sup>. Two points should be made about this. First, this was a reference to those who fall out of the procurement process earlier on (candidates) and those who fall at the last hurdle (tenderers). It was therefore entirely consistent with the provisions analysed so far. Secondly, as will be explained in paragraphs 148-153 below, these categories are of some importance when considering the proper interpretation of “economic operator”.
82. There is a Transposition Note relating to the PCAR09. That said that “these Regulations do what is necessary to implement Article 1 of the Remedies Directive”. There was no reference to any enhancement or change to the basic provision as to standing set out in Article 1(3); on the contrary, there was an express reference to Article 1(3) under the

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<sup>5</sup> These rights and obligations are set out in detail in Regulation 8 of the PCAR09.

heading ‘Implementation’, and the Note said that that had been “already implemented” (as indeed it had).

83. Finally, I note that the Impact Assessment for the PCAR09 encouraged the “avoidance of ‘gold plating’” and taking a minimalist approach to implementation.
84. Accordingly, pausing now in 2009, following the amendments to the Remedies Directive and the PCAR09, the position in relation to standing in the UK was unchanged: it remained as it had been in 2006 (paragraph 76 above). Again, by the end of the hearing, I did not understand that to be in issue either.

*(e) The EU Procurement Directives of 2014*

85. In 2014, the EU introduced three new Procurement Directives: 2014/23/EU, the Concessions Directive; 2014/24/EU, the Public Contract Directive; and 2014/25/EU, the Utilities Directive. Those Procurement Directives made changes to the procurement rules and, in the case of the Concessions Directive, introduced for the first time specific rules in relation to concession contracts. Importantly, they did not replace or amend the remedies and review regime established under the Remedies Directive. As previously noted, that was confirmed by:

a) Recital 122 of the Public Contract Directive, which stated that “those review procedures should not be affected by this Directive”;

b) Recital 81 of the Concessions Directive, which confirmed that “in order to ensure that adequate judicial protection of candidates and tenderers in the concession award procedures, as well as to make effective the enforcement of this directive...[the Remedies Directive] should also apply to services, concessions and to works concessions awarded by contracting authorities and contracting entities”.

86. In each of the three 2014 Procurement Directives, the definition of an “economic operator” was changed to the following:

“...any natural or legal person, or public entity, or a group of such persons or entities, including temporary associations of undertakings, which offers the execution of works and/or a work, the supply of products or the provision of services on the market”.

There was no suggestion in any of the lengthy Recitals to these Directives that the change to the definition of “economic operator” was designed to expand the pool of those capable of making a procurement challenge and/or who had a remedy under the Remedies Directive. Indeed, the opposite was the case because, as noted in the previous paragraph, the Recitals made clear that questions of remedy were not addressed in the three new Procurement Directives, but were instead addressed in the Remedies Directive, which was unchanged.

87. Recital 49 of the Concessions Directive said that this new definition of “economic operator” was designed to be broad, in order to catch those with a right to challenge the procurement:

“...irrespective of the legal form under which they have chosen to operate. Thus, firms, branches, subsidiaries, partnerships, cooperative societies, limited companies, universities, public or private, and other forms of entities should all fall within the notion of economic operators, whether or not they are ‘legal persons’ in all circumstances”.

Thus, I consider that Recital 49 strongly suggests that the change to the definition of “economic operator” was *not* intended to expand the pool of those with standing to bring a procurement challenge, but was simply designed to ensure that the precise form of the legal entity which had the necessary standing should not be a bar to making a claim. There was no other explanation for the change in any other Recital, and certainly no suggestion that the EU was expanding the pool of those with standing. I note too that, despite the change to the definition of “economic operator”, there was no change in any of the critical obligations as to notification of decisions and the like, which remained owed exclusively to candidates and tenderers.

(e) *PCR15*

88. In 2015 and 2016 the UK implemented the three new Procurement Directives identified above. I address the Concession Contract Regulations (“CCR16”) separately in Section 5.3 below, because they are at the heart of the Preliminary Issue. But it is necessary to say something about the Public Contract Regulations 2015 (“the PCR15”) because they came first, and because some of the explanatory material in respect of the CCR16 referred back to the equivalent material in respect of the PCR15.
89. For present purposes, the points to note about the PCR15 themselves are that:
- (a) The definition of “economic operator” was taken directly from the new EU Directive (paragraphs 86-87 above);
- (b) “Economic operators” were again divided between candidates (who had sought an invitation or had been invited to take part in a restricted procedure) and a tenderer who had submitted a tender. Different obligations were owed to those two groups (see Regulation 55, by way of example). As I have said, I deal with this topic in more detail at paragraphs 148-153 below, when considering the proper interpretation of the term “economic operator”.
90. The Explanatory Memorandum to the PCR15 expressly confirmed the use of the “copy out” policy. It also said that the PCR15 was designed to “re-enact” the provisions of the Remedies Directive. There is no statement anywhere of any intention to go beyond the minimum requirements of the Remedies Directive. Instead it noted:
- “7.3 Part 3 of this instrument re-transposes the public sector Remedies Directive, which covers review procedures and remedies available for breaches of the procurement rules; this is only necessary because this instrument replaces the Public Contracts Regulations 2006 (as amended), which transposed both the 1817 7 2004 Public Sector Procurement Directive and the Remedies Directive. The general approach has been to move the existing remedies rules from the 2006 Regulations into this instrument, with only comparatively minor amendments, including adjustments necessary to mesh with the new Regulations overall and some minor drafting improvements.*”

However, we have taken the opportunity to provide for the remedies to be available not only to economic operators from non-EEA countries where covered by the WTO Agreement on Government Procurement (which the 2006 Regulations did) but also to those from other third countries where required by any other international agreement by which the EU is bound.” (My emphasis)

91. In other words, at least as far as the PCR15 was concerned, there was no requirement to make any changes in respect of matters such as standing, because those were already covered by the Remedies Directive, and had already been introduced into the PCR regime. Further confirmation of that can be found in paragraph 7.7 of the Explanatory Memorandum, which identified the most significant changes which the new Regulations introduced. There was no reference to any changes to standing.
92. Paragraph 8 of the Explanatory Memorandum dealt with the consultation process. There were further references to the ‘copy-out’ approach. In relation to policy choices, paragraph 8.2.5.4 stated:

“8.2.5.4 Policy choices, i.e. where the directive permits one or more options, should be made in line with the Government’s proposed approach of rule-simplification and ensuring flexibility for procurers, not impose new burdens on practitioners or “goldplate” the directive without sufficient evidence to necessitate it. This includes choosing not to ban the possibility for contract award criteria to be based on lowest price; not imposing new obligations on subcontractors; and ensuring that all authorities and all suppliers, (including those have yet to fully use e-communications), have adequate time to prepare for the transition to mandatory electronic communications.”

Accordingly, in relation to the PCR15, there was an express reference to not imposing new burdens, not gold-plating the Directive, and not imposing new obligations on subcontractors.

93. Ms Hannaford referred to the consultation document itself. It is unnecessary, for the purposes of this judgment, to refer to very much of that. There are repeated references to avoiding “gold plating”, and to the “copy-out” approach. There was a reference to seeking stakeholders’ comments on “whether the proposed drafting achieved our objective of *sewing the existing remedies rules into the new procurement rules framework in a satisfactory way*” (my emphasis). That therefore appeared to confirm that there was nothing new in relation to standing, as too did paragraph 52 of the consultation document, which stated:

“52. Part 3 of the Regulations derives from the Remedies Directive implemented by the UK in 2009. These Regulations are not part of the transposition of the new package of procurement Directives, and *UK remedies policy is not being reopened during this consultation process*. The standstill and remedies regulations have simply been moved from the existing UK procurement regulations into the proposed new regulations, with adjustments that are necessary or appropriate to mesh with the changed main regulations/Directive, together with some minor drafting or technical improvements...” (My emphasis).



94. Mr Moser urged me not to treat the explanatory material as if it was statute, and I have not done so. But in my view, when taken together, the PCR15 and the explanatory material surrounding them could not be clearer: there was no change and no intention to change fundamental matters such as standing, and instead a repeated desire, wherever possible, to keep things as they were. It is against that background that I turn to look at the sister set of Regulations dealing, for the first time, specifically with Concession Contracts, namely the CCR16.

### **5.3 CCR16**

#### ***(a) The Relevant Regulations***

95. The definition of “economic operator” in Regulation 2 is:

“...any natural or legal person or public entity or group of such persons and/or entities, including any temporary association of undertakings, which offers the execution of works and/or a work, the supply of products or the provision of services on the market”.

