THE UNITED KINGDOM

Brian Doherty[1]

The context

Question 1

Systematic challenges: advisability of & choices in regulating; results in the UK

In the main, the EU has chosen the means of single market directives to regulate public procurement. As would then be expected in fulfilment of the UK's duty to give full effect to EU law in the manner in which that is usually done in the legal systems of the UK, the directives have been transposed into the UK national law by way of implementing statutory measures (see the Public Contracts Regulations 2006 for England Wales and Northern Ireland[2] and for Scotland the Public Contracts (Scotland) Regulations 2006).[3] These measures are secondary legislation made by government departments under the power of section 2(2) of the European Communities Act 1972.[4] This legislation is supplemented by guidance of various sorts issued by central and local authorities. It is worth noting that within the UK, the central government has devolved to regional administrations the power to regulate procurement. Constitutions of the devolved administrations provide that Ministers and Departments in the administrations 'do not have the power' to do... any act which is incompatible with EU law. (eg see s 24 of the Northern Ireland Act 1998[5]). Thus there is a high premium set at national level for the devolved authorities to comply with the EU rules. In addition, any failure to do so can also enable the central government to exercise 'override' powers to effect compliance if

1. Deputy to the Solicitor, Departmental Solicitors Office, Government Legal Service, Belfast, Northern Ireland (all views expressed are personal).
2. SI 2006 No 5.
3. SSI 2006 No 1.
4. c 68.
5. c 32.

that becomes necessary (see for example section 80 of the Northern Ireland Act 1998). However, as mentioned, although Scotland has its own statutory regime implementing the EU rules, Northern Ireland and Wales are regulated by statutory instruments made by the central government which extend to those jurisdictions. The content of the implementing regulations are very similar. Thus the differing devolved jurisdictions have not generally to date availed of the discretion confirmed by the CJEU in its *Horvath* decision[6] to implement differently (albeit within the discretion given to Member States) in the different internal jurisdictions, although there are indications they may do so to some extend as a result of their separate consultations on the implementation of the pending new directives. Each jurisdiction in the UK has built up case law from court decisions on disputed procurement processes which enhance the understanding of what is already provided for in the implementing regulations. The limitation period within which review cases under the EU remedies regime needs to be taken has been set at 30 days and the earlier additional requirement that it should in any event be brought 'promptly' had been removed following the judgment in the *Uniplex* case[7] which established that this requirement did not meet the EU law principle of transparency.

The current method of transposition of EU Directives in the UK is explained in the UK government's Department of Business Innovation and Skills document 'Transposition Guidance – How to implement European Directives effectively' of April 2013.[8]

The General Rapporteur invites comments on the following aspects:

1. – the challenges faced (by the UK) in implementing the rules, and the ways they were overcome

The guiding principles adopted by the UK in implementing EU obligations capture the essence of the UK's approach, and they apply to the area of procurement law. For the purposes of this paper, they indicate the attitude of the UK to the challenges posed and how they were met in the process of transposition. They touch on themes that will be raised later. They are that:

6. *Horvath v Secretary of State for Environment, Food and Rural Affairs* C-428/07
7. C-406/08 Uniplex [2010] ECR 1.
8. HM Government: This and other UK government documents quoted in this paper contain public sector information licensed under the Open Government Licence v2.0.

1. Ministers must ensure that:
   a. they are well sighted on all EU measures relevant to their department, from the initial Commission proposal through to transposition and implementation; and
   b. their department assesses from the outset the impact on the UK of the proposed legislation and effectively project manages the process from negotiation to transposition:
2. When transposing EU law, the Government will:
   a. ensure that (save in exceptional circumstances) the UK does not go beyond the minimum requirements of the measure which is being transposed;
   b. wherever possible, seek to implement EU policy and legal obligations through the use of alternatives to regulation;
   c. endeavour to ensure that UK businesses are not put at a competitive disadvantage compared with their European counterparts;
   d. 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 the reasons for their choice;
   e. ensure the necessary implementing measures come into force on (rather than before) the transposition deadline specified in a directive, unless there are compelling reasons for earlier implementation; and
   f. include a statutory duty for Ministerial review every five years.

As indicated these are just guidelines and there are exceptions to their operation. For example regarding 2.e, waiting until the transposition deadline before transposing, in the case of the latest set of directives the UK government intends to go for early transposition so that the UK can take advantage of the additional flexibilities in the new rules (eg regarding Mutuals) as soon as possible. These rules would bite on new procurement exercises commenced after the date when the new UK rules take effect.

A keynote element of that UK government policy is that the implementation should not go beyond the minimum necessary – (no 'gold-plating'). The UK government's approach to transposition is now primarily by way of 'copy-out' (where the implementing legislation adopts the same wording as that of the Directive so far as is possible or where it cross-refers to the relevant Directive provision) and not 'elaboration' (implementing in a way that uses language that differs from the wording of the Directive in order to clarify its meaning for legal or domestic policy reasons). This was not previously the

policy approach, so it will be interesting to see what difference this makes to the transposition of the new round of EU directives in the area. The measures should certainly be easier to cross reference with the directives. It should also mean that readers can avoid having to puzzle over why the UK elaborated in the manner it did.[9]

2. – how the original legal (including theoretical) framework is still creating frictions in the full implementation of EU law

Turning from these technical aspects of the adoption of the procurement directives, I would like to reflect on the more general setting:

As far as transposition is concerned I would suggest that there is no reason to think that the UK has not fully and faithfully carried into law the requirements of the EU directives. In this context I have some difficulty identifying 'frictions' in regard to the terms of the implementing measures. It can, however be said that the UK is adopting a copy-out approach in part to reduce the risk of the elaboration which would otherwise take place in 'translating' the terms of the directive into the usual parlance which had been the favoured approach of the UK drafters of implementing legislation. Adopting a 'copy-out' approach, which is now the policy of government, is a radical change to the traditional approach to legislative drafting in the UK. In adopting this approach the risks associated in deviating from the actual wording of the directives largely shifts away from the state in respect to its role as the authority responsible for accurate transposition. It is notable that the legislative drafters in Ireland have in the past been much more ready to use a copy-out approach.

However, apart from the issue of transposition, at a number of levels there are symptoms of the system not operating comfortably in the UK. Rather than simply freeing the market from risk of discrimination, there is evidence that the rules are causing various other distortive effects to the operation of the market to occur. Some of what follows is anecdotal and not based upon formal legal research, though I think that this is an area calling for further investigation.

There is now an established trend to litigate in a significant number of procurements on the issue of whether the EU rules have been properly applied and especially in Northern Ireland. This has created an area of legal practice which did not exist before the rules were made. In the UK, cases are usually taken to the High Court in the first instance, with counsel and solici-

9. House of Commons Library: Government action on gold-plating: SN/IA/5943.

tors representing the parties. If the matters end up in court, the time in processing the cases is very considerable. A case which goes to the High Court for hearing would rarely be resolved in less than 6 months in Northern Ireland. For example, the case of *McLaughlin & Harvey Ltd. v Department of Finance & Personnel*[10] commenced in 2008 has not yet completed. There are different views from the judiciary in different parts of the UK on how individual cases are to be dealt with procedurally. On the one hand Mr Justice McCloskey of the Northern Ireland High Court has said,

> 'the court's experience to date is that uncertainties and imponderables abound in this sphere of litigation. The cases have proved to be organic in nature. From the inception of proceedings, the Plaintiffs' grounds of challenge are intrinsically likely to alter. Some grounds may fade away, whereas other, new grounds may enter the fray, particularly as a result of discovery of documents. It is not easy for the court to efficaciously monitor all developments.'[11]

However, on the other hand in the case of *Corelogic Ltd. v Bristol City Council*[12] the High Court in Great Britain issued a warning that causes of action not included in the basic claim form may not be brought outside the 30 day limitation period.

By contrast with the UK's judicial system for dealing with disputes, from the European Commission's 26th November 2012 seminar on Remedies in procurement law,[13] it was impressive to see the number of member states which had specialised adjudicatory systems and bodies for procurement cases which resolved cases much sooner than in the UK, (in some cases initial adjudication of disputes could be concluded in a few weeks) and in various states with relatively low levels of further appeal.

In my opinion the rebalancing of the remedies regime has encouraged what was already a growing trend to litigate which did not exist in the UK before – in particular the creation of an automatic stay on procurement processes appears to have increased the incentive to litigate about procurement processes, where in many cases this may in effect mean at least delaying a competitor from winning a contract. Before the new rules, it was for the complainant to approach the court to apply for interim relief, and the issue was

10. [2011] NICA 60 & [2008] NIQB 122.
11. Papers from the Irish Centre of European Law archive: June 2012 Conference on European Procurement Law.
12. [2013] EWHC 2088.
13. Available online at: European Commission: DG The European Single Market: News.

dealt with on a level playing field, and where the courts had discretion as to the form in which the relief, if granted, could be given.

Again, anecdotal evidence suggests that in many cases litigation concerns procurements where there are only local contractors, there having been no bidders from outside the Member State (or other areas of the member state) concerned. This raises a question as to the need for the rules to apply to procurement processes which do not have an inter-state dimension.

All these difficulties have led to distortions of economic activity occuring. Such delay and uncertainty has discouraged the use of procurements where they can be legally avoided. Examples of the distortions that occur are: keeping or bringing services in-house, deciding not to procure but to grant aid parties who are operating in the area of economic activity where a procurement might otherwise have been used, stopping procurements where litigation is threatened and using overlapping established procurement frameworks which are already in place, either for that reason or because procurement processes are delayed/rerun as a result of allegations of impropriety.

I will refer to this theme of the distortive effects of the EU rules, or since the rules are prescriptive of what is legal, the absence of rules allowing authorities to use new techniques as these are developed, at various points in this report. However I will mention one such instance at this point, and that relates to framework agreements. These were not provided for in the original Directives (other than for utilities), and until the judgment in the *Greek Bandages case*,[14] and ultimately until the 2004 Directive, the law was not made clear. For a period the Commission objected to the use of the technique. The N. Ireland devolved government had good reason to know this as 10 years before the directive the use of the technique there was challenged by the Commission on the basis that frameworks were not provided for in the then applicable procurement directive. The result was that the particular procurement process and the use of frameworks generally were stood down for a period. This is one example of the damping down effect of such prescriptive rules on the development of innovative procurement techniques, and where there may be prolonged delays until EU legislation 'catches up' with new contracting techniques.

The general rapporteur raises the question of striking a balance between trusting the civil servants and regulating. As it has transpired, even taking the proposed new measures into account, we have ended up with an extensive, detailed, intricate and quite complex regime above and beyond what the trea-

14. Case C-79/94.

ty single market principles provided for. I believe that time spent by public servants administering and in particular trying to be compliant with the rules, are distracting, and that the rules discourage procurement professionals from developing bona fide innovative procurement techniques. (For another potential example see the decision in Henry Brothers v Department of Education for Northern Ireland[15] procurement). I believe that a statement of Professor Steve Kelman from Harvard's John F. Kennedy School of Government is apposite:

'As a strategy of organisational design, rules have a cautious character. When we design organisational models based on rules we guard against disaster, but at the cost of stifling excellence. Government officials deprived of discretion which could produce misbehaviour are at the same time deprived of discretion that could call forth outstanding achievement.'[16]

If the full implementation of EU public procurement law is aimed at improving the operation of the (single) market, then I suggest the evidence from the UK generally, and certainly from the legal jurisdiction of Northern Ireland is of more complex and slower processes, no sufficiently clear links between the burdens the rules entail, including resultant litigation, with the achievement of single market goals, an attrition to value for money outcomes and distortion of the free market which the founding treaty intended to foster.

