Friday 20 November 2026| Joanne Clement KC

How far can you push "Buy British" using growth and social value criteria and national security considerations?

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“Buy British”







Slide 2

JCK1 [@Joanne Clement KC] Add an authentic "Buy British" poster featuring the Union Jack here (e.g. from the Imperial War Museum or National Archives).

Joanne Clement KC, 2026-11-20T01:04:58.946

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1. EU LAW AND CORNWALL

EU law and Cornwall

- Treaty principle: non-discrimination on grounds of nationality one of most fundamental in EU law
- Award criteria not limited to purely economic matters
- MEAT – can take into account social and environmental matters so long as linked to subject-matter of contract and are proportionate.
- Must also comply with fundamental principles of EU law, including principle of non-discrimination
- Commission Interpretative Communication - Contracting authorities must not impose discriminatory conditions, such as a requirement that undertakings interested in the contract must be established in the same Member State or region as the contracting authority (§2.2.1).

Commission v Italy (1992)

- TFEU: requires abolition of all discrimination against providers of services established in a MS other than that in which service is to be provided.
- Successful tenderer must entrust between 15-30% of works to undertakings with their registered offices in the region. All sub-contractors it favours are Italian undertakings - **discrimination against undertakings established in other MS**
- Preference given to consortia of undertakings which carry out their main activity in the region in which the works are to be carried out. Favoured domestic sub-contractors, must more likely carry out main activity in region – **discrimination against undertakings established in other MS.**
- TFEU prohibits overt discrimination by reason of nationality, and all other covert forms of discrimination

Commission v Denmark (C-243/89)

- Rule requiring tenderers to ensure Danish materials, consumer goods and labour are used “to the greatest possible extent”. No mandatory minimum level.
- Accepted that this clause breached EU law. Likely to affect composition of the consortia and terms of the tender

Cornwall

- SoS decision to clawback ERDF grant paid to the Council – in spending the grant, the Council had breached procurement law.
- Included an SME sub-consultant requirement – tenderer must identify a minimum of two sub-consultants, one of which must be a Cornish SME, used to provide the service.
- SoS concluded requirement was discriminatory and in breach of the principle of equal treatment. UK tenderers much more likely, compared to non-UK tenderers, to have necessary local networks to identify and negotiate with Cornish sub-consultants
- Council argued that requirement did not cause harm, and was proportionate means of meeting its social value obligations - relied on Public Services (Social Value) Act 2012 to argue that requirement was intended to offset disadvantages encountered by SMEs.

Cornwall

Court concluded requirement was discriminatory

Bidders with existing local networks, overwhelmingly likely to be based in the UK, in a superior position to make contact with them and negotiate terms for a bid

Test is not whether requirement causes harm. Not know whether had deterrent effect. Attempt to overcome disadvantage from SME not override importance of non-discrimination

2. Non-discrimination, WTO GPA and trade agreements

2. We left the EU, who cares?

- WTO GPA – non discrimination clause
- No less favourable treatment to the goods and services of any other Party/suppliers of any other Party than accorded to domestic goods, services and suppliers
- Must not treat a locally established supplier less favourably than another locally established supplier on the basis of the degree of foreign affiliation or ownership.
- Exceptions for protection of essential security interests relating to procurement of arms, ammunition or war materials, or to procurement indispensable for national security or for national defence purposes.
- General exceptions: for measures necessary to protect order, safety, and human, animal, or plant life or health. This also states that these exceptions must not be applied as a means of arbitrary or unjustifiable discrimination or as a disguised restriction on international trade.
- TCA – broadly mirrors the WTO GPA non discrimination standards.

2. The Procurement Act

- Section 12 – in carrying out a covered procurement, treat suppliers the same unless a difference justifies different treatment
- Part 7 – implementation of international obligations
- Section 89 defines a Treaty state supplier – a supplier entitled to the benefit of an international agreement set out in Schedule 9 in relation to the procurement being carried out or challenged
- Need to look at any exceptions in the international agreement in question. Schedule 9 includes the WTO GPA and the TCA.
- Section 90 – contracting authority may not, in carrying out a procurement, discriminate against a treaty state supplier.
- Discriminate if it treats the supplier less favourably than it treats, or would treat, a UK supplier or other treaty state supplier, because of (a) supplier's association with the supplier's treaty state, or (b) supplier's lack of association with the UK or another treaty state.
- Definition of UK supplier – section 90(7). Supplier that is established in, or controlled or mainly funded from, the UK, a BOT, or a Crown Dependency and is not a treaty state supplier.