It will be seen that this mirrored the wording in the new Concessions Directive and PCR15.

96. Other specific Regulations which are relevant to IGT’s claim include:

**“50.— Duty owed to economic operators from EEA states**

(1) This regulation applies to the obligation on a contracting authority or utility to comply with—

- (a) these Regulations; and
- (b) any enforceable EU obligation in the field of procurement in respect of a concession contract falling within the scope of these Regulations.

(2) That obligation is a duty owed to an economic operator from the United Kingdom or from another EEA state.

...

**52.— Enforcement of duties through the Court**

(1) A breach of the duty owed in accordance with regulation 50 or 51 is actionable by any economic operator which, in consequence, suffers, or risks suffering, loss or damage.

(2) Proceedings for that purpose must be started in the High Court, and regulations 53 to 64 apply to such proceedings.”

These two Regulations come within Part 5 of the CCR16, which is headed and concerned with “Remedies”.

#### ***(b) The Explanatory Note***

97. The Explanatory Note for CCR16 said that:

“Part 5 contains provisions about remedies (and their facilitation) in relation to concession contracts within the scope of these Regulations. These provisions

*replicate, with consequential amendments*, Part 3 of the Public Contracts Regulations 2006 (S.I. 2006/6) and Part 9 of the Utilities Contracts Regulations 2006. In doing so they *implement* for England and Wales and Northern Ireland, the following EU instruments, as amended...

(a) Council Directive 89/665/EC [the Remedies Directive]...” (My emphasis)

98. Mr Moser had two points about the Explanatory Note. First, he contrasted it with the Explanatory Note for the earlier PCAR09 which said that, “except where otherwise stated”, the PCAR09 implemented the Remedies Directive (as cited in *EnergySolutions* at [34]). In *EnergySolutions*, the Supreme Court considered that this phrase indicated the clear intention of the legislature not to “gold plate” the entitlement to a particular remedy (i.e. *Franovich* damages). Mr Moser argued that, in the absence of such introductory wording, the same clear intention could not be identified in the Explanatory Note for the CCR16.
99. I do not accept that. Although they are different, the words used in the Explanatory Note for CCR16 have the same effect. Moreover, here, there was no need for the Explanatory Note to talk about the possibility of “gold plating” the remedies available because (unlike the situation in 2009, which was the subject of *EnergySolutions*) there had been no relevant change to the EU law in respect of remedies. That is why it talks instead about the straightforward implementation of the Remedies Directive (including, therefore, Article 1(3)).
100. Secondly, Mr Moser drew attention to the reference to “consequential amendments” in the first line, the implicit submission being that this could indicate that Parliament was intending to introduce changes to the remedies regime within the CCR16. Again, I disagree. The consequential changes were necessitated because, in respect of Concession Contracts, there had not been any specific Regulations before: these were the first Concession Contract Regulations in the UK. There was no need to make any amendments to UK Regulations consequential upon changes to EU law in respect of remedies, because there had not been any such changes. Nor were any “consequential amendments” identified, either in the CCR16 or the Explanatory Note or the other explanatory material, which might have affected the issue of standing.
101. Ms Hannaford submitted that the Explanatory Note confirmed that CCR16 was not providing a new remedies regime, but simply implementing the Remedies Directive. It therefore mirrored the position set out in the Recitals of the Concessions Directive itself (see paragraph 85 above). I accept that submission. The Explanatory Note expressly stated that, in relation to remedies, the CCR16 was not doing anything more than implementing Article 1(3).

**(c) *The Explanatory Memorandum***

102. In relation to the CCR16, the Explanatory Memorandum said at paragraph 2.1 that the CCR16 was “implementing” the Remedies Directive in respect of Concessions Contracts. That was correct because, as noted above, this was the first time that the UK had had any Concession Contract Regulations at all. Paragraph 3.1 of the Explanatory Memorandum said that the approach to transposing the CCR16 mirrored the approach taken for the PCR15, and that this general approach had been to use the “copy out” technique (a point repeated at paragraph 4.10).

103. Mr Moser argued that, although paragraph 3.1 of the Explanatory Memorandum referred to the Cabinet Office's general approach as being the "copy-out" technique, that was limited by the phrase "where available". He noted that the Transposition Note (a table showing the corresponding Regulation for each Article of the underlying Directive) confirmed that not all the Articles in the Directive were copied out into the Regulations. He argued that this demonstrated that "copying out" had not always been available and therefore at least allowed an opportunity for the enhancement of the remedies provisions.
104. I disagree. It is true that some Articles in the new Concessions Directive were not implemented. But that was in respect of those Articles which were dealing with administrative matters arising out of the tidying up of various elements of EU law, so would never have been transposed into separate UK Regulations in any event. For example, Article 53 was concerned with the Commission's obligation to assess the effect of the Directive and report back to the European Parliament, an obligation which would have had no place in UK domestic Regulations. Furthermore, there was nothing to say that, in respect of anything of any importance, "copying out" had not been "available" or had not been adopted.
105. Mr Moser's related submission was that Regulation 52 of the CCR16 had not been "copied out" from Directive 2014/24/EU (the Concessions Directive), so the court could ignore EU law and just fall back on what he called "domestic construction". The simple answer to that was that Regulation 52 could not come from the Concessions Directive, because the Concessions Directive was not concerned with remedies; for those, you go back to the Remedies Directive, as amended, which the CCR16 was "implementing". For standing in particular, you go back to Article 1(3). This emphasises the point I have already made, that the UK Regulations arise from two different EU sources: they are addressing simultaneously both the substantive law in the Procurement Directives, and the remedies from the Remedies Directive (see paragraph 66 above).
106. Paragraph 4.10 of the Explanatory Memorandum said:
- "The instrument contains a number of ambulatory references to EU legislation, which will give effect in UK law to technical updates to relevant EU legislation, respecting the principle of "copy out" by avoiding inadvertent gold plating while ensuring that UK legislation will remain up to date as technical changes are made at EU level..."

The reference to the avoidance of "inadvertent gold plating" becomes of some significance later, when considering one way in which Mr Moser put IGT's case.

107. Paragraph 7.3 of the Explanatory Memorandum said that Part 5 of the CCR16 "transposes the sections of the public sector Remedies Directives that are relevant to concession contracts." Moreover, it made an express reference to one small example of gold plating: it said that "we have taken the opportunity to provide for the remedies to be available not only to economic operators from non-EEA countries covered by the WTO agreement on government procurement...but also to those from other third countries were required by any other international agreement by which the EU is bound."

108. To my eye, that seems a clear indication that the CCR16 was intended simply to transpose the EU position on standing, save for that one specific expansion of the pool (which obviously has no relevance to this part of the present case). That is confirmed by paragraph 7.6 of the Explanatory Memorandum, which identified the most significant aspects of the new regime. Again, that did not suggest any expansion of the pool of those with the necessary standing; on the contrary, at paragraph 7.6.8, it referred simply to the “application of the Remedies Directives to all concessions above the threshold.”
109. Finally, in respect of the Explanatory Memorandum generally, Mr Moser drew another contrast with the same document for PCAR09, which had been considered in *EnergySolutions*. There, “gold plating” was said to be avoided “*invariably*”, whereas the language in the Explanatory Memorandum for CCR16 was different and, he suggested, less clear-cut.
110. I disagree: although the wording is different, I consider that, when taken as a whole, the Explanatory Memorandum for the CCR16 could not have been clearer in its resistance to “gold plating”. Moreover, the reference to “avoiding inadvertent gold plating” in paragraph 4.10 of the Explanatory Memorandum (paragraph 106 above) was the clearest possible renunciation of any such intention.

***(d) The Consultation Document***

111. This document contained the questions that formed part of the Government consultation on the implementation of the Concessions Directive. At paragraph 30 it confirmed that the remedies position would remain unchanged: “*UK remedies policy is not being reopened during this consultation process*”. Instead, the remedies provisions have “*simply been moved*” from the replaced PCAR09 to the CCR16. That seemed to me to provide yet further confirmation that there was no intended change to those who were eligible to claim a remedy.
112. The consultation document generally repeated the same points as above about avoiding gold plating and following the copy-out approach. Paragraph 28(d) stated that Part 5 of the CCR16 “transposes the obligations under [the Concession Contracts Directive] amending the Remedies Directives for the purposes of concession procurement”.
113. Mr Moser relied on C19-C21 of the consultation document, which referred to the extra costs to businesses of the CCR16, and which he suggested envisaged a wider scope for the Remedies Directive than before. In my view, that wrongly elides two points. There may have been extra costs, but that was because this was the first time that Concession Contracts were expressly made part of the public procurement regulatory regime. There was nothing to link those potential extra costs back to the Remedies Directive, much less any alleged change thereto.