The boundaries of EU public procurement law

Question 2

Defining 'public contracts' and distinguishing them from other state measures

No doubt the issues around what is and what is not caught by the procurement rules are a shared concern to procurement professionals across the EU Member States. Since the Rome Treaty of 1957 through to its latest iteration in the TFEU, the founding constitution of the EU has wisely chosen not to

15. [2011] NICA 59 & [2008] NIQB 105 and 153.
16. See Kelman: Procurement and Public Management: the Fear of Discretion and the Quality of Public Performance: AEI Press 1990.

regulate whether the Member States place economic activity in the public or private sector (see Art 222 of the Rome Treaty, now art. 345 TFEU), 'This Treaty shall in no way prejudice the rules in member states governing the system of property ownership'. Given the diversity of approaches adopted by different member states, and the policy changes within member states over the decades in this sensitive area, was seemed a prudent choice. Furthermore, a careful balance was struck by the equally wise and prescient provision in the competition chapter on regulating the borderline area between public and private ownership of key economic assets, which concerns public undertakings and undertakings to which Member States grant special or exclusive rights (see art 90 Rome Treaty and art. 106 TFEU). It is a tribute to the work over half a century ago of the original drafters of the Rome Treaty that these fundamental treaty rules on competition and the free market have essentially not been changed since that time. Against this background it is not surprising that the procurement rules, aimed at buttressing the single market by bringing more rigour to the treaty anti-discrimination provisions in the form of regulation of the public purchasing of member states, should present challenges in respect of which purchasing should be subject to these rules and which should not.

As the rules have matured and various aspects of the borderline areas of the application of the rules has become somewhat clearer, it is not surprising that the latest iteration of these rules in the form of the draft Classic Directive include a series of propositions regarding where key boundaries of the application of the rules have emerged (in the current draft at time of writing see recitals 3 and 4 which comprise some 17 paragraphs of the draft).

The UK has a tradition of being prepared to think and organise imaginatively about how the state should best organise many economic resources (as no doubt have other Member States), in particular for present purposes as to whether economic activity should be set in the public, private or semi-public sector. Furthermore, political ideology has meant that through the decades at times more, and times less trust has been placed variously on the public, the regulated semi-public or the private sector to deliver the most appropriate economic activity. In principle it is this setting which renders procurement activity more or less likely to attract the application of the procurement rules.

Here are a few examples of where the divisions between the three sectors I identified have changed in many cases in the UK: In Victorian times the business of running sizeable maritime ports was often placed in the hands of a company or trust constituted by statute which gave various powers and imposed various duties on the economic entity, all to be exercised in a commercial manner. These were often known as, 'trust' ports. Many were privatised

under the Conservative governments led by Margaret Thatcher. Originally, railways were largely privately owned as was coal and steel production, all to be later to ne taken into public ownership and later still to be re-privatised with greater or lesser subsequent government regulation. Education has remained a mixed sector. The energy industries have been increasingly privatised, though regulated. Interestingly, the more recent changes, largely to sell into the private sector, but retaining a greater or lesser degree of government regulation, has not been evenly carried out across the UK. For example in Northern Ireland unlike in the rest of the UK, the main ports, the main public transport and water industries remain in the public or semi-public sector.

For the purposes of the procurement rules, not only the EU, but the UK authorities have provided *guidance* on the kind circumstances raised in the *Irish Ambulances/Asemfo /Teckal/ Lodi/Muller/ Aurox*[17]/Concessions/licensing subject matter areas on which the General Rapporteur invites comment. There have also been occasional *national court cases* in the UK applying the EU rules. I list the guidance and cases below on the matters raised by the General Rapporteur, and then comment on them in turn.

With respect to UK government guidance and discussion papers, these have appeared sporadically over time.

Key UK government policy documents[18] are:

- Procurement Policy Note 03/06: Office of Government Commerce: 'Shared Services in Government'- EU Public Procurement Rules Considerations (Cabinet Office – March 2007);
- Public Procurement Policy Note-preliminary guidance on the application of the public procurement rules to development agreements. Information Note 11/09. 16th October 2009 (Office of Government Commerce);
- Public Procurement Note: Public Procurement Rules, Development Agreements and s106 'Planning Agreements'; Updated and Additional Guidance Information Note 12/10. 30th June 2010 (Office of Government Commerce)
- Government Shared Services: A Strategic Vision – July 2011.

17. Case references are available in the general Rapporteur's questionnaire.
18. The Office of Government Commerce (OGC) was absorbed into the Efficiency and Reform Group (ERG) of the Cabinet Office, and is served by team of lawyers from the Treasury Solicitors Office. Policy documents can be found in the cabinet office section of the government publications website under 'procurement'.

Key UK cases applying the EU law are:
- Re: *Teckal*: Brent London Borough Council v Risk Management Partners Ltd[19]
- Re: *Helmut Muller*: *R. on the application of Midlands Co-operative Society Ltd) v Birmingham City Council*, (Admin)[20]
- Re: *Auroux*: *AG Quidnet Hounslow LLP v Hounslow*[21]

This material provides some insights into how these aspects of the procurement rules have worked within UK constitutional arrangements and have interacted with the UK's free market based system and government purchasing objectives. Taking each in turn:

Guidance

– Procurement Policy Note 03/06

This is effectively a commentary for UK purposes on the European Commission's Interpretative Communication (IC) on Community law applicable to contract awards not or not fully subject to the provisions of the Public Procurement Directives

– 'Shared Services in Government' – EU Public Procurement Rules Considerations (Cabinet Office – March 2007):

This provides the UK government's view that the future for government purchasing is a shared services approach:

'by 2016 the majority of the transactional elements of Corporate Services in the public sector will be delivered through a handful of professional shared service organisations. Some of these organisations will remain inside the public sector, but many will be outsourced' (Cabinet Office, 2006).

The guide, which is aimed at key stakeholders in the procurement process, refers to the EU rules in this area as complex and evolving as a consequence of emerging case-law. In setting the context for the rules it recommends early legal advice on when a shared service exists – for example sharing a service

19. [2009]EWCA Civ 490; [2010 PTSR 349 & [2011]UKSC 7.
20. [2012]LGR393 [2012]All ER (D) 181.
21. [2012] EWHC 2639 (TCC).

between two or more central government departments does not attract the application of the rules as 'the Crown' (a collective term for the executive power of government) is one legal person. At central government level, legal powers in general derive from the Crown. In UK law the Crown is indivisible. The Crown is a single legal entity and each Crown body discharges functions on behalf of the Crown. The in-house exception is distinguished from the *Teckal* exemption. In the UK system there exists various non-departmental public bodies (commonly referred to as NDPBs) and these are assumed not to be Crown bodies for the purposes of shared Crown services provision.

– Public Procurement Policy Note-preliminary guidance on the application of the public procurement rules to development agreements. Information Note 11/09. 16th October 2009 (Office of Government Commerce); and
– Public Procurement Note-Public Procurement Rules, Development Agreements and s 106 'Planning Agreements'; Updated and Additional Guidance Information Note 12/10. 30th June 2010 (Office of Government Commerce).

This guidance was produced in the wake of the *Auroux* case and following developments and in particular because the European Commission had raised concerns over whether a number of property development agreements between public bodies and developers attracted the application of the procurement rules as public works or public works concessions contracts. The UK had argued that the rules did not apply in a number of cases. As a result, and no doubt honouring the art 10 TFEU obligation of co-operation, the UK published preliminary guidance on the issue. The initial guidance is interesting: it not only explains the law as it was known, but speculatively addresses where it believes the line should be drawn in a range of cases such as where a development agreement was ancillary to a lease, where licences to build were involved, where there is mixed land ownership and where there are developments including a public contract. In each case in some instances it proposed that the procurement rules do not apply.

The newer guidance, though more substantial and detailed, still shows that there remains considerable uncertainty about the application of the rules in various cases. In general it follows the format of the previous guidance. It does however pay special attention to statutory planning agreements. These are agreements for works which are entered into in connection with the grant of planning permission. Drawing on the *Helmut Muller* judgment the view is taken that these will not normally attract the application of the procurement

rules even though they possess some of the characteristics of public works contracts. They will be in writing, with a contracting authority, works will be involved and the agreement will be enforceable. However as the guidance points out such agreements will normally not be for pecuniary interest, rather, the agreement is for regulatory reasons. As a mere exercise of regulatory powers, it is not regarded, in the words of the *Muller* judgment as being, 'a requirement specified by the contracting authority'. Finally it is considered that a works contract only exists where there is a specific, legally binding contractual obligation to undertake work or works and this is not the case in respect of a planning obligation to carry out works. However as such arrangements are often complex it is considered that planning agreements need to be considered on a case-by-case basis.

The UK guidance indicates the UK's comfort with the CJEU analysis and findings in *Auroux* and *Muller*. This is consistent with its earlier guidance. It does however comment on the Muller case discussion of where direct economic benefit arises. It will be recalled the court ruled that a public contract would not arise unless the contracting authority received a direct economic benefit. In giving examples of where this arises, it included reference to where the authority has assumed economic risks in case the works are an economic failure. The guidance posits that it is not wholly clear where the exact boundary lies with this 'direct economic benefit' test, and suggests that requirements such as that a certain percentage of housing in a new development be 'affordable' (to those with lower income) should not be seen as a direct economic benefit to the authority.

Government Shared Services: A Strategic Vision – July 2011

This document, which points the direction forward in terms of government policy, needs only to be mentioned briefly. It identifies the strategic vision and future operating model for government controlled procurement. It recognises the benefits to be gained from shared purchasing and urges a shared services approach to buying for government departments and their arms length bodies. The work on this continues, and it points up the need for timely and accurate analysis and application of the relevant EU procurement rules.

Caselaw

Regarding Teckal:

Brent London Borough Council v Risk Management Partners Ltd
This case concerned a claim for damages against various London Boroughs by 'Risk Management Partners' in relation to the award of contracts for insurance. These authorities had awarded Part A services to London Authorities Mutual (LAM), a mutual insurance company of the London Boroughs (local government entities). The authorities were members of LAM. There had been no tendering procedure under the public contracts regulations implementing EU Directive 2004/18. The key issue was whether a regulated procedure should have taken place, or whether the Teckal exemption applied. The case reached the Supreme Court which held that the Teckal doctrine was available to apply to the circumstances even though it had not been explicitly implemented in the national regulations implementing the directive, and further, that the doctrine applied on the facts (and thus that there was no need for a regulated process to take place). The court held in particular the Teckal requirement that the awarding authority must have 'control' over the entity was fulfilled where the local authority members of LAML could direct the board of LAML by decisions made with a 75% majority of the members. The court took the view that that the term 'contract' in the implementing regulations should be interpreted teleologically to implement the directive, and therefore that it did not cover in-house arrangements. Such finding will be even more obvious in the case of the implementation of the new set of (currently) draft directives as the UK has now changed its implementation policy from an 'elaboration' policy to a 'copy-out' approach to directive implementation (see question 1). The CJEU decisions in *Carbotermo* (distinguished), *Coditel Brabant* and *Asemfo v TRAGSA* (relied on) were discussed, and the notion of shared services endorsed.

