

Peering into the fog: What are the four main considerations for procurement practitioners post-Brexit?

David Gollancz

November 2018

White Paper conference

- Damages for breach
- Below-threshold procurements
- The WTO's GPA
- A proposal for reform
- Free bonus slides

Sufficiently serious



Two lawyers, three opinions



- *NDA v EnergySolutions EU Ltd (now called ATK Energy EU Ltd)* [2017] UKSC 34
- *EnergySolutions v NDA* [2016] EWHC 3326 (TCC)
- *Bombardier Transportation UK Limited v Hitachi Rail Europe Limited, Alstom Transport UK Limited, London Underground Limited v Siemens Mobility Limited* [2018] EWHC 2926 (TCC)
- *Fosen-Linjen AS v AtB AS* Case E-16/16
- *WordPerfect Translation Services Limited v The Minister for Public Expenditure and Reform* [2018] IECA 35

- ***Brasserie du Pêcheur/Factortame* [1996] QB 404**
 - decisive test...is whether the member state or the Community institution concerned manifestly and gravely disregarded the limits on its discretion.
 - The factors which the competent court may take into consideration include...whether the infringement and the damage caused was intentional or involuntary; whether any error of law was excusable or inexcusable;

- ***EnergySolutions v NDA* [2016] EWHC 3326 (TCC)**
 - ‘failure to award a contract to the tenderer whose tender ought to have been assessed as the most economically advantageous offer’
 - Threshold or pass/fail requirement or evaluation criteria if, cumulatively or individually, would have affected the outcome.

➤ *FastWeb SpA C-19/13*, AGO 10 April 2014

- [The court] should, in particular, determine whether the contracting authority acted in good faith and with due diligence when concluding the contract
- It is essential, therefore, for the national court...to distinguish between a mistake committed in good faith and an intentional infringement of the procurement rules.
- The first situation is where the national court finds that the error of law made by the contracting authority is excusable because it has shown good faith...The second situation is where the review body considers the error of law to be inexcusable, on the view that the contracting authority has deliberately and voluntarily infringed the rules

Bit of a muddle



➤ Sch. 1(4)

- There is no right in domestic law on or after exit day to damages in accordance with the rule in Francovich. (Has effect by s5(6) but not commenced)

➤ Explanatory Note par. 214

- [Sch. 1]Paragraph 4...does not affect any specific statutory rights to claim damages in respect of breaches of retained EU law (for example, under the Public Contracts Regulations 2015) or the case law which applies to the interpretation of any such provisions.

➤ Sch. 8 (39)(7)

- Paragraph 4 of Schedule 1 does not apply in relation to any proceedings begun within the period of two years beginning with exit day so far as the proceedings relate to anything which occurred before exit day.

(3) Any question as to the validity, meaning or effect of any retained EU law is to be decided, so far as that law is unmodified on or after exit day and so far as they are relevant to it—

(a) in accordance with any retained case law and any retained general principles of EU law, and

(b) having regard (among other things) to the limits, immediately before exit day, of EU competences.

- The Regulations-based claim to damages will continue to exist; but
- Subject to *Francovich* principles despite para 3 of Schedule 1; and
- It will be possible for the parties to deploy pre-exit day EU case law concerning sufficient seriousness; and
- The interpretation of “sufficient seriousness” is open to considerable further development.

Scope for argument



Below the thresholds: Transparency and equal treatment?



EUWA Sch.1 (3)

(1) There is no right of action in domestic law on or after exit day based on a failure to comply with any of the general principles of EU law.

(2) No court or tribunal or other public authority may, on or after exit day—

(a) disapply or quash any enactment or other rule of law, or

(b) quash any conduct or otherwise decide that it is unlawful, because it is incompatible with any of the general principles of EU law.



(1) Any rights, powers, liabilities, obligations, restrictions, remedies and procedures which, immediately before exit day—

(a) are recognised and available in domestic law by virtue of section 2(1) of the European Communities Act 1972, and

(b) are enforced, allowed and followed accordingly, continue on and after exit day to be recognised and available in domestic law (and to be enforced, allowed and followed accordingly).

Central Tenders Board and anor v White [2015] UKPC 39



- ...there is no dispute as a general principle of public law that tenderers for public contracts should be afforded fair and equal treatment.