***(e) The Impact Assessment***

114. The Impact Assessment in respect of the CCR16 repeated that “the decisions maximise simplification and flexibility, avoid gold-plating, and do not go beyond EU minimum requirements”. Although Mr Moser argued that the Impact Assessment did not indicate a policy choice to avoid “gold plating” in respect of the remedy provisions in the CCR16, that was because, as I have already said, there was nothing to “gold plate”:

there was no change to the Remedies Directive, so that aspect of the transposition into the CCR16 did not involve the making of any choice.

115. Mr Moser also pointed to paragraph 47 of the Impact Assessment which, when considering additional costs, stated:

“The new Directive also makes above threshold service concessions subject to the remedy’s provisions, which could lead to suppliers challenging decisions taken during the procurement process, procurements being restarted or settlements being agreed, or ultimately to challenges before the courts and possible requirements to terminate a procurement. The cost will depend entirely on the number of challenges, the value and nature of such concessions which are subject to a challenge, and the success rate of the challenges that are brought. This depends both on the supplier’s willingness to mount challenges, and the extent to which UK concession-awarding bodies comply with the rules.”

He relied on the reference to “suppliers” as supporting the suggestion that the pool of those with standing had been widened to include suppliers.

116. I do not agree. I have already made the point (paragraph 75 above) that the Impact Assessments use looser language than the Explanatory Notes and Memoranda. It seems to me clear that paragraph 47 was explaining that, for the first time, services concessions were being caught by the public procurement regulatory regime. The reference here was to the suppliers of the services concerned, in other words unsuccessful bidders. The Impact Assessment does not use the term “economic operators”, but this passage was clearly not intended to suggest that those supplying services down the contractual chain to an unsuccessful bidder were somehow suddenly able to commence proceedings under the CCR16.

***(f) The Defence Security Regulations 2011***

117. For completeness, I note that Ms Hannaford had a point about the Defence and Security Public Contracts Regulations 2011, which have not been amended and therefore do not contain the new definition of “economic operator”. She said that, if Mr Moser was right, there would be a two-tier system, with standing to make a defence procurement challenge being different to standing to make any other kind of procurement challenge.
118. As a result of my conclusions on the other issues, it is not necessary for me to form a final view about this. But I do not regard it as a strong point. With so many different sets of regulations, I am afraid that there can be inconsistencies between them. I therefore say no more about that argument.

***(g) Summary re CCR16***

119. For the reasons I have given, I consider that both the CCR16 themselves, and the documents surrounding them, point unequivocally away from any suggestion that the UK intended to enhance the Remedies Directive or expand the pool of those with the necessary standing to bring a procurement challenge. Instead they confirm that the

CCR16 was intended to provide the existing remedies to those who unsuccessfully bid for Concession Contracts. Importantly, that would also make the CCR16 entirely consistent with the PCR15. The explanatory material shows that there was never an intention for the UK to go the one stage further that had been originally suggested (see paragraph 38 above) or that, by bringing the definition of “economic operator” into line with the 2014 Procurement Directives, the UK intended to give standing to (amongst others) sub-contractors and sub-sub-contractors.

#### **5.4 Answer to Question 2**

120. I regret that this review of the implementation of the European Directives into domestic UK law, with its particular analysis of the CCR16 and its explanatory material, has been like chewing through an extremely soggy biscuit. But the small dollop of jam in the middle is of critical significance in this case. It was not the intention of the UK Government, when they made the CCR16, to expand the pool of those who had standing to bring a procurement challenge, and to include those who had not had such standing before such as, say, sub-contractors and sub-sub-contractors. There is nothing in the CCR16 or any of the other explanatory material which gives any such indication: indeed, all those documents point unequivocally in the other direction.
121. Given that, I consider that the CCR16 (and in particular the definition of “economic operator”) must be read in a purposive way in order to ensure that their interpretation matches EU law. In that sense, the issue here is no different to the issue in *Risk Management* and *EnergySolutions*, and the result should be the same. I would be making the same error of law as the Court of Appeal made in *EnergySolutions* if I concluded that, because the CCR16 is a domestic set of Regulations, the position in EU law does not matter. The answer to Question 2 is therefore “No”.
122. For completeness, I summarise why I cannot accept either of the ways IGT put its case. Mr Moser’s basic submission was that Parliament had made a deliberate decision to make the CCR16 “a different set of rules which widens the group of persons who may have standing to bring a procurement challenge”. For the reasons that I have given in Sections 5.1-5.3 above, I reject that submission. It is at odds with all the material which I have analysed.
123. From time to time, Mr Moser hinted at an alternative position, namely that this change may have happened inadvertently. To the extent that that was his argument, I reject it. There are three main reasons for that. First, as explained in Section 6 below, this would have been a very significant change in the law. It could open up the pool of those who can challenge a public procurement decision to unimaginable numbers. Its effect on public procurement law would be profound. In my view, it is inconceivable that such a change in the law was made without anyone realising it.
124. Secondly, it runs counter to paragraph 4.10 of the Explanatory Memorandum for the CCR16 (paragraph 106 above), which expressly stated that, by respecting the principle of “copy out”, the CCR16 “avoid[ed] inadvertent gold plating”. In other words, the possibility of making a change to the law by accident had been considered and addressed.
125. Thirdly, this submission would make paragraph 4.10, and all the rest of the Explanatory Memorandum, the Explanatory Note, the consultation document and the Impact

Assessment for the CCR16, not only wrong, but positively misleading. It would mean that, where for example, the Explanatory Memorandum identified the major changes being introduced, it would have wholly failed to mention the most important of all. I am unaware of any previous case where such a position has been advanced by a party to proceedings such as these, let alone where that was accepted by the court. Perhaps the closest recent decision on this point, namely *Akinsanya*, made plain that inadvertent gold-plating may happen “when the practical business of adapting an EU right into a domestic scheme may mean going rather beyond the minimum requirements of the right at the margins” [65]. But for the reasons that I have explained, this is not a case where there were any such practical difficulties; neither is it a case ‘on the margins’. Far from it. It is also not a case where the legislature were under any misapprehension about what they were doing. In short, if IGT are right on this way of putting their case, the law was the subject of a fundamental change, which no-one ever intended and which was not advertised anywhere. I reject that alternative case.

126. So, for the reasons explained in answer to Question 1, EU law did not give the IGT Claimants the right to bring this challenge. For the reasons explained in answer to Question 2, the UK did not at any time depart from or “gold plate” this aspect of EU law when implementing the relevant Directives; the IGT Claimants therefore never had any right to challenge the award to Allwyn. “Economic operator” in the CCR16 must be read purposively so as to be consistent with the Remedies Directive and the CJEU case law. That excludes the IGT Claimants. On the approach adopted by the Commission and Allwyn, that is the end of the Preliminary Issue, and that is the end of the case.
127. However, I would be anxious to go on and consider in more detail the definition of “economic operator”, because I do not believe that I can do full justice to the Preliminary Issue without doing so. Accordingly, I shall assume that I am wrong in my analysis, and that the interpretation of “economic operator” falls to be made without any reference back to EU law.

## **6. QUESTION 3: THE DEFINITION OF ‘ECONOMIC OPERATOR’**

### **6.1 What ‘Standing’ Means in the Procurement Context**

128. It is important to start this analysis with a closer examination of what ‘standing’ means in the procurement context. Whilst the IGT Claimants are claiming damages for breach of the duties owed by the Commission under the CCR16, that is of course only one of the remedies available to a party who has standing to bring a procurement challenge.
129. By far the most important remedy which a claimant in a procurement challenge seeks to obtain is to prevent the award of the contract to the successful bidder. In procedural terms, that usually means that, once the automatic suspension under CCR16 Regulation 56(1) has been triggered by the challenge, the contracting authority will apply to lift the suspension under Regulation 57(1). The challenger will often cross-apply to continue the suspension. That is the critical moment, before the disputed contract is lost forever: that is why most of the leading authorities on public procurement law are concerned with that first stage in the proceedings.