Regarding Helmut Muller:

*R. on the application of Midland*s *Co-operative Society Ltd) v Birmingham City Council*
The case was the first to consider the application of the Public Contracts Directive in the planning and development context of the UK after the landmark cases of *Auroux v Roanne* and *Helmut Muller*. The Co-Op Society challenged a decision by Birmingham City Council to sell certain land interests in Stirchley to Tesco, as well as the authorisation 'in principle' for the exercise

of compulsory purchase powers to facilitate land assembly for Tesco's proposal for retail-led regeneration of Stirchley. At the time the Co-Op had an existing retail store in Stirchley as well as planning permission for a different scheme. The claim was brought on several grounds, including that the transaction, viewed together with planning obligations that Tesco had entered into relating to the relocation of a community centre and bowling facility currently located at the site, was a 'public works contract' engaging the public procurement rules in the Public Contracts Regulations 2006. These obligations were generated under a statutory planning agreement which allowed for obligations to carry out particular works to become a part of the grant of planning permission. Following the CJEU's judgment in *Muller* the court found that in order for a contract to fall within the scope of the Directive, there needed to be a binding legal obligation upon the contractor to carry out or be responsible for the carrying out of works. There was no such binding obligation in this case. The statutory 's. 106 agreement' (under the Planing Act) would only be triggered if Tesco chose to implement the development, and there was no obligation on Tesco to do so.

Regarding Auroux:

AG Quidnet Hounslow LLP v Hounslow LBC
This case concerned a proposed agreement between Hounslow Council and Legal & General (L&G) for the development of land partly owned by the Council. However a local developer (Quidnet) challenged the legality of the arrangement on the basis that it should have been processed through a regulated procurement process, and as it was alleged there had been insufficient advertising, that art 56 TFEU had been breached. However the court found that art 56 was not breached as the subject matter was wholly internal to the member state, all the parties involved were English and the land was in England. Furthermore the court held that the proposed agreement was in essence concerned with the leasing of land, not about service provision by L&G. Nor was it considered that the agreement restricted the ability of third parties to provide services. Interestingly the court also added that even if it was wrong about art 56TFEU, Quidnet had not demonstrated there was any interest in the contract from outside the UK, and on this basis he would have refused to exercise the discretion to grant relief.

R. on the application of Midlands Co-operative Society v Tesco Stores Limited

When Tesco submitted the sole bid for the sale of land by Birmingham City Council, the Co-op challenged the transaction as it had not been conducted as a regulated procurement. This was because the land was a part of a wider land regeneration project with community benefits agreed under s 106 of the Town and Country Planning Act 1990. These obligations would become enforceable once a planning permission was obtained. However the court held that as Tesco was not legally obliged to comply with the development obligations at the point at which the transaction was concluded, it followed that the 2006 procurement regulations did not apply. The court went on to say that even if the obligations had been enforceable it did not follow that the procurement rules would apply. In particular the court commented that it would have to be determined whether the obligations in question were actually within the ambit of the 2006 Regulations or simply an extension of the Council's planning controls.

Regarding Gaming Licences C-260/04 and Sporting Exchange C-203/08

In respect of gaming licences and concessions generally, in the key CJEU cases of *Betfair* and *Ladbroke*, although both companies have UK connections, the cases concern the circumstances of their operations in the Netherlands and I therefore defer to Netherlands colleagues for comments on the effects of the outcomes of those cases on the national legal system there.

However in the UK there has been the relatively recent case of *JBW Ltd. v Ministry of Justice*[22] concerning the procurement of bailiff services by the Ministry of Justice which applied the *Commission v Italy, C-382/05, Wasser C-206/08 and Stadler C-274/0*9 decisions all to the effect that a concession only exists when the service provider undertakes the risk connected with the operation of the services. The JBW Ltd case involved the procurement of bailiff services by the Ministry of Justice. The service which had been put to the market was to collect unpaid fines by seizing and realising the value of property of the debtor (the collection of 'warrants of distress' issued by Magistrates Courts). The contractors were paid through a fee payable by executing the warrants. The tenderers competed on the basis of the level of fees and the service quality. JBW had been unsuccessful and claimed that the procurement rules had not been complied with. In the end after some difficulty (the court indicated that this was not a paradigm case of a concession) the

22. [2012] EWCA Civ 8.

Court of Appeal held that in all the circumstances this was indeed a concession. Although the Ministry exercised detailed control over the service provision, and the scope for exploitation of the opportunity by the concession holder was limited (no opportunities to expand the 'market' and price charged), it also considered that as the risks involved were passed over to the contractor (even though they were considered to be low), there was no direct payment by the Ministry to the concession holder, rather the payment came from the assets of the debtor, and that they were the receivers of the service, albeit unwilling ones.

I would like to comment on two other aspects of this segment of the topic. Firstly, one other area of demarcation, not specifically identified by the general rapporteur but which has attracted academic comment in the past, concerns distinguishing when grants of financial assistance by public authorities attract the application of the procurement rules and when they do not. This is an issue of particular importance to underdeveloped parts of the UK where the provision of financial assistance by government and its agencies is a major activity. Helpfully, for the first time the Commission has specifically referred to this area of demarcation in the recitals to the new (draft) classic directive where it says:

> 'The notion of acquisition should be understood broadly in the sense of obtaining the benefits of the works, supplies or services in question, not necessarily requiring a transfer of ownership to the contracting authorities. Furthermore, the mere financing, in particular through grants, of an activity, which is frequently linked to the obligation to reimburse the amounts received where they are not used for the purposes intended, does not usually fall under the public procurement rules.' (recital 3)

I take the critical distinguishing feature to be that the disbursing authority is not procuring the works good or services which it is funding, that is to say, it is in essence assisting activity which the recipient chooses to do in its own right, as it is considered to be a desirable activity. Of course if, in the event, this activity does not take place where the assistance has been already given, it will in all likelihood be returnable to the disbursing authority under the arrangements for disbursement. Any grant giving exercise, especially where there are 'strings attached', needs to be carefully considered by reference to its features to determine whether the offer attracts the application of the public procurement rules.

If a public authority wishes to pay a grant in connection with the provision of services, then the critical question of deciding whether the procurement rules apply to that arrangement is whether the recipient undertakes a legal obligation to provide the services in question. If it does, that is a public services

contract and therefore subject to the EU rules, regardless of whether it is labelled ‘grant-giving’ or not. (See also comments on grant-giving under Question 7).

Finally, the general rapporteur refers to the phrase ‘concessions for the exploitation of natural resources’. I wish to point out that EU law itself draws on aspects of the model of the procurement rules for other purposes and one of those is in regulating the member states opening of their markets for granting and using authorizations for the prospection, exploration and production of hydrocarbons. An example can be seen in Directive 94/22/EC.

Question 3

Regulating in-house arrangements, public-public partnership & like arrangements

In the United Kingdom, Parliament, the Courts and Her Majesty’s government are three manifestations of a unitary Crown – the Crown as head of state. Generally speaking, however, the term 'Crown' is more often associated with the administration of government. Crown bodies are not divisible in law. However local government bodies are. The Crown can provide services to itself and to certain non departmental public bodies (providing they are not distinct as a matter of fact or law). So procurement rules do not apply to two entities which form part of the same legal person. Arrangements between two legal persons comprised in separate legal entities are in principle covered by the procurement rules under discussion.

So under *Tecka*l in the setting of the UK, when 2 Crown bodies A and B decide to, for example, share services, then the procurement rules do not apply. Similarly, where A, B & C are Crown bodies – and create E within the Crown, E is not distinct in law so again the public procurements rules do not apply. Where A, B & C are Crown bodies – and create E as a separate legal entity outside of the Crown, then the public procurement rules apply unless E is not distinct as matter of fact.

It is also useful to note that in the sort of circumstances where the *Tecka*l and shared services jurisprudence might apply, procuring entities may also look to the use of other procurement approaches, such as framework agreements. These can be set up so that a wide range of public sector bodies can call down their requirements under them. Another approach might be to set up central purchasing bodies. These might for example act as a goods warehouse for commonly required supplies.

The general rapporteur asks us to comment on how these non-procured agreements are regulated. The commonly used means of regulating such arrangements in the UK is by way of what has been termed 'service level agreements'. This is an agreement between parties, setting out in detail the level of service to be performed. Where such agreements are between central government bodies, they are structured as memoranda of understanding, which are not legally enforceable contracts (because the Crown cannot sue itself) but are intended to reflect binding terms and conditions between the parties to the memorandum.

However this is not the only way to arrange such co-operation. For shared services, for example for local government entities, the parties may enter into a legally binding agreement to control their collaborative activities.

Because these activities involve public bodies performing public functions it will always be relevant to consider in the UK whether they have the powers (normally under statute) to collaborate, and perhaps in some cases not only the degree of collaboration, but how the functions are to be carried out may be constrained by statute. It follows that in this respect administrative law principles may apply and it follows that the functions may be subjected to judicial review on the usual grounds available in the UK, for example, the principle which requires that the one to whom power is delegated cannot itself further delegate that power ('delagatus not potest delegare') may be applicable.

The general rapporteur also asks for some reflection regarding the limitations imposed by the procurement rules on what might otherwise be competed for; if there are such restrictions on when public-public partnerships involved can also trade in the private market; and, whether and how the conditions for public-public partnership laid down in the case law are understood and complied with.

In the UK, as in other Member States, this subject matter needs to be considered in the context of the constitutional limitations on the remit of EU law. The TFEU, in common with its preceding treaties on European integration does not prejudge Member States' decisions to place economic activity in the public sector, the private sector or somewhere in between, for fundamental reasons connected with the freedom of States to choose whether the activities are subject to market conditions, or to democratic control as possessions of the state on behalf of its citizens or to place the activities somewhere in between in the semi-state or state regulated sector of economic activity. I suggest it follows that the results of the decisions of member states in this context are not a matter for criticism, as they result from the constitutional dispensation we are working within. What is clear is that the decisions of member

states on where economic activity will be placed will influence whether the resultant businesses have to comply with the EU public procurement rules or not.

I am not in a position to give any quantitative estimate of what is excluded in the UK from the application of the procurement rules by virtue of the *Teckal* and shared services exclusions from the full application of the procurement rules. It is clear however that the limitations on member states elucidated in cases such as *Ordine degli Ingegneri della Provincia di Lecce and Others (C-159/11),* need to respected.

Particularly under the Thatcher and Major led conservative governments (1980s – '90s), the UK adopted a policy backed by legislation of compulsory competitive tendering (CCT) focussed on local government provision where in-house government services were tested against private sector provision by means of public procurements. My understanding is that in such a circumstance, public accounting rules would ensure that the in-house bidders bid would reflect the true cost of, let us say the service offered, and could not be the subject of cross subsidisation. CCT was abandoned in the late 1990s. It was not regarded as a success.[23]

It may be useful to add that the increased volume of public procurement law cases coming before UK courts and the specialist lawyers that have become increasingly indispensable to contracting authorities and bidders alike in this context might suggest that the lack of litigation on this particular aspect of the rules suggests that these particular rules are understood, and their application is by and large respected.

As a final comment on this area I would like to add that normally the basic decisions on structuring economic activity in ways that happen to attract or do not attract the application of the procurement rules because of choices that involve *Teckal* and shared services styled arrangements, are normally driven by political decisions. However, it is also the case that in a range of instances, in the light of the detailed laborious time consuming processes which go with

23. 'Under Compulsory Competitive Tendering service quality has often been neglected and efficiency gains have been uneven and uncertain, and it has proved inflexible in practice. There have been significant costs for employees, often leading to high staff turnover and the demoralisation of those expected to provide quality services. Compulsion has also bred antagonism, so that neither local authorities nor private sector suppliers have been able to realise the benefits that flow from a healthy partnership. All too often the process of competition has become an end in itself, distracting attention from the services that are actually provided to local people. CCT will therefore be abolished*'* Department of the Environment Transport and the Regions: Criteria for Project Selection.

the application of the procurement rules in the UK, especially where there is an increased risk of litigation and where litigation is expensive and can cause major delays to procurement processes, authorities have increasingly considered using options which legitimately avoid the application of the procurement rules. Insofar that this happens, it means in effect that the regulated procurement regime is creating its own distortions to how the free market might otherwise operate. (See also comments at Question 1).