- Lord Toulson

WTO



UK application to accede to the GPA

I have the honour to communicate the United Kingdom's interest in acceding to the Government Procurement Agreement (GPA) to become a Party in its own right.

The United Kingdom currently participates in the Government Procurement Agreement by virtue of its membership of the European Union. The United Kingdom has implemented Government Procurement Agreement rules in domestic law for over twenty years, and its government procurement market is one of the most open in the world.

The United Kingdom has notified its intention to withdraw from the European Union pursuant to Article 50 of the Treaty on European Union. The United Kingdom and the European Union agreed to work together towards the United Kingdom's objective of remaining, in its own right, subject to the rights and obligations it currently has under the Government Procurement Agreement as an European Union Member State on the basis of the commitments which are currently contained in the European Union's schedule.

In this context, please find attached the draft market access offer and Checklist of Issues to be circulated to the Committee on Government Procurement. Further material to aid your review of the draft offer is available from the United Kingdom Permanent Mission.

I invite you to bring to my attention or that of my staff (lauren.boag@fco.gov.uk) any issues you or GPA Parties wish to raise outside the formal meeting structure in order to make swift progress on this initiative.

Sincerely,

H.E. Mr JULIAN BRAITHWAITE

Ambassador

Permanent Representative of the United Kingdom to the WTO

Can we have a PAT?



Thanks for listening!



Chocolate mayonnaise cake

➤ Chocolate mayonnaise cake

➤ **Ingredients**

➤ For the cake:

- 275g self raising flour
 - 225g caster sugar
 - 1½ teaspoons baking powder
 - 200g mayonnaise (I make my own using sunflower oil but you can use ready-made)
 - 4 tablespoons cocoa powder
 - 225ml boiling water
 - 1 teaspoon vanilla essence
- For the icing:
- 2 level teaspoons instant coffee *or* sub 2 tbs espresso for hot water
 - 2 level tablespoons cocoa powder
 - 2 tablespoons warm water
 - 75g butter
 - 225g icing sugar

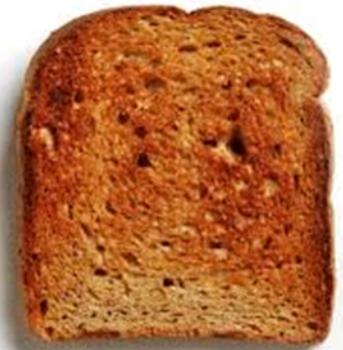
➤ **Instructions**

- Preheat the oven to 180°C (350°F) mark 4. Line an 18 cm cake tin with greaseproof paper.
- Sift the flour into a large mixing bowl and stir in the caster sugar and baking powder. Beat the mayonnaise well into the flour – it is very important to beat thoroughly into the dry ingredients.
- Dissolve the cocoa in the boiling water and stir this gently until it's smooth. Add to the flour mixture with the vanilla essence and give it a quick stir. Stir everything thoroughly until all the ingredients are blended but this time don't beat the mixture because that will spoil it. Just keep stirring it gently until all the lumps are gone.
- Pour the cake mixture into the tin. Bake for about an hour or until the centre feels springy and a skewer comes out clean. Leave the cake in the tin to cool before turning out onto a wire rack.
- For the topping, dissolve 2 teaspoons of coffee and 2 tablespoons of cocoa in 2 tablespoons of hot water. Add the soft butter and the icing sugar.
- Beat the mixture thoroughly ensuring there are no lumps and spread it over the cake.

Perfect garlic mash

- Estima* potatoes peeled and cut in quite large chunks
- Sprinkle with EV olive oil, salt, and fine-cut garlic; (touch of nutmeg?)
- Steam till tender but not too soft and definitely not collapsing
- Put in mouli with fine screen, set over warm ceramic bowl (fireproof if you're going to keep hot in oven), add generous dollop of best butter and some whole milk or a little cream
- Pass through mouli
- Voila! Parfait

➤ You will need:



- Toast bread (sourdough highly recommended)
- Rub toast with olive oil and crushed garlic
- Grate cheese onto toast
- Lightly toast again to melt cheese
- Slice avocado onto cheese
- Slice tomato onto avocado
- Toast again

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