130. Accordingly, the IGT Claimants are seeking to argue that, amongst others, sub-contractors and sub-sub-contractors would have the standing to challenge the award of the contract to the successful bidder because they are caught by their interpretation of “economic operator”. That would be a very significant right. It would allow, say, a sub-sub-contractor who was a long way down an unsuccessful bidder’s supply chain, and who did not and could never have bid for the contract or licence in question, to challenge its award to a company who not only bid for, but won, the competition. Furthermore, that sub-sub-contractor would have the necessary standing, even if the unsuccessful bidder (the company that may have used that sub-sub-contractor to supply a component part or element of the service) does not itself seek to challenge the award of the contract. Instinctively, that feels quite wrong. So what do the words say?

## **6.2 The Words Used**

131. IGT say that the definition of “economic operator” (paragraph 95 above) includes everybody who “offers...the provision of services on the market”. They say that the offeror did not have to make the offer to the contracting authority, but can embrace anyone who generally offers an element of the relevant service as part of their business (i.e. who offers it to the world). They argue that the reference to “services” is not to the whole of the services that the unsuccessful bidder offered to the contracting authority in its tender, but any constituent element of those services. Thus they say that anyone within the unsuccessful bidder’s proposed supply chain, no matter how lowly, who was providing some small element of the services provided by the bidder as a whole, was caught by this definition. Finally, they say that “on the market” does not limit the scope of the definition in practice: it just means that the company or person has to be “economically active”.
132. There are a number of reasons why, just focussing on the words used, I am not persuaded by this interpretation of “economic operator”. I address in particular “offers”, “services” and “on the market”.
133. An economic operator has to “offer” the execution of works or the supply of products or the provision of services. Does that mean an “offer to the world” (i.e. someone who generally offers to perform the services in question, or some element of them), or is it limited to the offer to the contracting authority (i.e. an unsuccessful bidder)? I think the latter is the more natural reading of the word. Why use the word “offer” at all, if it was not intended to refer to the unsuccessful offer that had been made in the procurement process? If, for example, this definition was supposed to cover a sub-contractor or supplier in the unsuccessful bidder’s supply chain, it could easily have said so. The requirement of an “offer” is an inapt way of embracing such parties, if that had been the intention. Indeed, on Mr Moser’s reading of “offers”, it could theoretically cover those who were not involved in the unsuccessful bid at all (although they would of course still have to show loss or the risk of loss).
134. Then there is the interpretation of “services”. I would have thought that the natural interpretation was by reference to the “services” actually sought by the contracting authority namely, in this case, the service of running the Fourth National Lottery. I do not consider that, to arrive at the natural meaning of “services”, the services offered to the contracting authority should be broken down into every constituent element of those services. Where would that break-down end?



135. Again, the difficulty for Mr Moser is that, on his interpretation of the word “services”, the definition could never become too granular. X, who made the widget that went into the microchip (made by Y), which went into the terminal (made by Z) which was supplied to the principal sub-contractor (A) and then on, via the unsuccessful bidder (B), to the Commission, would be able to say that he provided a “service”, and was therefore entitled to challenge the award of the contract to Allwyn. But, so it seems to me, that is not only an unnatural reading of the words, but would lead to absurd results.
136. That leaves “on the market”. Mr Moser argues that these words qualify the offer. But I am not sure about that. Surely it cannot be, as Mr Moser submitted, a reference to “on the market” generally? Otherwise it would catch everyone who offered a service, no matter how small an element that might hypothetically be of the offer as a whole, and whether or not they were involved in the bid, indeed whether or not they even knew about the competition.
137. Take, for example, a public contract for the provision of car-parking services. A, B and C all offer some element of that service “on the market”. Local Authority X decides to tender for its car-parking services. A bids and fails to obtain the tender. B was going to be sub-contractor to A in relation to the provision of staff. C, who supplied cones and signage to parking companies generally, did not themselves bid, and had no involvement in A’s bid. If “economic operator” is to be read as catching all those who offer the provision of services “on the market”, whether they offered that service to the Local Authority or not, then B and C would be caught by this definition and would have the same standing as A to bring a claim. Even allowing for the probability that C might struggle to show loss or risk of loss, that is a nonsensical result. It would be a major expansion of the pool of those able to make a procurement challenge. “On the market” cannot possibly have that meaning.
138. At one point in his submissions, Mr Moser suggested that ‘the market’ would be limited to the market in which the competition was run, which in this case would be for lottery services. But if that is right, then that would exclude the IGT Claimants (or all but possibly C4), because they were not bidders in that market and they did not bid. He also said that the IGT Claimants were covered because they offered a critical element or elements of the service, but the words of the definition do not suggest any differentiation between a critical and a subsidiary element of the overall service sought.<sup>6</sup> And if, to take his related point, the IGT Claimants could have been part of a joint venture in order to make a bid to the Commission, then that provides its own answer: the Joint Venture would then have been a bidder, and would then have had the necessary standing.
139. Mr Moser sought to rely on *R(Chandler) v Secretary of State for Children, Schools and Families* [2009] EWCA Civ 1011; [2010] P.T.S.R. 749 to support his interpretation of the words “on the market” in the definition of “economic operator”. The question in *Chandler* was whether the public procurement regime applied to a university sponsoring a secondary school, where the university would not receive any profit. The procurement regime would apply if it could be shown that the sponsoring university

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<sup>6</sup> At one stage, Mr Moser argued that the long list of additional CPV codes in the original Concession Notice, which included lottery machines, lotto games, banking and information technology services might limit the scope of those with standing. But the problem with that is that there is again nothing to stop it becoming so granular that it covers every widget-maker, as well as every bank and tech company.

was an “economic operator”, which in turn required a consideration of whether the contract was made “for pecuniary interest”, and whether the service provider was offering services “on the market” under Regulation 2(1) PCR06 (at [39]). Dismissing the claimant’s challenge, the Court of Appeal held that that “on the market” must be interpreted in the light of the meaning placed on “for pecuniary interest”. Consequently, for an entity to be ‘on the market’ that participant had to be intending to make a profit from providing services (at [61]).

140. I do not consider that *Chandler* is of any real assistance to Mr Moser. That case was decided on the basis that the sponsoring university needed to have a pecuniary interest in order for the procurement regime to apply, an interest which was lacking on those facts. It was therefore unnecessary for the court in *Chandler* to go further and consider the proper meaning of ‘on the market’. Crucially, *Chandler* went no further than to say that a ‘market’ must have multiple participants. It does not address whether those multiple participants had to provide the full set of services required by the competition, or just some element of them.
141. For all those reasons, I am not persuaded that the definition of “economic operators” in CCR16 (and its EU parent in the Concessions Directive), even if read without the purposive approach supplied by the answers to Questions 1 and 2 above, can be read in the way suggested by Mr Moser. On the contrary, I consider that the better interpretation of the words “offers...services on the market” limits standing to unsuccessful bidders in the competition in question.

### **6.3 The Width of IGT’s Definition**

142. As is doubtless apparent by now, the principal difficulty that I have identified with IGT’s case is that, if “offers...services on the market” means more than just unsuccessful bidders, there seems to be no way in which its scope can be constrained. The real issue is the attempt to say that “services” must include every component part of those services. Mr Moser did not duck that challenge: he submitted expressly that the definition “was wide enough to cover the widget-maker” (paragraph 135 above). But in my view, the absence of any constraints (beyond loss or the risk of loss) meant that Mr Moser’s interpretation proved too much.
143. This problem can be demonstrated by reference to sub-contractors. Although Mr Moser stressed the fact that C3 and C5 were identified as “key sub-contractors” in the Camelot tender, and submitted that they at least were caught by the definition of “economic operators”, he had to accept that the definition of economic operators made no mention of sub-contractors at all. In that way, they are irrelevant to the proper meaning of “economic operators”. The widget maker in my example above is not a sub-contractor, much less a key sub-contractor. But it is accepted that he would fall within Mr Moser’s definition.
144. Another example of the width and breadth of the proposed definition can be illustrated by reference to the numbers in this case. There were 26 key sub-contractors in Camelot’s bid, together with 3 “designated sub-contractors” and 25 further named sub-contractors who were not characterised as “key” but who were clearly intended to play some part in the operation of the Fourth Licence. That is a total of 54 legal entities. Of course, many of those may have been made up of separate companies, acting together in a Joint Venture.