Question 4 and Question 5

Consensual and mixed procurement/non-procurement arrangements

The questions posed by the General Rapporteur in this context are essentially questions of policy or commercial practice. However, as a matter of law there is much which can be added. Clearly there needs to be a written contract and for consideration; it needs to be for works, supplies or services. Then there are the issues of whether the full regulatory regime or just the principles of EU law only apply. The thresholds have a bearing on that issue. Further, there are the specific exemptions mentioned by the general rapporteur, (which may be express or implied). Finally, there are the exclusions of in house provision, acquisitions from other public bodies (consortia; general purchasing bodies), subcontractor provision, step-in rights, supply incidental to wider transactions, privatisations, joint ventures, planning and development agreements and products goods and services that cannot be bought from a general market.

Clearly it is simply not possible to the space available to explore all of these areas. Besides, there are excellent reference points already for those interested to explore these areas in a UK setting, such as Arrowsmith's excellent, 'The Law of Public and Utilities Procurement'.[24]

Nevertheless, I will dip into a number of these headings to give a flavour of the UK experience of matters falling outside the scope of the rules.

Firstly, it is worth noting that it is for EU law to define the detail of what is meant by 'contract' in the context of the EU procurement rules, not UK or any other Member States laws. The issue is therefore treated more as a question of substance rather than of form. For example under English law the courts have sometimes held that no contract exists in domestic law in providing services and utilities such as electricity water mail or gas (see for example

24. Sweet and Maxwell 2nd Ed. 2005. (new ed. expected 2014).

Norweb plc v Dixon.[25] In principle such arrangements are probably covered by the Directives. The corollary is also probably the case – that is there are some acquisitions which are contractual in UK law that are not contracts under the regulations. UK law has a very specific technical definition of 'consideration' (a requirement that a contract takes the form of 'an exchange' rather than a gratuitous promise by one party) which is generally a necessary element for the existence of a contract. However, the EU's concept of pecuniary interest, does not necessarily match exactly the English law on consideration.

Then there are issues arising concerning extension, renewal or amendments to contracts, and when these events trigger a fresh contract attracting the application of the procurement rules. Such changes can be provided for in the agreement itself. I understand that the other alternative of general law effecting such change is less common in the common law jurisdictions (England and Wales, Northern Ireland and Ireland) and is more likely in the civil law jurisdictions. Some light was cast on this matter in the Commission's state aid decision in the *London Underground case*,[26] which considered what changes were allowed after the preferred bidder had been selected in a notice led negotiated procedure, and this seems also to be relevant to changes to concluded contracts. It is established that a post contract change which favours a contracting partner is more likely to involve a new contract. However the extent of change, as that case illustrates, depends on the justification for the change. In *London Underground* the Commission considered whether the contractor's bid would still have been the best bid after the change was made. In general, both before conclusion, but especially after conclusion of the contract, changes are more likely to be justified in innovative complex long term contracts because planning is more difficult and because the costs of a new procedure are higher. Because of the UK's attachment in the past to PFI (private finance initiative) partnership contracts this model has by its nature been likely to give rise to issues in this area, due to the length of the contracts and therefore the greater likelihood of changes in demand often contain clauses to facilitate changes to specifications and conditions.

PFI contracts can also test the boundaries between works and services contracts as these often relate to constructing and running institutions such as hospitals, schools, prisons and in the transport area over a long period of time (20- 30 years in some cases). UK government guidance (in addition to that

25. [1995] W.L.R. 636.
26. Commission Decision 264/2002.

from the EU) is available in this area. There had been debate about the relevant test to use, a 'main objective of the contract' test and a 'relative value' (of the works and services) test, the latter having been approved by the Commission in the *London Underground case*. However this has been overtaken by the 2004 Directive which adopted a 'principal object' test, which operated at least where a principal object can be discerned, the relative value test remaining available where it cannot (*Commission v Italy Case C-412/04*).

Our rapporteur invites comment on contracts that are expressly excluded. Among these features the security exemption, where the contract must be accompanied by special security measures. On this, the case of *R. v Secretary of State for Home Affairs Ex Parte Evans Medical*[27] is of interest. In this case the CJEU held that the security exemption could not be used to exempt a contract for the delivery of drugs. It held that the proper concern for the security of passage of the drugs could be adequately addressed by the use of an award criteria in an open or restricted procedure evaluating the bidders' ability to provide security; or alternatively by putting stringent security requirements into the specification. As a result if would seem that the scope for using this exemption is rather restricted.

Another general observation is that when implementing the directives the UK has not departed from its own domestic tradition of whenever possible, controlling procurement by non-legal rather than by legal means – the main legal obligations are there as a result of EU law. It is however the case in the UK that formal procurement procedures may be used even where there is no legal obligation to do so, to give a guarantee of regularity and an assurance that a fair competitive process has taken place. Interestingly it has been estimated that about half of supplies and services contracts and two thirds of works contracts awarded by UK central government were below the thresholds.[28]

Regarding privatisations, the idea of privatising an in-house service provision and an accompanying guarantee to buy back services from the privatised entity has been a common theme in the UK of some decades and this raises a question as to the applicability of the procurement rules. The issue was considered in the English High Court in *Severn Trent v Dur Cymru Cyfyngrdig (Welsh Water) Ltd*.[29] A company – UUCo., purchased a part of Dur Cymru's water business and undertook to provide various services formerly provided

27. Case C-324/93 [1995] ECR 1 563.
28. Office of Fair Trading: Assessing the impact of public procurement on competition: September 2004.
29. [2001] EuLR 136.

in-house. It was argued that this arrangement was merely incidental to the purchase of the water business and that therefore a sale of services was not involved. This argument was rejected, the judge finding that both a sale and a service provision were involved, and that in this case the service provision was not merely incidental but was at the very essence of the transaction. The decision has been criticised as obiter dicta and incorrect by at least one eminent commentator in the field, who has opined that a more subtle approach is called for given that a balance needs to be struck in such circumstances between the policy of opening specific work to competition in the short term whilst allowing for effective privatisation to take place which will in the longer term create more competition.

Finally, I do not have a sense at this point that the UK arranges its policy approach to make agreements severable, or to rearrange its affairs to avoid the operation of the procurement rules. I do however have a sense that in practice in an increasing number of circumstances, contracting authorities take into account the cost and delay, including litigation risks incumbent is applying these complex rules and in consequence they may rearrange their plans to use legitimate means to avoid procurements in order to avoid the application of the rules.

The general principles of EU law: public procurement law and beyond

Question 6

Rules and principles applicable to contract awards/consensual arrangements not covered by the procurement directives

The question of whether the general principles of non-discrimination/equal treatment and transparency apply to the process of awarding contracts expressly excluded, I suggest, needs to be considered in terms of the application of EU law generally. These principles are not limited to the area of regulated procurements or even also to that category along with procurements which are not subject to the full regime. In fact, it can be said that the general principles apply within the ambit of the area occupied by EU law. It follows that one needs to look at each area excluded from the procurement regime, examine whether that area is subject to EU law where it is applicable, apply the general principles through the prism of that applicable law. Although that

statement can be made simply, the application of it requires a more detailed scrutiny of the subject matters areas in question.

Firstly, given the imbedded and general nature of the EU law on the '4 freedoms' of goods, services, establishment and capital, particularly the first two of these, any procurement process of actual or potential cross-border effect, needs to respect the anti-discrimination on grounds of nationality principle that is the TFEU established norm. That such a principle is applicable and effective in its application to government purchasing outside the application of the Directives is readily apparent from the case of *Commission v Ireland*[30] (Dundalk Water supply), where a contacting authority's use only of imperial measurement for the diameter of water pipes, and where it did not make available to bidders the option of using a metric equivalent or a simple 'or equivalent' option, was found to be discriminatory on grounds of nationality.

Next, many areas of the treaty laws, such as competition or employment laws may also be applicable when public purchasing or acquisition is being considered and will bring the application of the general principles in their train. For example, let us take the general rapporteur's exemption (a), the acquisition or rental of land: in this case I believe the starting point would be art. 345 TFEU which provides, 'The Treaties shall in no way prejudice the rules in Member States governing the system of property ownership.' Nevertheless, this backdrop does not mean that individual property transactions cannot attract the application of EU rules, for example with respect to 'solus' agreements for franchising which have attracted the application of EU competition rules, because of their anticompetitive effects where they tie down areas of the market, in respect of beer (assistance to purchase bars), or petrol sales (assistance to purchase petrol stations), or where state compulsory land purchasing operates, where the system discriminates against non-nationals. In these instances one can see that the general principles of the treaty would come into play. Employment contracts attract the application of different EU laws. And so for our purposes in the context of land acquisitions, as discussed above, where a sale of land is on such terms that the procurement rules are engaged, they bring the application of the general principles in their train.

If, on the other hand, the subject matter of the exclusions does not fall within the scope of EU law, then only national law, and in the UK, one or a combination of national legal regimes may come into play with respect to procurement procedures: public administrative law principles, which are available generally to condition the use of public discretion; general contract

30. Case 43/87.

law, general laws on trading, for example with respect to fraud and any other national legislation on tendering, such as that on social issues which may be applicable.

Question 7

Non-discrimination*/equal treatment/transparency & unilateral measures*

Firstly, I am assuming that this issue should be addressed on the assumption that the circumstances involve a potential cross-border interest, and therefore a question is whether, in that setting, general Treaty principles might apply even to the 'selection of the beneficiary of unilateral administrative measures'. I suggest that an obvious example would be financial grant-giving) under arrangements which did not amount to a regulated public procurement contract (because the recipient undertook no obligation to for example, provide services). That the general rapporteur's question should be answered in the affirmative seems to me unlikely in the UK, in the light of the decision in *AG Quidnet Hounslow LLP v Hounslow LBC* (already mentioned in Question 2 above). At least in ordinary circumstances, I do not think that failing to benefit from the exercise of a unilateral administrative measure (such as not being given a grant) amounts to a restriction upon the freedom to provide services. It is of course possible that in some circumstances the conferring of an economic advantage, such as the making of such a grant might involve state aid issues, but that is another matter.

It is also possible that, regardless of any procurement law issues, public authority decisions on the legality of the exercise of a discretion amounting to the conferral of an advantage by unilateral administrative measure, such as a grant giving may attract judicial review on ordinary domestic law principles. In cases in which would-be recipients have to compete against each other for finite advantages, what is required by ordinary public law fairness may well overlap with what procurement law would require under the principles of transparency and equality. But public law is unlikely (for example) to put any obstacle in the way of limiting the competition for grants to voluntary organisations, if there is some rational basis for such a restriction, whereas that would clearly be impossible in a case governed by the Public Contracts Regulations in the UK. An authority which proposes to fund the provision of services will need to come to a clear view at the outset as to whether it does or does not need to secure from the recipient of funding an enforceable legal obligation to provide the services, or whether it is content to proceed upon the assumption that if the monies are paid and their permissible use suitably re-

stricted, the recipient's own objects are likely to drive it towards providing the services. Depending upon the nature of the services and how important they are as a means of delivering public policy objectives, no doubt amongst other factors, the latter approach may or may not suffice. If an enforceable legal obligation is required, (Part B, below threshold and service concession cases and to the availability of any specific exceptions under the Regulations/Directive excluded or where there is potential justifications under the Treaty) the authority will need to proceed on the basis that it is necessary to comply with procurement law in awarding the contract under which funding will be provided. If it is considered possible and desirable to do without such an enforceable obligation, then the authority will be able to proceed outside the framework of procurement law, although the documentation would need to be clear about that.