2. The Procurement Act

- Also makes provision for exempted contracts in Schedule 2 (which are not public contracts)
- Para 25: National security contracts – contract that the contracting authority determines should not, in the interests of national security, be subject to this Act or a part of this Act.
- Act applies to covered procurement (procurement of a public contract) and procurement. If a contract is an exempted contract, then it is not a public contract.
- So national security exemption takes a contract outside of the provisions on “covered procurements”. But section 90 (non discrimination) continues to apply, as it applies to “procurement” which is the award, entry into and management of ”a contract”
- Separate treatment of defence and security contracts under section 7 – fall outside Schedule 9 agreements

3. PPN 025, PPN 026, what comes next?

PPN 025: Protecting the UK's national security through public procurement

- UK's purchasing power more effectively deployed to protect our national security
- National security extends beyond defence – true resilience requires supporting critical sectors and securing supply chains so they can be relied upon during crises to protect UK's national security
- Four critical sectors – shipbuilding, steel, AI and energy infrastructure
- Applies only to central Govt depts, executive agencies, NDPBs. Private utilities strongly encouraged to use, others to use as guidance
- Deploy national security exemption in the Act where appropriate and justified in a relevant procurement
- The national security exemption must only be relied on in accordance with the Act, and, where relevant, consistently with the UK's international trade agreements relating to procurement. In-scope organisations should make a case by case assessment of whether the exemption can be relied upon in relation to any relevant procurement.

Guidance to PPN 025

- Procurements in these critical sectors are not automatically exempt – authorities consider on a case by case basis whether exemption can be applied to each particular procurement. If applies, CAs have more freedom to decide on most appropriate approach to procurement of goods, services and works where national security interests are involved

- Annex A sets out sector specific requirements for relevant procurements.

- BUT exemption can only be used in accordance with the Act and UK's international trade agreements relating to procurement. Exempted contracts are still bound by the provisions of the Act that relate to "procurement" (instead of "covered procurement"). This includes the duty not to discriminate against a treaty state supplier.

- Consider interests of national security, what required to meet them. Could restrict potential suppliers to UK based suppliers only while still complying with other parts of the Act. Need to determine if procurement covered by international agreement. Most critical sectors likely to be covered. Then consider whether "Buy British" would breach that international agreement. Looking at exceptions in the agreement. Guidance suggests can disapply s90 – that is not right.

Guidance to PPN 025

- Article III.1 of the GPA includes national security exceptions which allows for action which is necessary to protect essential security interests relating to procurement indispensable for national security or national defence purposes.
- To rely on this exception, there must be a clearly articulated essential security interest, any action must be necessary to protect the identified essential security interest and must relate to procurement indispensable for national security.
- Action is likely to be necessary only where less trade restrictive measures have been considered first and discounted.
- Essential security interests - generally considered to be “quintessential functions of the state” such as protection of territory and population against external threats and maintenance of public order internally.
- Guidance states this requires careful consideration on a case by case basis in relation to each relevant procurement, informed by the factors referenced in this guidance.

PPN 026: The Social Value Model

1. Govt wants every £ spent on public procurement so support British businesses, boost growth, help build fairer economy - people in UK feel full impact of investment in their communities

2. Social value defined as

taking account of how a supplier will work for our communities to provide good British jobs, skills and opportunities in every postcode.

Streamlining social value model to focus on good jobs, skills and opportunities for those facing barriers to employment within local communities.

PPN 026

- Applies to central Govt departments, executive agencies and NDPBs. Other CAs “may wish” to adopt same approach. Does not apply to private utilities contracts. For frameworks, assessed at framework and call-off
- Applies to covered procurements valued at over £1million.
- Applies to procurements commenced after 1 Jan 2027
- Applies at all stages of commercial life cycle, applies to all in-scope procurements where a model award criteria can be selected which is relevant to the subject matter of the contract, proportionate, does not create unnecessary burdens for suppliers or barriers to participation
- AND does not discriminate against treaty state suppliers

PPN 026

Select relevant delivery outcome from model in Annex A, with corresponding award criteria (plus sub criteria in guidance) include in tender docs. . Two outcomes: good jobs and skills. Six model criteria. List of target cohorts.