145. There were 4 bidders. By extrapolation, therefore, if each of the 4 bidders intended to use 50 or so sub-contractors, then that would make a total of 200 legal entities caught by the expression “economic operators”. On Mr Moser’s interpretation, each would have been capable of challenging the award of the Fourth National Lottery Licence to Allwyn; of resisting the lifting of the suspension and arguing that the Licence should not be awarded. In my view, that would be entirely unworkable. It is impossible to overstate the potentially chilling effect that this would have on any public procurement process.
146. It was Mr Hollander who, in his succinct oral submissions, made the point that the Preliminary Issue came down to an “all-or-nothing” dispute, and he asked rhetorically, if you expanded the pool of those who have standing beyond the unsuccessful bidders, it becomes impossible to stop. For the reasons I have set out, I agree with him. That is another reason why I have concluded that the wide interpretation adopted by Mr Moser cannot be sustained.

#### **6.4 Incompatibility with Other Regulations**

147. As a separate strand of my reasoning, I consider that the wide interpretation favoured by IGT, which would give standing to such a potentially boundless group of entities (including but not limited to sub-contractors and sub-sub-contractors) must be rejected because it would be incompatible with other parts of the CCR16 (and by extension, the PCR15 and the UCR16). In the interests of brevity, I take just two examples of this incompatibility.
148. In the Concessions Directive, “economic operator” is defined at Article 5(2), which then immediately goes on to identify what are plainly three sub-sets of those economic operators with the necessary standing: “candidates”, “tenderers” and “cessionaires”. Those categories are then transposed into the definitions in Regulation 2 of the CCR16. A candidate is an economic operator “that has sought an invitation or has been invited to take part in a concession contract award procedure...” (Article 5(3)); a tenderer is an economic operator “that has submitted a tender” (Article 5(4)); and a “cessionaire” is an economic operator “that has been awarded a concession contract” (Article 5(5)). In my view, they are the economic operators to whom the relevant duty is owed under Regulation 50, and no others. Of course, none of the IGT Claimants fall into any of those sub-sets.
149. Those definitions become important because, amongst other things, when a contracting authority decides to award the contract, they have to notify candidates and tenderers in a particular way and provide certain information to each. Those obligations are different, depending on whether the economic operator is a candidate or a tenderer. Thus, CCR16 Regulation 47 provides as follows:

**“47.— Notices of decisions to award a concession contract**

(1) Subject to paragraphs (5) and (6), a contracting authority or utility shall send to each candidate and tenderer a notice communicating its decision to award the concession contract.

*Content of notices*

(2) Where it is to be sent to a tenderer, the notice referred to in paragraph (1) shall include—

- (a) the criteria for the award of the concession contract;
- (b) the reasons for the decision, including the characteristics and relative advantages of the successful tender, the score (if any) obtained by—
  - (i) the tenderer which is to receive the notice, and
  - (ii) the tenderer to be awarded the concession contract, and anything required by paragraph (3);
- (c) the name of the tenderer to be awarded the concession contract; and
- (d) a precise statement of either—
  - (i) when, in accordance with regulation 48, the standstill period is expected to end and, if relevant, how the timing of its ending might be affected by any and, if so what, contingencies, or
  - (ii) the date before which the contracting authority or utility will not, in conformity with regulation 48, enter into the concession contract.

(3) The reasons referred to in paragraph (2)(b) shall include the reason for any decision by the contracting authority or utility that the economic operator did not meet the technical and functional requirements in an equivalent manner as mentioned in regulation 36(6).

- (4) Where it is to be sent to a candidate, the notice referred to in paragraph (1) shall include—
- (a) the reasons why the candidate was unsuccessful; and
  - (b) the information mentioned in paragraph (2), but as if the words “and relative advantages” were omitted from sub-paragraph (b).”

150. In this way, the CCR16 is careful to set out what must be provided and when to candidates and tenderers. It is a critical Regulation, because it is this information on which a candidate and/or a tenderer is likely to base its challenge. In my view, Regulation 47 confirms that it is to those entities whom a duty is owed as an “economic operator”. It would be wholly contrary to the calibrated working of the CCR16 if the contracting authority also owed unexpressed and undefined obligations and duties (in relation to notices of decisions and the provision of other information) to, say, sub-contractors or sub-sub-contractors. If such a sub-contractor was owed similar duties simply because it was an “economic operator”, it would make Regulation 47 entirely otiose. In addition, it would leave the mechanism by which these vital obligations were fulfilled wholly unexplained. What information would have to be provided to such a sub-contractor by the contracting authority? Why? When?
151. The same point is further illustrated by reference to Regulation 48, which provides as follows:

**“48.— Standstill period**

- (1) Where regulation 47(1) applies, the contracting authority or utility must not enter into the concession contract before the end of the standstill period.
- (2) Where the contracting authority or utility sends a regulation 47 notice to all the relevant economic operators by facsimile or electronic means, the standstill period ends at midnight at the end of the 10th day after the relevant sending date.

(3) Where the contracting authority or utility sends a regulation 47 notice to all the relevant economic operators only by other means, the standstill period ends at whichever of the following occurs first—

- (a) midnight at the end of the 15th day after the relevant sending date;
- (b) midnight at the end of 10th day after the date on which the last of the economic operators to receive such a notice receives it.

(4) In paragraphs (2) and (3), “*the relevant sending date*” means the date on which the regulation 47 notice is sent to the relevant economic operators, and if the notices are sent to different relevant economic operators on different dates, the relevant sending date is the date on which the last of the notices is sent.

(5) Where the contracting authority or utility sends the regulation 47 notice to one or more of the relevant economic operators by facsimile or electronic means and to the others by other means, the standstill period ends at whichever of the following two times occurs latest—

- (a) midnight at the end of the 10th day after the date on which the last notice is sent by facsimile or electronic means;
- (b) the time when whichever of the following occurs first—
  - (i) midnight at the end of the 15th day after the date on which the last notice is sent by other means;
  - (ii) midnight at the end of the 10th day after the date on which the last of the economic operators to receive a notice sent by any such other means receives it.

(6) In this regulation—

- (a) “*regulation 47 notice*” means a notice given in accordance with regulation 47; and
- (b) “*relevant economic operators*” means economic operators to which regulation 47 requires a notice to be sent.”

152. This is the sister provision to Regulation 47, dealing with the consequences of the information provided by the contracting authority and the triggering of the automatic standstill provision. The “relevant economic operator” in Regulation 48 is therefore the candidate and tenderer referred to in Regulation 47. It would be contrary to both the letter of Regulation 48, and the way in which the Regulations were supposed to work, if the same or similar obligations were owed to an unidentified category of sub-contractors or sub-sub-contractors.
153. I consider Regulations 47 and 48 to be critical provisions relating to the challenge of a contract award to a successful bidder. It makes complete sense that these obligations are owed to candidates and tenderers. But it makes no sense at all for these obligations to be owed to, say, sub-contractors and sub-sub-contractors, who are not even mentioned, and whose identity the contracting authority may not even know. Accordingly, I consider that these Regulations are wholly inconsistent with the wider interpretation urged by Mr Moser, but consistent with both the position under Article 1(3) of the Remedies Directive, as explained in *Grossmann*, and my interpretation of the words used summarised in paragraph 141 above.
154. The second example of incompatibility from the CCR16 again concerns sub-contractors. I note that they are expressly referred to in Article 42 of the Concessions Directive, not as a sub-set of “economic operators” to whom obligations were owed,

but as an entirely separate grouping. Article 42 is under the sub-heading ‘Rules on Performance of Concessions’ not, as Ms Hannaford pointed out, the earlier sub-heading ‘Rules on the Award of Concessions’ (my emphasis). The reason for their inclusion is explained in Recital 72 of the Directive. It is a way of imposing control on sub-contractors to ensure that they observe applicable obligations in the fields of environmental, social and labour law. The Recital identifies the need for obtaining information from sub-contractors and the importance of the transparency obligations.

155. All this is faithfully reflected in Regulation 42 of the CCR16 as follows:

**“42.— Subcontracting**

*Giving information to contracting authority or utility*

(1) In the concession documents, the contracting authority or utility may ask the tenderer to indicate in its tender any share of the concession contract that it may intend to subcontract to third parties and any proposed sub-contractors.

(2) Paragraph (1) is without prejudice to the question of the concessionaire’s liability.

(3) In the case of a works concession contract and in respect of services to be provided at a facility under the oversight of the contracting authority or utility, after the award of the concession contract and at the latest when the performance of the concession contract commences, the contracting authority or utility shall require the concessionaire to notify to the contracting authority or utility the name, contact details and legal representatives of its sub-contractors involved in such works or services, in so far as known at the time.