In *R (Chandler) v Secretary of State for Children, Schools and Families*,[31] the Court of Appeal in England held that an academy sponsorship agreement between the Secretary of State and a university was outside the scope of European procurement law. The court concluded that an arrangement under which services are provided on the basis only of reimbursement of costs, and without any view to profit, is not a contract 'for pecuniary interest' and accordingly falls outside the scope of the Directive. The court also stated that a party not seeking to make a profit from the provision of the services in question could not be said to be offering those services 'on the market', and so was not an 'economic operator' within the meaning of the Directive. The court's reasoning is focused upon whether the particular contract in question is or is not performed for profit, rather than on the status of the organisation performing it. So an organisation which is 'not for profit' in the sense that it does not ultimately aim to make a profit for distribution to its members may nonetheless be seeking to generate a return on a particular contract. These were clearly meant as statements of general application not limited to the particular circumstances or nature of the services at issue in that case.

If Chandler is correct, then it would follow that a contract providing for the payment of a grant, under which the amount paid to the recipient did not and could not exceed the costs incurred by it in providing a service, would not amount to a public services contract (at least within the meaning of the Directive), even if the recipient was under a contractual obligation to provide the service in question. Quite where the dividing-line between profit and cost-recovery lies in this context may be debateable. Probably the recovery of

31. [2010] LGR 1.

costs could include an appropriate contribution to the overhead costs of providing the services, at least where the overheads in question were not fixed but could vary with the volume of activity undertaken (paragraph 59 of the judgment in *Chandler* appears to suggest that it is sufficient if there can be said to be no profit on the basis of applying realistic accounting conventions). The contract would certainly need to include provisions whereby the amount actually spent on the service was properly recorded and monitored, and anything not spent on that service was returned to the paying authority, so that the contract could not generate any surplus.

There is reason to be doubtful about the correctness of *Chandler* in this respect. Although the presence or absence of an intention to make a profit may be a very important consideration in distinguishing between a contract within the meaning of the Directive on the one hand, and an administrative arrangement outside the Directive on the other, to conclude that no contract which is not aimed at making a profit can be a contract for pecuniary interest, appears to me to be too simplistic, and only doubtfully supported by the CJEU authority that was cited. There are certain judgments where the reasoning does not sit altogether happily with that in *Chandler*, including *CoNISMa*[32] and *Commission v Germany* (the Hamburg decision). In *CoNISMa* it was held that a consortium of universities was an economic operator even though it was a not for profit organisation without a regular market presence, and in Germany the test of a contract being for pecuniary interest was said to be whether it was of direct economic benefit to the contracting authority; see also the Advocate General's opinion on the question of pecuniary interest in *Commission v Spain*[33] at paragraphs 80 and 86. However, it is not clear that the contracts in issue in those cases were themselves costs-only contracts, and the reasoning of the CJEU and Advocate General certainly does not confront that situation directly.

There are also two possible respects in which it might be said that *Chandler* does not conclude the argument even if the decision is correct so far as it goes. One is that the judgment expressly does not reach a final conclusion about the possible relevance of general Treaty principles (as opposed to the Directive itself) to the award of contracts on a cost-recovery basis, although it would be somewhat odd if such contracts were subject to those principles whilst kept systematically outside the Directive because they were of insufficient relevance to the internal market – the position in relation to the Treaty

32. C-305/08.
33. C-306/08.

should if anything be a fortiori. The other is that it was apparently accepted by the claimant in Chandler that, if the case fell outside the Directive then it fell outside the Regulations as well.

Finally, the recent judgment of 19th December 2012 in *Azienda Sanitaria*[34] appears to contradict the conclusion in *Chandler*. The CJEU held that a contract cannot fall outside the concept of a public contract merely because the remuneration remains limited to reimbursement of the costs incurred to provide the service.

Public procurements and general EU law, including competition and State aids law

Question 8 and Question 9

Procurement, the application of general single market rules & the risk of competition limiting abuses

The setting of the boundary between the application of public law and private law raises issues of principle and practice in both the UK, and I am sure also in other member states and the position is no different in principle at EU level. For example in the UK see *Re Gerald Dorido Solinas*[35] judicial review judgment (on the powers of Ministers in the Northern Ireland Executive) for reference to a selection of cases in which apparently enforceable private contractual provisions are ousted by the operation of public administrative law. In that particular case contractual provisions were set aside to allow public administrative law to regulate what would otherwise have been considered to be a set of circumstances regulated solely by contract law. In the context of the application of the competition rules of the TFEU, it has long been clearly established that, taking the traditional teleological approach, the key competition articles have been applied to state bodies that are operating in a trading milieu (see for example *Commission v Italy*[36]).

I think this answers the question posed by the General Rapporteur as far as the potential application of arts 101 and 102 TFEU (restricted practices and abuse of a dominant position) to the state when it is trading are concerned. Of

34. Case C-159/11.
35. [2009] NIQB 43.
36. C-118/85.

course the TFEU is based on a respect for the Member States' choices as to whether in various sectors the main economic (trading) activity will take place in the private or public sector, or somewhere in between, in what is sometimes referred to as the semi-state sector. From the outset, the authors of the Treaty have also made provision in the competition rules for a more nuanced approach to the consequences of this sector, in particular by article 106 TFEU (special or exclusive rights). In principle, where such circumstances arise, art. 106 TFEU is applicable.

Noting that not all EU law enforcement is in the hands of the Commission or the CJEU, it can nevertheless be said that just because the provisions are in principle available as a matter of law to regulate does not mean that they would be exercised by those institutions where there is a choice of measures applicable. See for example the choice made by the CJEU to use the free market provisions in preference to the competition chapter provisions where they were both were the subject of an art 177 reference (as it then was, now art. 267 TFEU) to the CJEU in *Redmond v Pigs Marketing Board*.[37] My sense is that as a matter of principle in matters of public procurement, and in line with the founding Treaty provisions, the key enforcement institutions would look to the single market rules and their related legislation as a first choice for enforcement of EU norms rather than the competition rules where both are potentially applicable.

As to whether procurement rules stifle competition, from experience in practice I am in no doubt that in specific particulars and in general, they do stifle competition. In fact, by definition I suggest that once it is accepted that the concept of competition inherently means allowing the free market operate as such, it follows that to regulate the procurement process, particularly in the detail which the procurement rules provide for, inevitably gives rise to distortions of competition. As to a specific example, allowing correction of tenders during the course of a competition might well improve competition, but risks allegations of breach of the principle of transparency and equality. Transparency itself may foster collusion between tenderers.

Because of the time and trouble required to meet the requirements of the rules, contracting authorities are more likely to use longer term procurements, to make greater use of frameworks (the use of which was initially frowned on by the Commission) and to frame procurement requirements so that they may become SME unfriendly. This has then led to initiatives at EU and national level to use legal means to encourage SME participation in bids.

37. C-83/78.

It is also worth noting that fostering competition does not always equate to getting best value for money. Opening a tendering process where there it is very unlikely that there will be more than one bidder, or an international market means that if this is indeed transpires to be the case, then the negotiating position of the contracting authority has been much reduced, by making this obvious to the single tenderer available, where the threat of a competition may have produced a better value for money deal. In electronic auctions the requirement to be transparent about rankings at all times during the bidding process may encourage collusion.

As to the rules in general, the time, trouble and heightened litigation risk these rules have engendered in the UK, have meant that decisions to keep services in-house which might otherwise have been subjected to competition, or to bring services in-house when litigation starts on a procurement process are more likely. A policy to buy a service provision may be stood down and instead a policy to aid by grant of financial assistance may be made instead. Contracting authorities may be named on several legally procured framework contracts with different durations, so that if litigation starts on a procurement process, instead of completing it, it can be terminated and the goods or services obtained from the overlapping framework so that security of supply can be maintained and the time, expense and uncertainty of litigation can be avoided.

The General Rapporteur's reference to SGEIs, and therefore inevitably to art 106 TFEU and to the *Altmark* jurisprudence, invites national rapporteurs to reflect on the partial shelter SGEIs obtain from the full application of the competition and other fundamental treaty rules, including in some instances from the procurement rules. Where the *Altmark* decision is applicable to a set of circumstances it is not compulsory (and indeed it may not be sensible) to have a procurement to establish the minimum compensation necessary to operate a service of general economic interest. In my view art 106TFEU is a necessary concomitant of the founding fathers' decision to leave it to the Member States to place some economic activity in public sector or private sector or somewhere in between. It deals with the 'in between' bit. This has allowed the principles of the treaty to operate in an effective manner in all the Member States, irrespective of the differing democratic decisions of Member States on the relative utility for their citizens of public sector or private sector enterprise. It represents an enlightened balance between the democratic wishes of the member states in what are usually sensitive areas of economic activity and the preservation of a suitably orchestrated approach to applying competition and free market rules to all sectors of the economy.

The balance struck in the UK between public and private sector enterprise in this respect has changed over time. A range of SGEIs existed over a long period of time, certainly back to the nineteenth century, where they could be seen in the form of corporate bodies created by statute. A statutory corporation typically has no shareholders and its powers are defined by the Act of Parliament or other legislative instrument which creates it. Such bodies were normally created to provide public service, examples in the past including trust Ports, British Railways, the National Coal Board and the Post Office Corporation. Many of these have been transferred out of the public to the semi-state or to private sector especially during the conservative governments led by Margaret Thatcher from 1979 to 1990 (see question 2).

With respect to restrictions on what can be bought under the procurement regime, *Contse* and cases from this line of authority, *Commission v Italy* and *Commission v Italy,* as well as earlier jurisprudence, such as *Commission v Ireland* (Dundalk Pipes)[38] are illustrations of how effective the general provisions of the treaty can be in addressing directly discrimination problems with procurements which have the potential to directly impact on the operation of the single market. This is in contrast to many judicial decisions about what can seem arcane details of the application of the procurement regulations, without direct reference to actual effects on the single market and in circumstances where the disputes are between entities which are all based within the member state or within one jurisdiction of a member state. One aspect of the intrusiveness of the rules is that although the key focus of regulation is on the face of it to allow freedom of trade, the rules actually regulate in ways what can be bought, and in doing so create certain conundrums, and also restraints on contracting authorities freedom to contract.

An example of the former in the UK is the understandable desire for reasons other than discrimination on grounds of nationality for the devolved authorities to 'ensure greater uptake of sustainable and/or local food'. There is a well developed private sector ability to promote local produce to visitors from outside, and there are well-developed examples of this to be seen. In respect of Northern Ireland, see for example the locally based Hastings Hotel Group booklet on Food Provenance.[39] This is not an approach that the public sector even where it is operating in parallel areas, or wishes to showcase its wares can readily emulate even when catering for tourists or distinguished guests. So, for example, in Wales, in the production by the National Assembly for

38. C-3/69, 3/88 & 45/87 respectively.
39. readily accessible from the Hastings Hotels website www.hastingshotels.com

Wales of the paper, 'Sustainable Public Food Procurement',[40] one can see a much more oblique approach in this area of the guidance to local contracting authorities on the subject. Whilst there may be a very understandable desire to use local produce in a range of circumstances, the ability of the public sector to do so is very constrained by the procurement regime.

