

Peering into the fog – or...

David Gollancz

Spring 2019

White Paper conference



Questions



- Do the EU provisions still apply?
- Where are you obliged to advertise, e.g. OJEU?
- What about contractors and supplies from the EU: prices, extensions, supply chains and new contracts?



DEAL

The withdrawal method



- European Union (Withdrawal) Act 2018 (amended by EU (Withdrawal Agreement) Bill if WA approved):
 - Repeals European Communities Act 1972
 - EU law cease to apply:
 - On Exit Day if no WA *or*
 - At end of transition period if WAA so provides
 - Creates “retained EU law” whether or not a deal is agreed but ends jurisdiction of CJEU
 - During transition period (if there is one), UK ≠member state, so no vote, commissioners or judge at CJEU, but EU law continues to apply (inc amendments etc.), together with CJEU supervision; UK continues in GPA and EU international trade agreements

But...



- A “no deal” Brexiteer government could propose changes to these provisions, such that EU law would simply cease to apply on exit day

After transition



- At end of transition EUWA preserves procurement regulations in UK law
- “Brexit SIs” make mainly technical amendments to Regs e.g. “e-notification service” instead of Official Journal
- Retained EU law construed in accordance with pre-exit CJEU cases
- UK courts may take notice of post-exit CJEU cases

- Subject to saving for procurements/call-offs as below, UK then free to reform procurement law
- Unlikely to see radical change: GPA
- But some simplification of procedures and changes to remedies possible
- EU procurement rules continue to apply to
 - Any procedure started before end of transition period and not yet finalised on the last day of it (draft WA Article 76(1)(a))
 - Any call off procedure where procurement of framework agreement launched before end of transition period until framework agreement expires / is terminated) (draft WA Article 76(1)(b))



NO DEAL

GIBLET SOUP (8 or 10 people)

4 sets giblets.	2 oz. fat.
1 carrot.	1 blade mace.
1 onion, stuck with	1 bunch herbs.
3 cloves.	Juice of half lemon.
1 turnip.	2 qt. stock.
$\frac{1}{2}$ head celery.	2 oz. flour.

Seasoning.

Wash the giblets and cut them up. Slice the vegetables and put them with the giblets into a pan with the stock. Simmer 2 or 3 hours till cooked. Make a roux with the fat and flour. Add some of the soup to this. Boil and return this to the rest of the soup. Stir and skim for 20 minutes. Strain, re-heat; add a glass of sherry if wished; season to taste, and add the giblets cut into neat dice.

NETTLES

Young nettles are very wholesome. Follow the directions for Spinach. Old nettles are too strong in flavour to use.

➤ On Exit Day:

- Most existing EU law (including procurement legislation) converted into UK law
- Subsequent amendments of EU law n/a in UK
- End of jurisdiction of CJEU in UK
- Procurement regulations amended so as to function in UK outside EU (see next slide)
- UK no longer a party to GPA/other international trade agreements through EU but will join GPA asap
- No access to Official Journal to advertise contracts

Amendments to procurement legislation



- Public Procurement (Amendment etc.) (EU Exit) Regulations 2019 SI 2019/560 as amended by the Public Procurement (Amendment etc.) (EU Exit) (No. 2) Regulations 2019 (SI 2019/623) make technical and substantive amendments, coming into force on exit day
- Provisions include:
 - “e-notification service” replaces “Official Journal”
 - No change to Contracts Finder etc. requirements
 - Pro-forma notices abolished

Amendments continued



- Minister for Cabinet Office (instead of EC) has power to change:
 - financial thresholds
 - rules about electronic communications
 - grounds for exclusion of EOs for non-compliance with international environmental/social/labour obligations
- Delete “enforceable EU obligations” (but duty to comply with retained EU law persists)
- From 18 months after exit day, obligation to comply with duties owed only to EOs in UK and Gibraltar

Amendments continued



- Access and rights of economic operators in countries party to GPA (inc EEA states) preserved for 18 months (i.e. to allow time for UK accession to GPA in own right)
- ALT due to state aid: provision deleted
- E-Certis references deleted
- Provisions about joint procurement between CAs in different member states deleted

Amendments continued



- Mostly applies from exit day, including to procurements under way, but with fairness provisos, e.g. duty to EEA EOs where participating in procurements under way
- Consequential technical amendments to other legislation, e.g. Greater London Authority Act 1999, Public Services (Social Value) Act 2012, Equality Act 2010

➤ **Explanatory Note:**

A full impact assessment has not been produced for this Instrument as no, or no significant, impact on the private or voluntary sector is foreseen.

- Defence and Security Public Contracts (Amendment) (EU Exit) Regulations 2019 SI 2019/697 makes technical amendments to Regs, adds Norway and Iceland as “member states”

In short...



- Very little substantive change for at least 2½, more probably 3 years
- And not that much thereafter: GPA differs in detail but not in basic principle
- Administrative changes: UK e-notification and forms, perhaps gradual changes in thresholds

Explanations and guidance – *Caution: may go out of date surprisingly quickly!*



- HoC library:
<https://researchbriefings.parliament.uk/ResearchBriefing/Summary/CBP-8453>
- European Commission:
[http://europa.eu/rapid/press-release MEMO-18-6422_en.htm](http://europa.eu/rapid/press-release_MEMO-18-6422_en.htm)
- BBC: <https://www.bbc.co.uk/news/uk-46237012>

- Procurement Policy Note – Preparing for the UK Leaving the EU Action Note PPN 02/19(2)
<https://www.gov.uk/government/publications/procurement-policy-note-0219-preparing-for-the-uk-leaving-the-eu>
- Frequently asked Questions on No-deal Exit
https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/800661/20190508-FAQ-on-no-deal-exit.pdf

- Public-sector procurement after a no-deal Brexit
<https://www.gov.uk/guidance/public-sector-procurement-after-a-no-deal-brexite>
- Explanatory Memorandum to the Public Procurement (Amendment Etc.) (EU Exit) Regulations 2019 2019 No. 560
https://www.legislation.gov.uk/uksi/2019/560/pdfs/uksiem_20190560_en.pdf

David Gollancz
Spring 2019
White Paper conference