(4) The contracting authority or utility shall require the concessionaire to notify it of—

(a) any changes to the information notified under paragraph (3) during the course of the concession contract; and

(b) the name, contact details and legal representatives of any new sub-contractors which it subsequently involves in such works or services.

(5) Paragraphs (3) and (4) do not apply to suppliers.

(6) Contracting authorities and utilities may extend the obligations provided for in paragraphs (3) and (4) to, for example—

(a) services concession contracts (other than those concerning services to be provided at the facilities under the oversight of the contracting authority or utility) or suppliers involved in works concession contracts or services concession contracts;

(b) sub-contractors of the concessionaire’s sub-contractors or sub-contractors further down the subcontracting chain.

*Excluding sub-contractors*

(7) Contracting authorities and utilities may verify whether there are grounds for exclusion of sub-contractors under regulation 38(8) to (25).

(8) In such cases, the contracting authority or utility—

(a) shall require that the economic operator replaces a sub-contractor in respect of which the verification has shown that there are compulsory grounds for exclusion; and

(b) may require that the economic operator replaces a sub-contractor in respect of which the verification has shown that there are non-compulsory grounds for exclusion.”

156. Mr Moser relied on this Regulation as supporting his submission that the definition of “economic operators” at least included sub-contractors. But, in my view, this Regulation helps to establish the opposite. This Regulation does *not* treat sub-contractors as economic operators. It does not give them any sort of standing to bring a challenge (nor could it, this not being derived from the Remedies Directive). On the contrary, it talks about economic operators and sub-contractors as entirely different entities.
157. In a similar vein, Article 42.4(b) of the Directive, and thus Regulations 42(7) and 42(8) of CCR16, gives the contracting authority the power to “require the economic operator to replace a sub-contractor in respect of which verification is shown that there are compulsory grounds for exclusion”. That is one of the consequences of the information/transparency points made above. There would be no need for that provision if sub-contractors were also economic operators; indeed, it would be difficult to see how it could work. The two groups are treated very differently in and by the Regulations.
158. Furthermore, the exclusion of economic operators by contracting authorities in certain circumstances is already provided for by Article 38 and Regulation 38 of the CCR16. Therefore if, as Mr Moser suggested, sub-contractors were economic operators for these purposes, then there would be no need for Article 42 and Regulation 42 *at all*, because the provisions as to their exclusion would already be covered by Article 38 and Regulation 38.
159. In those circumstances, the specific provisions relating to sub-contractors seem to me to be incompatible with the suggestion that sub-contractors were included within the definition of “economic operator”, and were therefore of the same status and had the same standing as unsuccessful tenderers. The CCR16 suggests the opposite.
160. For these reasons, therefore, when taking the CCR16 as a whole, I consider that they are incompatible with the wide interpretation that IGT seeks to give to the words “economic operator”. I consider that they are consistent with the narrow definition which can be traced back to Article 1(3). The final matter is whether there is any authority which compels the opposite conclusion.

### **6.5 Are There Any Authorities Which Compel The Opposite Conclusion?**

161. There are no EU or UK authorities which define the term “economic operator”. I have, however, been reminded of a number of authorities which may have some bearing on the question of the potential standing of sub-contractors. I deal with those cases in chronological order.
162. In *Wall AG v La ville de Francfort-sur-le-Main* (Case C-91/08) [2010] EWR 1-02815, FES, the economic operator who bid for the concession contract, relating to the operation, maintenance, servicing and cleaning of 11 municipal public lavatories in Frankfurt, stated in their bid that they would use a sub-contractor, Wall. FES obtained the concession contract. Subsequently they asked the authority, the City of Frankfurt, for consent to a change of sub-contractor in accordance with the concession contract, so that certain public lavatories could be supplied, not by Wall, but by other companies.

163. The issue, identified at [30] of the judgment, was concerned with, where an amendment to a service concession contract included the replacement of a specific sub-contractor on whom weight was laid during the procedure, the reopening up to competition of the relevant tender process was required. At [39], the court made plain that it would only be in exceptional circumstances that a change in sub-contractor would be regarded as a decisive factor in the granting of the original contract. That is therefore a different case to the present case. There was no issue referred to the CJEU about the standing (or otherwise) of Wall. In addition, as Mr Moser properly conceded, the report does not make clear what German domestic law said about the standing of such a party. Accordingly, the highest that it can be put is that nowhere in the judgment in *Wall* is the question of the standing of the sub-contractor expressly raised.
164. Similarly, in *Systemex (UK) Ltd v Imperial College Healthcare NHS Trust* [2017] EWHC 1824 (TCC), Systemex were a specialist sub-contractor to the unsuccessful bidder. The judgment was concerned with the authority's application to lift the suspension. The question as to whether or not there was a serious issue to be tried was conceded. Thus the court did not have to grapple with the issue of standing at all, which had not been raised by either side. There was no consideration of the definition of "economic operator".
165. In *Consultant Connect Ltd v NHS Bath and North East Somerset, Swindon and Wiltshire Integrated Care Board* [2022] EWHC 2037 (TCC) it was held that there was no *in limine* prohibition on a tenderer who was not a party to a framework challenging an unlawful award made by that route. CC were the incumbent provider, but they were not a party to the framework agreement so were not invited to tender and did not learn of the competition until their existing contract was not extended. As Kerr J said at [146]:
- "There could be no legal bar or lack of "standing" to claim merely because the claimant is not a member of the relevant framework, CC submitted. If the contracting authority unlawfully awarded a contract to a framework member, the class of persons entitled to sue is delineated by the language of regulation 91(1) and on the facts included CC. Otherwise, a contracting authority could pit two members of different frameworks against each other in a biased, unfair and skewed competition; and neither would have standing to bring a claim."
166. In this way, *Consultant Connect* was not concerned with the legal position of sub-contractors or sub-sub-contractors, and there was no consideration in the judgment of the Remedies Directive or the definition of "economic operator". Furthermore, the defendant in *Consultant Connect* expressly accepted that CC constituted an "economic operator" for the purposes of PCR15. All that said, I can see why Mr Moser relied on the decision, because CC did not bid and yet were found to have had standing. But the reason for that was because of the discriminatory way in which the entire procurement competition was run: CC were not in the framework, so did not even know that they were being excluded from the competition in respect of the services they currently provided. As I observed during oral argument, although *Grossmann* was not cited to the judge, it is quite possible to read Kerr J's judgment as fitting neatly into the *Grossmann* exception. Mr Moser did not dissent from that proposition. On analysis, therefore, *Consultant Connect* does not help IGT.
167. In an earlier iteration of the present case, *Camelot UK Lotteries Ltd v the Gambling Commission* [2022] EWHC 1664 (TCC), O'Farrell J dealt with the application by the



Commission to lift the suspension. Although the dispute embraced by this Preliminary Issue was raised, and addressed by the judge at [60]-[78], her conclusion was simply that the question of the standing of the IGT Claimants raised a serious issue to be tried. It is that triable issue with which this judgment is concerned.

168. Finally there is the recent decision of Constable J in *Boxxe Ltd v The Secretary of State for Justice* [2023] EWHC 533 (TCC) which was again concerned with an application to lift the suspension, and focussed in particular on whether damages would be an adequate remedy for the unsuccessful tenderer, Boxxe. Their difficulty was that the principal losses would be suffered by their key sub-contractor, Involve. By reference to the decision of Sir Anthony Edwards-Stuart in *Circle Nottingham Ltd v NHS Rushcliffe Clinical Commissioning Group* [2019] EWHC 1315 (TCC), Constable J concluded that the position of Involve was irrelevant, and should not be taken into account when assessing the adequacy of damages for Boxxe. He noted at [38] that Involve could have attempted to become, but were not, a party to the proceedings. He was not suggesting that, if they had been, they would necessarily have been found to have had standing.
169. Accordingly, with the exception of O'Farrell J's judgment in the present case (where she said that the question of standing was a serious issue to be tried), none of the other authorities deal directly with the issue before me. In one sense, Mr Moser relied on those authorities simply to say that, where there were actual or potential claims by sub-contractors, there was no express suggestion that the sub-contractor did not have standing. But there are two points to be made about that.
170. First, since the question of standing never arose as an issue to be decided in those cases, they can hardly be relevant, let alone persuasive, authorities on the point. Secondly, the small number of cases in which sub-contractors were involved or evoked, despite the fact that the public contracts regulatory regime has been in operation for more than 20 years, may be a point against Mr Moser. It may be that those statistics show that sub-contractors have concluded that the necessary standing cannot be made out as a matter of law.
171. On any view, there are no binding authorities which would lead me to a different conclusion to the one I have expressed above.