In a similar vein, although in this case with the authority of the CJEU, the decision in *Commission v Kingdom of the Netherlands*[41] (fair-trade coffee), means that an award criterion may relate to fair trade production provided that relevant criteria (including transparency) are met.

More generally, public authorities need to take care in describing what they wish to purchase in a way which will not give rise to allegations of national preference. For example, if a contracting authority wishes to buy water pipes, and chooses to exclude from its specification pipes which are composed of asbestos where there is no proven risk that the use of such pipes is injurious to health, but where it knows consumers of the water perceive (albeit wrongly) that there may be such a risk, and where key suppliers from outside the state specialise in asbestos pipes may claim that he has been discriminated against. This is reflected in the inclusion of an 'or equivalent' requirement when specifying. It is generally accepted that anything other than a functional requirement in other than a restricted class of cases (where artistic reasons pertain) is required.

Question 10

Can SGEIs be outsourced without following public procurement-like procedures, inc. direct awards; & if there is no direct award do state rules apply?

The short answer to each of the questions posed in the headline above is, I believe, in the affirmative in both cases.

I have no reason to report from the UK that the current state of play with the development of EU law in this area is not accepted and applied where it is relevant.

UK government guidance is available as follows: Guidance for State Aid practitioners of June 2011[42]

There has been some judicial activity also in respect of the application of the *Altmark* jurisprudence although it was discussed in *Stagecoach, Go-*

40. National Assembly of Wales: October 2012 (Paper number 12/046).
41. C-368/10.
42. Department of Business Innovation and Skills (BIS).

Ahead and others v S. of S. for Transport[43] in the context of Regulation (EEC) No1191/69 of the Council of 26 June 1969 on action by the Member States concerning the obligations inherent in the concept of a public service in transport by rail, road and inland waterways as amended (and now repealed).

There may be an implied sense from the general rapporteur's comments that failings and shortcomings in the current state of EU law in the area still exist. I think that it needs to be borne in mind that there are a range of circumstances where a competitive process is not feasible or appropriate. For example in the UK where established institutions are charged by statute with carrying out SGEI activities exclusively by themselves, there is no possibility that the service can be outsourced as the state has entrusted the responsibility with the state designated institution only. Furthermore as it is within the state's privilege to decide what economic functions will be carried out by the state (in whatever form), it follows that it is not appropriate that the EU should require that these activities be subjected to a competitive process. Of course the compensatory amounts should always be in compliance with state aid law requirements and the Member State should be in a position to be transparent by being able to demonstrate, even in the absence of a competitive process that this is so. Altmark and associated guidance shows what must be done in this respect.

Strategic use of public procurement

Question 11

The challenge of using public procurement to advance social/environmental aims

As a matter of the policy approach adopted there has been a mixed history in the UK. In a nutshell, during the years of the conservative governments under Mrs Thatcher, the tendency was for the central policy to be focussed on letting the market operate without adding what were seen as extraneous requirements. Getting the best value for money was perceived to be achieved by looking at procurement through a narrower prism. The addition

43. 2010 EWHC 223 (Admin).

of wider objectives was seen as adding cost. However, latterly, especially with the creation of devolved government in the UK, all the jurisdictions in some shape or form have adopted policies embracing the addition of environmental and social objectives when procuring.

There is therefore guidance available in the UK to contracting authorities to this end. Examples, in addition to the Welsh example given above are the UK's 'Buy, and make a difference'[44] and in Northern Ireland the guide 'Equality of Opportunity and Sustainable Development in Public Sector Procurement'.[45]

Northern Ireland provides a good example of a transition to a policy approach that wishes to take the most from the space EU law has created for policy development. As I will show, this was not always the case as a matter of government policy. However, the Northern Ireland Act 1998 (effectively the constitution of the devolved government) included a provision (section 75) which imposed a duty on all public authorities:

> 'to have due regard to the need to promote equality of opportunity between persons of different religious beliefs, political opinions, racial groups, ages, marital status or sexual orientations as well as between men and women, people with disability or those without and those with dependants and those without'.

The Equality Commission of Northern Ireland's guidance unequivocally stated that public authorities' procurement policies form an integral part of how they carry out their functions. Their procurement policies should therefore give effect to section 75 duties.

Before a fully democratically accountable devolved government was restored in Northern Ireland the direct rule administration from London view was uncompromising on the use of procurement to drive social change:

> 'The government's longstanding position is that public procurement of goods and services is to be based on value for money ... and should not be used to pursue other aims.'

However a dramatic shift occurred with the institution of a devolved administration in 1999. Procurement policy was devolved to the local government to administer, and in its first programme of Government, that administration picked key areas for particular review including public procurement policy.

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44. 2008 Office of Government Commerce.
45. 2008 Equality Commission for Northern Ireland and the Central Procurement Directorate of the Department of Finance and Personnel.

The team that took this stream of work forward found several key constraints to policy development:

(1) the constraint of section 24 of the Northern Ireland Act requiring the local government to act in compliance with EU law, together with the power in section 14(5)(b) of the Act on the part of the UK government to intervene to revoke legislation which had an adverse effect on the single market for goods and services within the UK;
(2) the political constraint, which was that four parties with diverse political opinions would have to sign up to the results;
(3) the NI Treasury Officer of Accounts, Treasury and Office of Government Commerce's overarching policy to obtain 'value for money'.

After intensive discussions to overcome these challenges, the team's report identified the need to obtain best value for money as its starting point. But in a critically important comment it added that this 'allows for the inclusion as appropriate of social, economic and environmental goals within the procurement process', thus linking this approach with the section 75 duty.

A pilot project to assist the unemployed was recommended to test this approach. This was especially significant as this had particular equality implications in Northern Ireland given that for many years Catholics were approximately twice as likely to be unemployed as Protestants. Addressing unemployment therefore came to be regarded as a part of the fair employment agenda. (I should add that the statistical base could be established as Fair Employment legislation had been passed in Northern Ireland requiring employers to carry out monitoring of their employees – so that there could be transparency about the scale of the problem, and a targeted approach taken to resolving it).

The pilot scheme involved the insertion of a special condition into twenty selected procurement contracts in Northern Ireland. This required suppliers to implement a plan with a clear, specific and concise utilisation strategy for the employment of unemployed people (the employment being provided either by contractors or sub-contractors). No maximum or minimum number was defined. The definition of unemployment was carefully considered by the Equality Commission so as not to discriminate against women. Further, the unemployed could be from anywhere in the EU (or from outside if the bidder was also from outside the EU). Under the tender documentation, the proposed plan was to be submitted as part of a bid and failure to comply would be subject to an appropriate penalty. The feasibility and quality of the plan could only be taken into account at the award stage where otherwise equivalent ten-

derers who submitted a plan were in competition. This was to comply with the *Nord Pas de Calais decision*[46] and indeed with the European Commission's interpretation of it.[47] I would like to make some comments on this approach:-

1. The approach was modest. Academic and other debate about the meaning and significance of *Beentjes* and the *Nord Pas de Calais* decisions meant that to obtain legal certainty a very conservative policy option was chosen. To have had the project mired in legal uncertainty as to its compatibility with EU law would have had a very detrimental effect on whether it was regarded as a success.
2. Modest though the initiative was, it gained the approval of the then Executive and created a distinctly different policy approach to that in the rest of the UK. Arguments for parity of approach with that operating in England were therefore defeated – this was against the background that procurement was a devolved matter which was therefore within the discretion of the local administration;
3. Given the presence of section 75 of the Northern Ireland Act and the particular problems of Northern Ireland, it was not unnatural that such a different approach be taken.

An evaluation of the project was submitted to the Procurement Board of Northern Ireland in September 2005. It showed that the cost of job creation was modest compared to other schemes. It was considered that clarity between value-for-money and social objectives were achieved by the two-stage selection process: first price and quality, and secondly assessing the scheme only in the event of a tie between bidders. The gains were, however, modest. Approximately 50 workers from the target group remained in employed afterwards.

Ultimately this is attributable to the modesty of the scheme due to EU law constraints and the lack of clarity on what was possible. Nevertheless the scheme pointed the way to a broader use of this kind of orchestration or regulation into the operation of private sector entities. Other examples where such an approach could be taken might include social, environmental and health and safety objectives.

46. C-225/98 Commission v France.
47. See Interpretative Communication of the Commission on the Community Law Applicable to Public Procurement and the possibilities for integrating social considerations into Public Procurement COM/2001/0566 Final.

As a result of the successful pilot, Northern Ireland Government, together with NGOs under the new devolved administration adopted the comprehensive guidance, 'Equality of Opportunity and Sustainable Development in Public Sector Procurement' in May 2008 (Equality Commission for Northern Ireland and the Central Procurement Directorate Equality of Opportunity and Sustainable Development in Public Sector Procurement (May 2008)). The document provides guidance on everything from strategic and project development through specification and selection to the performance management of contracts.

First Minister Peter Robinson in the foreword to the Guidance acknowledged that:

> 'the leverage of public procurement to contribute to delivering greater equality and social inclusion as well as sustainability goals within the current legislative framework should not be underestimated. In Northern Ireland public procurement accounts for approximately 1.9 billion of supplies, services and construction works and over the next 10 years this will be added to by a further 20 billion under the Investment Strategy for Northern Ireland'.

The document is an interesting reflection of both the policy priorities and the struggle with the EU rules to make sensible policies in this area.

In particular, it illustrates the constraints, uncertainties and slow development of EU law and consequently the convoluted design of the pilot project. This is an illustration of the results of the imposition of 'top-down' Single Market regime set against determined local 'bottom-up' efforts to address urgent challenging and divisive inter-communal issues. It should be borne in mind that the fledging and hard-won devolved government was, through enlightened use of procurement, trying to assist a community to emerge from long term conflict, and to address directly the causes of inequality (here with respect to long term unemployment). This was intended to bring communities together to identify with their own elected, though relatively untested government structures and publicly procured assets – in short, to help make a hard-won democratic system work effectively.[48]

48. The Minister with responsibility for public procurement, Sammy Wilson commenting in the NI Assembly on the launch of a guidance document on integrating of social policy objectives into procurement processes said: 'A lot of practical help has been given [with the Guidance document]. We have to be careful, of course. Everybody [in the debate] qualified their comments with the words 'keeping within the law'. Again, there is a bit of tension, because, 'being a member of the European Union ties our

Question 12

Are public procurements used as a tool to foster innovation?

These questions raise issues on which I thought it best to consult my colleagues from the central procurement directorate in Northern Ireland (CPD). From them I have elicited the following observations:

A mixture of performance based and technical specifications are used within the central procurement directorate of the devolved government in Northern Ireland. Since the upsurge in NI legal cases (and the number of competitions which have been abandoned during the standstill period to avoid the risk of legal challenges), the tendency has been to increase the weighting in relation to price, and evaluate quality against 'mandatory requirements' (i.e. the economic operator has to demonstrate they meet the specification before their tender is assessed). In these cases the non-price assessment is generally weighted at 30% or lower. Over the last 12 months of the date of writing, the majority of regulated ICT contracts have been awarded on the basis of the lowest priced tender that meets the specification. This shift has eliminated any opportunity to encourage or assess innovation. The procurement professionals have confirmed that this approach has been driven by the volume, diversion of effort, delay and outcomes of litigated procurements.