Above threshold, below £1m – minimum is zero

Above threshold contracts valued £1m to £5m – minimum of 10% weighting to social value criteria

Contracts valued £5m and above – minimum of 20% weighting

Assess bids and apply evaluation methodology. Set social value KPIs, poor performance against social value KPIs taken into account in considering whether grounds to exclude suppliers from bidding for future tenders

Guidance on using PPN 026

- Reminder: apply guidance in compliance with the Act and international obligations. Departure is permitted where necessary to comply with international agreements, to keep requirements relevant and proportionate and ensure fair treatment and non-discrimination

- Determine the likelihood of international suppliers bidding on the contract. Aware of how impact on UK's international obligations. Must not discriminate against or deter treaty state suppliers from bidding on the contract

- Discrimination arises where a treaty state supplier is treated less favourably than a UK supplier. In the social value context, discrimination is likely to arise where a treaty state supplier cannot bid on your contract or is deterred from doing so by, for example, higher costs or practical obstacles. You must not apply PPN 026 to your procurement if it would breach your duty to treaty-state suppliers

- **Where possible, and consistently with UK's international obligations,** consider how Social Value Model can be used to support the delivery of jobs, skills and opportunities for the target cohorts in contracts that are not location specific.

Guidance on using PPN 026

- Discrimination may arise where award criteria create barriers for treaty-state suppliers,
- Example - if they cannot be met without a UK workforce but the contract could be delivered from outside the UK, or because delivering them would be disproportionately expensive for a treaty-state supplier and therefore they are deterred from bidding.
- If market engagement has indicated that treaty state suppliers are likely to bid and/or it is capable of delivery, wholly or partly, from outside the UK, consider alternative ways of applying the Social Value Model which are appropriate to achieve the successful delivery of social value outcomes and are proportionate, linked to the subject matter of the contract, non-discriminatory and comply with other international obligations.
- Consider amending the model question, outcomes, criteria, and/or sub-criteria, or not applying the Social Value Model if it would breach your duties to treaty-state suppliers.
- If a supplier proposes to deliver social value via a subcontractor - cannot require that the subcontractor is a UK supplier or give preferential treatment to a supplier whose subcontractor is based in the UK.

PPN 026

- Problems: create new jobs, apprenticeships etc in the relevant area – more difficult for non UK suppliers if contract can be delivered outside UK
- Fair working conditions: focus on working conditions in the UK. Again more difficult for non-UK suppliers.
- How know if treaty supplier likely to bid? Argument in Cornwall that they wouldn't. Depends on nature/value of contract? Are we back to assessing potential impact on trade for application of Treaty principles?

Future?

- Budget statement
- “Strategic public procurement to back British firms”
- March 2027 - new National Procurement Policy Statement laid in Parliament to “prioritise delivery of high quality jobs, fair pay and skills opportunities, including pathways for young people”.
- Redefine what constitutes a “UK supplier” for public procurement purposes – by Jan 2027
- Public contracts for large govt infrastructure and construction projects – planning for further change, suppliers commit to target of at least 3% for apprenticeships on such projects

How far can you push "Buy British" using growth and social value criteria and national security considerations?

Social Value

- Explicit geographical exclusions – only UK suppliers permitted to bid, only UK goods accepted – unlawful
- Preferential scoring for domestic origin – “Made in Britain” or “UK supplier” – unlawful
- Mandatory UK content thresholds - source minimum percentage of materials, manufacturing or labour from within UK – unlawful
- Requiring local supply chain or sub-contractors – unlawful
- Proximity/travel limits – unlawful
- Local job creation, upskilling – probably lawful **if** relevant and proportionate and can be operated in a non-discriminatory way

National security

- Is it an exempt contract? What is required to protect national security?
- BUT still have to comply with section 90. Still can't discriminate against a Treaty state supplier. That is a supplier entitled to the benefit of an international agreement in Schedule 9, in relation to the procurement being carried out or challenged.
- So if the particular procurement would fall within an exemption to the international agreement – can "Buy British"
- Four critical areas all likely covered by international agreements. Q is whether exemption will apply.