## **6.6 Fairness and Judicial Review**

172. Finally, there is the point that Mr Moser made at paragraphs 61-64 of his written submissions, to the effect that a finding that sub-contractors (at the very least) do not have standing would somehow not be fair, particularly if, as here, the unsuccessful bidder chooses to abandon its own challenge. The sub-contractor may have suffered a significant loss but would be left without a remedy. However, general notions of fairness are not the issue here: the only question is whether or not those who have not made a bid, such as (but not limited to) sub-contractors, have a private law remedy against the contracting authority in these circumstances. That is a matter of law to which there is a clear answer. It cannot be a question of rules being construed in such a way as to undermine existing rights, as Mr Moser argued by reference to the decision in *NTN Corp v Stellantis NV* [2022] EWCA Civ 16; here, there was no relevant right in the first place.

173. I say nothing about the scope of any public law claim that might be made in these circumstances. That is partly because such an issue plainly falls outside the scope of this Preliminary Issue, and partly because the ability of non-economic operators to bring claims for judicial review is far from settled: see for example *R (Good Law Project Ltd) v Minister for the Cabinet Office* [2022] EWCA Civ 21 at [6], where the Court of Appeal said that the question was “ripe for review when it next arises”. The court could not go further in that case because standing had not been disputed before the judge and was not in issue on the appeal.

### **6.7 Answer to Question 3**

174. In my view, the proper interpretation of “economic operator”, even ignoring the purposive interpretation derived from EU law, produces the same result. Unsuccessful bidders have standing whilst, subject to the *Grossman* exception, those who did not make a bid – including sub-contractors, sub-sub-contractors and suppliers - do not.

## **7. QUESTION 4: THE STATUS OF C1, C3, C4, AND C5**

175. For the reasons which will now be apparent, I have concluded that the IGT Claimants have no standing to bring this claim. It may be helpful if I summarise those views by reference to each of them.

### **7.1 C1**

176. C1 is the parent company of the IGT Group. It directly owns C4 and indirectly owns the other IGT Claimants. It was not going to provide any services to Camelot under the Fourth Licence.
177. For the reasons set out in Sections 4, 5, and 6 above, C1 does not have standing to make this claim and is not an “economic operator” within the meaning of CCR16. Indeed, it does not appear that C1 could ever have been an economic operator, even on Mr Moser’s wide definition, because it did not offer any services, whether to the Commission, or to Camelot, or to the world.

### **7.2 C3 and C5**

178. C3 and C5 were key sub-contractors. For the reasons set out in Sections 4, 5 and 6 above, they do not have standing to make this claim and are not “economic operators” within the meaning of CCR16.

### **7.3 C4**

179. C4 was a Special Purpose Entity (“SPE”) created for the purpose of making a separate bid for the Fourth Licence. In the end, that bid was never made. They may therefore have been a “candidate” within the meaning of CCR16 for a brief period until they withdrew from the Competition, but were never a “tenderer”. I should stress that there is no pleaded claim, and no submissions were ever made, to suggest that the effect of their pre-qualification was somehow to give C4 standing. In any event, for the reasons set out in Sections 4, 5 and 6 above, C4 does not have standing to make this claim and is not an economic operator within the meaning of CCR16. Furthermore, Mr Moser accepted that, following the decision not to bid, C4 had never been economically active

so, even if his wide definition of “economic operator” had been right, C4 could not have had the necessary standing in any event.

180. Two other arguments relating specifically to C4 need to be addressed. First, Mr Moser said that, because the ITA expressly required the bidder to be an SPE, it would be unfair and illogical if the SPE created for the purposes of this bid (namely C4) could not challenge the result of the procurement. He asked rhetorically who, if not C4, could raise such a challenge? But his question is based on a false premise. C4 would have had standing if they had made a bid to run the Fourth National Lottery. But they chose not to. I accept that companies setting up an SPE in these circumstances *may* have separate standing to challenge the result of the procurement (because it might otherwise prevent those who have actually suffered the loss from making a claim), but I cannot reach any sort of a concluded view about that: it is a complex topic and far beyond the scope of this Preliminary Issue. In any event, it would again be on the assumption that the SPE had made an unsuccessful bid in the first place. Since C4 never made such a bid, the point does not arise. And to answer a question raised in the post-draft judgment correspondence, C1 could not acquire standing as a result of a bid by C4 that was never made.
181. Secondly, Mr Moser referred me to the second witness statement of Mr Mears which dealt with why C4 had decided not to make a bid to run the National Lottery themselves. The relevant paragraphs are between 2.9 and 2.13. I set them out in full below (making the necessary deletions of confidential material):

“2.9 IGT decided to work on an operator bid and to also explore in negotiations with Camelot a role as a Key Sub-contractor. As we progressed with Camelot towards the Phase One application submission, it was my view that the Camelot bid with IGT as Key Sub-contractor would be a compelling offering. I recall when reading the Invitation to Apply (“ITA”) and from interactions with the Gambling Commission that the key concerns of the Gambling Commission in the 4NLC were transition, brand and risks to major games. In my view, given the way the ITA was written and our understanding of the requirements in the competition documents for the 4NLC, if our application with Camelot could present innovative new ideas alongside the continuity of the core central system (upgraded with even better technology) then the chances of Camelot winning were higher than IGT's chance of winning as an operator, and higher than any challenger bids chance of winning.

2.10 Despite the public perception that existed in the market that Camelot had operated the National Lottery for a very long time, it was my view that risk of transitioning to a new operator would likely be too great for the Gambling Commission under the ITA evaluation scheme.

2.11 Under the ITA, I was aware that a solution risk factor (“SRF”) would be applied to the whole of a bidder's business plan. Having refreshed my memory by reviewing the ITA, I recall understanding that the SRF would apply across 5 areas, being transition, branding, portfolio, channels and operations, in order to assess how much risk any given business plan would bring. As an example, it would take into account how aggressive a sales plan was and whether there was a risk it would not be realised or whether it would actually have a

detrimental effect on sales. It might also assess how drastic a change in technology would be and whether this would cause any technical issues for retailers or players. This is where IGT saw strength in the Camelot bid. [...]. Consequently, IGT viewed the Camelot bid as a very low risk bid and it was felt that the SRF once applied would put Camelot in the winning position. I did not expect that the Camelot bid would score zero for the SRF, but I expected it would be a low score and lower than any other bidder's SRF score (including IGT's, if IGT bid as an operator).

2.12 At a high level, IGT was aware that as a stand alone operator it would have been a higher risk to the Gambling Commission than Camelot because IGT does not have operator experience in the UK market. As I have addressed in this statement, after January 2020, I was only involved in the Camelot/IGT bid workstream. However, I recall that IGT did not need to go so far as invest considerable time and resources working up what a full operator bid would look like to provide a granular assessment of how we thought it would score under the SRF but it was apparent to us at a high level that Camelot would be in a winning position.

2.13 My recommendation to the senior leadership was that IGT would have a better chance of winning with Camelot than as an operator. I had this view because I could see as we progressed in working with Camelot [...] that the Camelot proposal with IGT as Key Sub-contractor would be lower risk for the reasons I have explained earlier, and Camelot was developing as a compelling offering.”

182. It was not clear to me what the relevance of this evidence was. I asked Mr Moser if he was suggesting that, in consequence of this evidence, it was argued on behalf of C4 that it fell within the *Grossmann* exception: in other words, that there was material within the tender documentation which was itself said to be discriminatory, and which meant that C4 did not bid for the Fourth Licence. Although not overly enthusiastic about it, Mr Moser confirmed that “if I need it, I say it is”.
183. It seems to me that, on a proper analysis, that second argument on behalf of C4 must fail at every level. First, as Ms Hannaford correctly pointed out, such a claim is not pleaded or even suggested in the Particulars of Claim or in the Reply. Secondly, there was no pleaded claim that C4 was in a different position to the other IGT Claimants. Thirdly, the IGT Claimants' claim, including that of C4, is expressly put on the basis that Camelot's bid ought to have been the winner, not that C4 should have been allowed to bid but was prevented from so doing. Fourthly, it seems to me that, even taking Mr Mears' statement at its highest, he was not suggesting that there was anything discriminatory in the ITA; he was simply saying that, in all the circumstances, IGT had decided that it was a commercially better option for them to act as Camelot's sub-contractors rather than to launch their own bid. There can be risks in bidding against an incumbent contractor, but that is part of the commercial assessment that must be made by any prospective bidder in circumstances like these. It is all a million miles from *Grossmann*. Fifthly, if this had been the basis of C4's claim, it was wholly out of time. In *Grossmann*, the challenge failed because the CJEU decided that, if the claim was about discrimination in the tender documentation, the claim had to be made straight

away, and before any contract was awarded based on the tainted material. Plainly that did not happen here.<sup>7</sup>

184. Accordingly, to the extent that it formed part of C4's case, I reject the alternative submission that C4 fell within the *Grossmann* exception.