The competitive dialogue is generally used for complex ICT procurements and the number of these would be low (probably 2 or 3 over the last few years). This procedure undoubtedly provides scope for innovative solutions to be suggested. However, the risk of challenge is as great (if not greater) when a contracting authority excludes an economic operator's solution during the dialogue phases. Contracting authorities are treading with caution regarding the ability to objectively assess innovation particularly when having to compare the relative advantages and characteristics between the successful and unsuccessful tenders. Protecting Intellectual property is also an issue for bidders.

CPD is well aware that innovation should be considered at the earliest stages of the commissioning process and can work well when contracting authorities genuinely engage with markets when the need is identified.

Generally, when Contracting Authorities start a procurement competition they have already 'defined' how they want the service to be delivered. Some

hands and our feet and puts tape around our mouth and a hood over our head, when it comes to the freedom to do things.'

of this is due to the rules regarding 'Managing Public Money',[49] a policy document, where business case approval is predicated on certainty and defined outputs, thereby stifling innovation.

Performance based specifications are widely used. However, a hindrance that is identified by CPD colleagues with this is that following a decision of the Northern Ireland High Court in Northern Ireland, where the measure for evaluating price adopted was held to be flawed and where the court considered that without an element for including price as a part of the evaluation of which bid was the most economically advantageous tender (MEAT), the process did not comply with the EU procurement rules (*Henry Bros v Department of Education for Northern Ireland*) *CPD* have abandoned the use an innovative procurement technique intended to provide better value for money. This technique only looked at sample pricing mechanisms pre-award, but post award operated in partnership with the winning bidder, taking an 'open-book' approach to the actual pricing post-award (which was designed to avoid the all too common problem of bidders making low priced bids, but using every opportunity to raise the price afterwards under the contract or by invoking dispute procedures (the so-called 'low bid, high claims' culture), identified in various studies (by Sir Michael Latham (1994); Sir Peter Levine (1998); Sir John Egan (1990), as a real problem with publically procured contracts), by working in partnership with contractors and using a mechanism to reward savings suggested by the contractor as construction proceeded, could no longer be used. I should add there was no suggestion in the case that any discrimination on grounds of nationality was raised.

Remedies

Question 13

Directive 2007/66/EC: Strengthening remedies against breaches of the rules?

Of course the 2007 Directive has been transposed across the UK and is in operation in procurement cases brought before the courts. It has substantially changed the law as it had operated before its provisions came into place. Be-

49. Managing Public Money: Department of Finance and Personnel for Northern Ireland 2008/2012.

fore, it was up to the complainant to apply for an injunction to the relevant court. There was no automaticity about the grant of this interim remedy. Rather each side had to make its case to the court, the complainant having to show that it had a prima facie case and both sides to address the court on where the balance of convenience lay in the specific circumstances regarding whether the interim relief was granted. This could in effect lead to a mini-hearing, sometimes taking more than a day of court time where the rights and wrongs of the procurement process were debated. It was considered that in some instance contracting authorities would agree to desist from proceeding with a procurement process in order not to have its arguments heard before they could be developed in full. In any event, the introduction of the automatic stay has not ended these preliminary hearings as contracting authorities have still quite frequently applied at the outset to have the stay lifted. In this, readers are referred to the comments of Mr Justice McCloskey at topic 1 of this paper on what a public procurement case might involve in a court proceeding. It has been increasingly recognised that generally, but in particular the results of this key element of the process of challenging public procurement processes had led to distinctly different outcomes in cases heard in the Northern Ireland legal jurisdiction and the other jurisdictions of the UK. It is considered that the normal outcome of this preliminary phase in Northern Ireland is not to lift the stay, whereas in the rest of the UK, the stay is normally lifted. It is difficult to see why this should be so, and various reasons have been advanced, including that there has been a difference of judicial treatment generally to procurement cases between the jurisdictions, with the scrutiny in Northern Ireland being more anxious of the processes of contracting authorities (for an example of a radically different approach to the same issues see the Court of Appeal judgment in *Clinton* where two of the judges in the Court of Appeal came to radically different conclusions on the basis of the agreed facts), or a greater desire to 'run' cases in Northern Ireland than elsewhere, where more cases may be settled at an early stage without litigation, or simply differences in quality of the procurement processes in the different jurisdictions.

In general, concern has been expressed by contracting authorities that the institution of an automatic stay has encouraged more litigation on procurement matters, and there is no doubt that across the UK, but especially in Northern Ireland, it is generally regarded that since the institution of the rules, but particularly latterly, procurement litigation, procurement law specialists in solicitors firms and a growing specialist procurement law bar has developed with their main focus being the operation of the EU rules.

As to VEAT notices in my own jurisdiction 8 VEAT notices have been issued, all in respect of services and supplies contracts, none in respect of works contracts.

As to damages, I know of no cases where damages have been awarded in the UK, or where the remedy of ineffectiveness has been granted to date of writing. In one prolonged piece of litigation where proceedings initially issued in 2008, and the case was heard in the High Court, appealed to the Court of Appeal, and findings made in favour of the complainant, the case was remitted to the High Court again to consider the award of damages, there is as yet no sign at time of writing of the process coming to an end. Of course, it is not possible to say how many cases may have been settled out of court, or procurements withdrawn during the process of a complaint and /or a judicial remedy being sought

As to cases where the full regime is not applicable, it is the case that the full remedies regime as developed for regulated contracts does not apply

The legal regime in the UK before the procurement rules and their attendant remedies regime existed allowed in differing circumstances for each of the headings adumbrated by the general rapporteur to apply. For example, an award decision could be challenged on contractual/administrative law grounds. Exceptionally, a contract could be found to be void, for example where there had been fraud or misrepresentation, and damages could be awarded in a range of circumstances.

The EU remedies regime has in the case of regulated contracts set the traditional balances aside both in respect of interim and final remedies. Of course the EU legal regime has a superior status in the national legal system, but it does not follow that the issues raised by the rules and their enforcement put against those raised in a purely national setting merit a different remedies regime. What is clear in the UK is that the substantive procurement rules and the attendant legal regime has given rise to delay in awarding contacts, prolonged litigation in some cases, a growth area for litigation and the role of lawyers, and apparently an uneven application of at least the remedies regime in respect of the interim measures decisions.

Of course some of this at least can be put down to the common law's adversarial approach to conducting litigation. On the other hand various continental states appear to have highly efficient specialist administrative tribunals which appear to effectively administer and enforce the rules speedily and at minimum expense.

Conclusion and reform

Question 14

The *new directives: contributing to the modernisation of EU public contracts law?*

At time of writing (October 2013), the most up to date UK official document on the new directives generally, summarising the key elements and their import in a UK context is the Cabinet Office procurement policy note 'Further progress on the modernisation of the EU procurement rules' of 25 July 2013 (Information Note 05/13). At this point I understand European Parliament approval in plenary session, technical modifications and translation need to be undertaken before the measures are adopted in December 2013 by current estimates. The UK's view of the outcomes of the negotiations is that,

'For contracting authorities, this means being able to run procurement exercises faster, with less red tape, and more focus on getting the right supplier and the best tender. And for suppliers, the process of bidding for public contracts should be quicker, less costly, and less bureaucratic, enabling suppliers to compete more effectively.'

The UK takes the view that its priority objectives have been achieved. These were:

- To make clear that contracts could be awarded directly for a period of, for instance, three years, to employee led organisations/mutuals, to enable employees to gain experience of running public services prior to full and open competition
- Reducing lengthy and burdensome procurement processes that add cost to business and barriers to market competition,
- Providing more flexibility for purchasers to follow best commercial practice, so that the best possible procurement outcomes can be achieved, and
- Supporting measures to enhance SME access to public procurement, where such measures are non-discriminatory and are consistent with a value for money approach.

More specifically the UK has welcomed:

i) A much simpler process of assessing bidders' credentials, involving greater use of supplier self-declarations, and where only the winning

bidder should have to submit various certificates and documents to prove their status

ii) More freedom to negotiate – constraints on using the negotiated procedure have been relaxed, so that procedure is available for any requirements that go beyond 'off the shelf' purchasing.

iii) Poor performance under previous contracts is explicitly permitted as grounds for exclusion

iv) The distinction between Part A and Part B Services has been removed, and a new light-touch regime introduced for social and health and some other services. There will be OJEU advertising and other specific obligations for this new light-touch regime, but a much higher threshold has been agreed (EUR 750,000).

v) The rules on 'Dynamic Purchasing Systems' have been greatly simplified, with the removal of the onerous obligation to OJEU-advertise call-off contracts made under the DPS

vi) The ability to reserve the award of certain services contracts to mutuals/social enterprises for a time limited period

vii) Electronic marketplaces for public procurement are expressly permitted, removing any doubt as to their legality

viii) Reduced red-tape on suppliers' response times: The statutory minimum time limits by which suppliers have to respond to advertised procurements and submit tender documents have been reduced by about a third. This flexibility could be helpful for speeding up simpler or off-the-shelf procurements, but still permits longer timescales for requirements where bidders will need more time to respond.

ix) Review of thresholds: The directive includes a binding commitment on the Commission, to review the economic effects on the internal market as a result of the application of thresholds, which could lead to an increase in the thresholds, which have been broadly static for 20 years. The review must happen within 3 years of the directive's transposition.

x) Legal clarity that buyers can take into account the relevant skills and experience of individuals at award stage where relevant (eg for consultants, lawyers, architects)

xi) Improved rules on social and environmental aspects, making it clear that:
   - social aspects can now also be taken into account in certain circumstances (in addition to environmental aspects which had previously been allowed).
   - buyers can require certificates/labels or equivalent evidence of social/ environmental characteristics, thus facilitating procurement of

contracts with social/ environmental objectives and refer to factors directly linked to production processes

xii) Electronic communication / e-procurement will become mandatory following 4.5 years after the directive's adoption.

xiii) Various improved safeguards from corruption:
- specific safeguards against conflicts of interest, similar to common existing UK practice where declarations are signed by procurement staff to confirm they have no outside interests with bidders etc
- similar provision against illicit behaviour by candidates and tenderers, such as attempts to improperly influence the decision-making process or collusion; safeguards against undue preference in favour of participants who have advised the contracting authority or been involved in the preparation of the procedure.
- self-cleaning measures, for suppliers who have cleaned up their bad practices

xiv) Buyers will be encouraged to break contracts into lots to facilitate SME participation, but there is discretion not to do so where appropriate.

xv) The new rules encourage and allow preliminary market consultation between buyers and suppliers, which should facilitate better specifications, better outcomes and shorter procurement times.

xvi) A turnover cap has been introduced facilitating SME participation. Buyers will not be able to set company turnover requirements at more than two times contract value.

xvii) A new procedure has been introduced: the 'Innovation Partnership' procedure. This is intended to allow scope for more innovative ideas. The supplier essentially bids to enter into partnership with the authority, to develop a new product or service.

xviii) The full life-cycle of costings can be taken into account when awarding contracts; this could encourage more sustainable and/or better value procurements which may save money over the long term but appear more costly on the initial purchase price

xix) Public authorities will no longer have to submit detailed annual statistics on their procurement activities. The Commission will collect this information directly from the online system, thereby freeing up valuable time and resources for public authorities.

xx) 'E-certis': Where contracting authorities require certificates etc from winning bidders, suppliers need to know what type of information and documents they will need to provide. 'E-certis' will be a central, online point where suppliers can find out the type of documents which they may be asked to provide in any EU country, even before they de-

cide to bid. This should be of particular help when suppliers wish to bid cross-border, as they may be unfamiliar with the detailed requirements of other EU Member States

xxi) Concessions contracts (works and services) will need to be advertised in OJEU where the contract value exceeds EUR 5million, and procured in compliance with the new procedural rules regime for concessions.

I wish to reflect generally on where we have reached with the EU procurement regime. I think it might be useful to get a historical perspective on where we are now by going back to basics and reminding ourselves of the roots of procurement law within the scheme of EU law. Its foundation is within the original Treaty provisions establishing the Single Market Project, articles 30 and 34, 43 and 49 of the Rome Treaty (on goods, establishment and services), as they then were (now 28, 43 and 49 TFEU). From the detailed regulatory setting where we find ourselves now, it seems a world away to remember that these provisions were in effect merely declaratory and not of real effect. It was considered impractical at the outset to apply the provisions directly. The treaty's freedom of movement of goods provisions only became directly effective in 1971. The original liberalisation directive on procurement, 70/32 was modest in scope prohibiting practices that favoured national providers in public works contracts, but the roots of the current legislative regime are in this and following directive in 1971 and 1977. It is also extraordinary to recall that these measures were largely disregarded and not well enforced, and it was only with the single market project in the run-up to 1992 that this area of law was given priority, dusted off, and further legislative measures adopted

It is interesting to reflect on what has been achieved in this respect. I suppose that we could not have reached the detailed regime we have now, had the practice of national preference across the EU not been substantially addressed. In the process of moving the single market policy forward, the policy has moved from simple national barrier removal to the creation of a detailed regulatory regime. This appears to have been on the assumption that procurement practices that do not allow for fair competition between firms may also operate as barriers to trade and produce trade distortions. I am not an economist – but I know there is continuing debate about the degree of distortion, and I must leave that debate to others. However, such a starting point explains why the view has been taken that trade barriers cannot be removed solely through negative obligations – it is considered that it is difficult to prove discrimination. It is also considered that apart from discrimination, trade barriers also arise from inefficient sourcing – for example if you do not

advertise widely enough, you cannot expect that the best bidders, even if they are more distantly based, will respond. In effect we do now have in the public procurement sphere a regime dealing with the key elements of contract law in the common law systems, especially 'offer' but also 'acceptance', 'consideration', 'illegality' and 'remedies'.

It is clear that the EU legal regime does not displace all national or regional discretion in the operation of procurement policy – rather, as was emphasised by the European Court in the *Beentjees* case[50] they provide a framework within which Member States implement their own national procurement policies. Nevertheless, despite the optimistic view of the UK presented above, procurement professionals would say there is still have a complex regulatory regime. It is clear in the UK that the various legal jurisdictions have experienced a burgeoning number of cases at EU, national and local level, interpreting the rules and the number of lawyers and administrators we need to deal with the regime climb steadily over the years.

The single market project is a necessary and worthy cornerstone of the EU. It is intended to create an absence of constraint on the operation of the market. The procurement rules are aimed at the removal of barriers to trade between Member States, and at the creation of a setting where contracting authorities can get the best from the market. The new procurement directives are intended to simplify that regime in this context. This is an acceptance that the rules have been too burdensome. It should not be surprising, therefore, as aspects of this paper relate, that I have observed worrying effects in practice such as distortions of the market, reduced innovation, an inability to respond adequately to local needs by advancing local social policy through procurement, more costly and slower processes and increased litigation. All these aspects seem antipathetical to the operation of an effective single market. The lifting of some burdens is therefore to be welcomed. However, even with these changes, I think that there will still be a set of detailed rules on public procurement which will continue to create a series of constraints on the freedom of public contracting authorities to get the best from the market and which will not address, or not address fully the problems I have referred to. Whilst some aspects of practice can be improved at national level, I doubt that the new directives will go far enough to free up the operation of the market. In short even with the new regime I believe the rules will still be a disproportionate means to an end. Time will tell.

50. C-31/87.

List of editors and authors

Elsa Adamantidou
Head of Public Procurement Monitoring Unit, CIEEL – (Greece)

Roberto Caranta
Dr., Professor of Administrative law, University of Torino – (General Rapporteur)

Evelyne Clerc
LL.M. (NYU), LL.M. (Collège d'Europe, Bruges), Professor in European law and Competition law, Faculty of Law, University of Neuchâtel – (Switzerland)

Ivaylo Dermendjiev
Dr., Attorney-at-law, Senior Partner, 'Simeonov & Dermendjiev' Law Firm – (Bulgaria)

Anna Dimoulis
Lawyer-linguist, European Court of Justice, Finnish Translation Unit, Luxembourg – (Finland)

Brian Doherty
Deputy to the Solicitor, Departmental Solicitors Office, Government Legal Service, Belfast, Northern Ireland – (The United Kingdom)

Catherine Donnelly
Barrister in the Law Library, Dublin and Blackstone Chambers, London; and Associate Professor at Trinity College Dublin – (Ireland)

José Maria Gimeno Feliú
Full Professor of Administrative Law, University of Zaragoza – (Spain)

Boštjan Ferk
Dr., LL.B., Managing Director of the Institute for Public-Private Partnership – (Slovenia)

Petra Ferk
M.Sc., Researcher at the Institute for Public-Private Partnership, PhD Candidate at the Faculty of Law, University of Ljubljana – (Slovenia)

Patricia Valcárcel Fernández
Associate Professor of Administrative law, University of Vigo – (Spain)

Joanne Finn
Partner and Head of the EU Competition and Regulated Markets group at Eugene F. Collins – (Ireland)

Michael Fruhmann
Mag. Dr., Head of Unit, Federal Chancellery, Constitutional Service – (Austria)

Brady Gordon
PhD reasercher at Trinity College Dublin – (Ireland)

Ana Luísa Guimarães
Senior Associate, Sérvulo & Associados, Sociedade de Advogados, RL, Lisbon – (Portugal)

Pavlína Hubková
Mgr. (Charles University, Prague), Ing. (University of Economics, Prague), Researcher at the European University Institute (Florence) – (Czech Republic)

Catherine Jacqueson
Dr., Associate Professor, Research Centre in Legal Studies in Welfare and the Market, Faculty of Law, University of Copenhagen – (Editor)

Giulia F. Jaeger
Barrister, Luxembourg; candidate for the function of notary, Luxembourg; senior associate, Law firm – (Luxembourg)

Jiří Kindl
Dr. (Charles University, Prague), M.Jur. (Oxon), Partner in Weil, Gotshal & Manges (Prague); member of the Czech Bar Association; Lecturer at the Faculty of Law, Charles University in Prague – (Czech Republic)

Eija Kontuniemi
Chief Legal Councel, Hansel ltd, State Central Procurement Unit – (Finland)

Filip Kuhta
LL.M., Research Fellow, Jean Monnet Chair for European Public Law, Faculty of Law in Zagreb – (Croatia)

Anna Kuusniemi-Laine
Partner, Castrén & Snellman Attorneys Ltd, Helsinki – (Finland)

Elisabetta R. Manunza
Dr., Professor, University of Utrecht – (The Netherlands)

Roberto Mastroianni
Professor of EU law, University of Naples « Federico II » – (Italy)

Ilias Mazos
Conseiller d'Etat, Greek Council of State – (Greece)

Gert-Wim van de Meent
Dr., Professor, University of Amsterdam, and Loyens & Loeff N.V. – (The Netherlands)

Jenny Mellerick
Partner at McCann FitzGerald – (Ireland)

Arthur Merle-Beral
Chamber of Commerce and Industry of Paris – (France)

Aileen Murtagh
Associate at A&L Goodbody – (Ireland)

Eva-Maj Mühlenbock
Partner and Head of the Public Procurement group at the Law Firm Lindahl's Stockholm office – (Sweden)

Ulla Neergaard
Dr., Professor of EU law, Faculty of Law, University of Copenhagen – (Editor)

Anita Németh
Dr., Attorney at law, official public procurement adviser; Lecturer at the Faculty of Law of Eötvös Loránd University (ELTE), Budapest; former Head of the EU Law Department of the Ministry of Justice, Hungary – (Hungary)

Pernilla Norman
Lawyer at the Law Firm Lindskog Malmström and doctorate candidate at the University of Linköping – (Sweden)

Tomáš Pavelka
JUDr. (Charles University, Prague), LLM (Cantab); stagiaire attorney at Cleary Gottlieb Steen & Hamilton LLP (Brussels) – (Czech Republic)

Agris Peedu
Deputy Secretary General, Ministry of Finance of the Republic of Estonia – (Estonia)

Nikola Popović
Dr., Member of the Council of the Croatian Agency for Post and Electronic Communications (HAKOM, NRA) – (Croatia)

Sune Troels Poulsen
Dr., Associate Professor, University of Copenhagen, Faculty of Law – (Denmark)

Martin Ráž
Mgr. (Charles University, Prague), M.Jur. (Oxon), senior associate in Havel, Holásek & Partners (Prague); member of the Czech Bar Association – (Czech Republic)

Ivan Sammut
Dr., Senior Lecturer, Faculty of Law, University of Malta – (Malta)

Aleksandra Sołtysińska
Dr., Chair of European Law, the Jagiellonian University in Cracow – (Poland)

Ines Tantardini
Chamber of Commerce and Industry of Paris – (France)

Adrián Tokár
Member of the Legal Service, European Commission – (Institutional Rapporteur)

Markus Ukkola
Senior Adviser, Competition Policy, Ministry of Employment and the Economy, Finland – (Finland)

Ferdinand Wollenschläger
Dr., Professor, Chair of Public law, European law, European and International Economic law, Faculty of Law, University of Augsburg – (Germany)

Grith Skovgaard Ølykke
Dr., Associate Professor of EU law and State aid, Law Department, Copenhagen Business School – (Editor)

ABBREVIATED QUESTIONNAIRE GENERAL TOPIC 3

The Context

Question 1

Which main systemic challenges were/are Member States confronted with when adopting EU style public procurement rules?

The boundaries of EU public procurement law

Question 2

How are public contracts defined, and what are the criteria that set them apart from legislative measures, administrative decisions, or other arrangements which are not considered public contracts?

Question 3

How are in house arrangements and instances of public-public partnerships or other public-public cooperation forms regulated?

Question 4

Which (if any) consensual arrangement between the public and private sectors is considered to fall outside the scope of application of EU rules?

Question 5

What kind of mixed arrangements are to be found in your jurisdiction and how are they regulated?

The general principles of EU law: public procurement law and beyond

Question 6

Which rules or principles are applicable to the award of contracts (or consensual arrangements) excluded, not covered, or not fully covered by the EU procurement directives?

Question 7

Do the principles of non-discrimination/equal treatment and transparency (or rules derived therefrom) also apply to the selection of the beneficiary of unilateral administrative measures?

Public procurements and general EU law, including competition and State aids law

Question 8

Can decisions taken by contracting authorities be treated as measures imposing restrictions on the internal market? If so, shall they comply with the non-discrimination and proportionality principles and be additionally justified by imperative requirements in the general interest?

Question 9

Which if any public procurement rules may lend themselves to abuse thus potentially limiting competition?

Question 10

Can SGEIs be outsourced to market participants without following public procurement-like procedures, including through direct award? Do EU State aid rules apply if the latter is the case?

Strategic use of public procurement

Question 11

Are public procurements used as a tool to achieve environmental and social policy goals and if so what are the challenges?

Question 12

Are public procurements used as a tool to foster innovation?

Remedies

Question 13

To what extent (if any) and how has Directive 2007/66/EC strengthened the remedies against breaches of EU public procurement rules?

Conclusion and reform

Question 14

How are the new directives to contribute to the modernisation of EU public contracts law?