#### **7.4 C6**

185. C6 was a sub-sub-contractor, and therefore not even named in the Camelot bid. For the reasons set out in Sections 4, 5 and 6 above, it did not fall within the definition of "economic operator".

### **8. QUESTION 5: THE GPA ISSUE**

186. Even if the Commission were wrong that none of the IGT Claimants had standing as economic operators, Ms Hannaford had an alternative argument in relation to C3. As I have concluded that none of the IGT Claimants had standing, it is strictly unnecessary for me to address this alternative argument. However, for completeness, and in deference to the submissions made during the hearing, I explain briefly my reasons for finding that Ms Hannaford was right, and that this is a further reason why C3 does not have standing to bring a claim.

187. C3 is a USA registered company. It could therefore never have been owed a duty by the Commission under the CCR16 Regulation 50, as that is reserved for economic operators from EEA states. Instead, any duty owed to C3 would be owed under Regulation 51 which applies to 'certain other states'. It is in the following form:

#### **"51. Duty owed to economic operators from certain other states**

(1) The duty owed in accordance with regulation 50 is a duty owed also to—  
(a) an economic operator from a GPA state, but only where the GPA applies to the procurement concerned; and

(b) an economic operator which is not from an EEA state or a GPA state, but only if a relevant bilateral agreement applies.

(2) For the purposes of paragraph (1)(a), the GPA applies to a procurement if—  
(a) the procurement may result in the award of a concession contract of any description; and

(b) at the relevant time—

(i) a GPA State has agreed with the EU that the GPA shall apply to a concession contract of that description, and

(ii) the economic operator is from that GPA state.

(3) For the purposes of paragraph (1)(b), a relevant bilateral agreement applies if

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<sup>7</sup> Mr Moser suggested that IGT could not do anything about the SRF until they saw that Camelot's bid had been marked at zero. That is incorrect on the facts, and in any event irrelevant to the putative claim under consideration. It is incorrect on the facts because Mr Mears said that he always knew that Camelot's SRF would be "low", so nothing can turn on it being zero rather than low. And it is irrelevant to any putative claim under the *Grossmann* exception, because that could only arise, not on the scoring of a rival's bid, but out of the allegation that the SRF was itself discriminatory and prevented C4's bid in the first place. Had that been the case, it would have been known to C4 at the outset.

- (a) there is an international agreement, other than the GPA, by which the EU is bound; and
- (b) in accordance with that agreement, the economic operator is, in respect of the procurement concerned, to be accorded remedies no less favourable than those accorded to economic operators from the EU in respect of matters falling within the scope of the duty owed in accordance with regulation 50.

(4) In this regulation—

- (a) “GPA” means the Agreement on Government Procurement between certain parties to the World Trade Organisation signed in Marrakesh on 15th April 1994 as amended
- (b) “GPA state” means any country, other than an EEA state, which at the relevant time is a signatory to the GPA; and
- (c) “relevant time” means the date on which the contracting authority or utility sent a concession notice in respect of the concession contract to the Publications Office of the European Union or would have done so if it had been required by these Regulations to do so”

188. The Government Procurement Agreement (“GPA”) is an agreement between members of the WTO relating to procurement procedures. C3 is a company established and incorporated and has its registered address in the state of Delaware, USA. Both parties agree that the USA is a ‘GPA state’ and that, when the UK was an EU Member State in 2020 at the time of the competition (see paragraph 5 above), the UK was a member of the GPA through its EU membership.
189. However, there is a dispute as to whether the GPA “*applies to the procurement concerned*” as per Regulation 51(1)(a). This dispute arises in part based on how the parties define “*the procurement*”. The Commission say that the procurement concerned in this case was for a services concession contract for lottery services. Ms Hannaford submitted that, looking at the terms of the GPA between the EU and USA, the GPA does not apply to either:
- (i) Lottery services; or
  - (ii) services concession contracts.

Hence, the Commission has two routes to its conclusion that the GPA did not apply to this procurement.

190. To ascertain the coverage of the GPA, one must start with Article II (2) which defines a ‘covered procurement’ as one which is “*of goods, services, or any combination thereof [...] as specified in each Party’s annexes to Appendix 1*”. Ms Hannaford pointed to Annex 5 of the EU’s GPA agreement, which lists the services covered by the GPA. Neither ‘lottery services’ nor ‘services concession contracts’ appear in this Annex 5 list.<sup>8</sup> Similarly, there is no reference to ‘services concession contracts’ in the EU’s GPA Annexes. The only reference to ‘concessions’ is in Annex 6 (entitled

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<sup>8</sup> To make good this submission, Ms Hannaford showed how under the United Nations Provisional Central Product Classification code for lottery services – 96929 – does not appear in Annex 5, entitled ‘Service Contracts’.

‘Construction Services and Works Concessions’). There is no reference to services concessions.

191. IGT addressed each of these arguments. First, Mr Moser submitted that the failure of the EU Annex to refer to ‘services concession contracts’ does not mean they are necessarily excluded from the GPA. He suggested that the reference to the wider term of ‘concession contract’ of any description in Regulation 51 indicated that they were included, and that what mattered was the activity actually to be performed by the economic operator, rather than the nature of the procurement itself.
192. I disagree. The wording of the GPA is clear: it only covers those procurements to which the GPA applies. Hence the Annexes are so important (as per paragraph 21-21 of *Arrowsmith on Procurement in the World Trade Organisation*). Possibly the reason why ‘services concessions’ are not included is because they are a relatively new concept in EU law and post-date the GPA and Annexes 5 and 6. Neither the GPA nor the Annex have been subsequently amended. But for whatever reason, they plainly do not include “services concessions”. Moreover, Mr Moser’s reference to the activity actually to be performed by the economic operator takes us right back to his granularity submissions, which I have already rejected.
193. Regarding the second route, IGT accept that ‘lottery services’ (and its corresponding CPC code) do not appear in Annex 5. However, Mr Moser submitted that this overlooks the reality of what IGT were going to provide in the procurement, namely goods and services required for the operation of a lottery. He said that goods and services were covered by Annex 4 of the EU GPA Schedule, because that works on the basis that all goods and services are covered, except those identified in Annex 4. Since those are primarily related to defence matters, he argued that Annex 4 does not exclude the goods and services to be supplied by the IGT Claimants.
194. I reject that submission. The ordinary meaning of Regulation 51(1)(a) requires the court to look at what the procurement was for. Here, it was for lottery services. The Commission did not launch a competition, to take a hypothetical example, for the provision of lottery technology or lottery operation software. They sought to procure ‘lottery services’, not certain pieces of hardware. Whilst it is true that many discrete elements of goods and services are no doubt vital to running a lottery, they were not what the Commission was trying to procure.
195. Further, it was only Annex 4 that operated by way of exclusion; Annexes 5 and 6 take care to select which services and goods were included in the GPA. This is supported by their detail, which was no doubt the product of careful negotiations. IGT’s approach would allow goods and services to be covered by the GPA in circumstances where the actual procurement competition was expressly not covered by the GPA. I consider that the effect of this would be to make a nonsense of the carefully negotiated international agreement between states, an outcome which in my view serves to confirm the correctness of the Commission’s approach.
196. For those reasons, the answer to the fifth question on the GPA Issue is “No”: the GPA is not applicable to this procurement, such that C3 is not owed a duty by the Commission under Regulation 51.

## **9. CONCLUSIONS**

197. For the reasons that I have given, I have concluded that the IGT Claimants do not have the necessary standing to bring this procurement challenge. On the face of it, that would appear to mean that this claim must fail. I will deal with any consequential matters that cannot be agreed at a hearing to be fixed in late August/early September 2023.