

Post Brexit: a look in to the future

The White Paper Procurement Conference
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What we will cover this morning

- ▶ Consequences of Brexit
- ▶ WTO and GPA
- ▶ Common law case-based approach
- ▶ Domestic policy agenda
- ▶ Developments on Third Country Access
- ▶ Some tentative conclusions

Consequences of Brexit (1)

- ▶ Savings provision to cover immediate post-Brexit period to avoid fall-away of EU-derived secondary legislation (s 2(2) European Communities Act 1972):
 - ▶ 10% of all UK secondary legislation is EU-derived
 - ▶ Lengthy period raises difficult issues (eg effect of CJEU decisions)
- ▶ Soft Brexit entails continued single market membership
- ▶ So, some form of Hard Brexit is of more interest from our point of view

Soft BREXIT

Hard BREXIT

Very hard BREXIT

Directives;
single market
access retained
via EEA

Bespoke trade
deal with EU

Sector-specific
application of
Directives

GPA –
“Directives light”

No GPA but
domestic
regime; Third
Country Access
Regulation?

Consequences of Brexit (2)

- ▶ How hard?
 - ▶ Sign up to GPA or
 - ▶ Go it alone:

Chancellor Philip Hammond before HoC Treasury Select Committee, 19 October 2016:

"... will want to introduce our own bespoke competition policy and procurement policy which will seek to encourage the UK supply chain but which will certainly not want to create a situation where UK Government procurement is buying uncompetitively expensive products. It would not be in our interests."

and

"I personally regard some of the EU public procurement processes as being burdensome and not conducive to the conduct of good and efficient public procurement but I would certainly not agree with the direction...[which would prop up] uncompetitive and failing industries through public procurement to the detriment of the taxpayer. We've been down that route before"

and Theresa May's Mansion House speech, 14 November 2016:

"We will use the freedoms that come from negotiating with partners directly, to be flexible, to set our own rules and forge new and dynamic trading agreements that work for the whole UK."

The UK and the WTO/GPA

- ▶ UK is a member of WTO in its own right, but so is EU, and EU speaks for all ms's; prediction of “*long and rough ride*”; one objection can delay progress
- ▶ Coverage schedules: probably start with the EU schedules, but...
- ▶ Revised GPA since 6 April 2014 (19 members, counting EU as one)
- ▶ China, Russia, Australia and others are in process of joining GPA

The WTO and the GPA

- ▶ Much of what we see in the Directives has its origin in the GPA:
 - ▶ Thresholds
 - ▶ Technical specifications: reference to international standards where possible
 - ▶ Non-discrimination, impartiality and transparency
 - ▶ Exclusion on grounds of criminal convictions, misconduct, non-payment of taxes and poor performance
 - ▶ Informing bidders of characteristics and relative advantages of winning bid
- ▶ If complying with the GPA what could we drop?
 - ▶ “Type 3” utilities regulation and defence
 - ▶ Requirement to supply all tender documentation at start of process
 - ▶ Ineffectiveness (so what?); (limited) damages only: see GPA Art XVIII.7 (requires interim measures)
 - ▶ Remove automatic suspension?

Treaty-free does not mean rule-free: a common law case-based approach?

- ▶ Remember *Blackpool*?
- ▶ Subsequent UK judicial references to implied terms/implied contract
- ▶ Development of *Blackpool* thinking in other common law jurisdictions
- ▶ See *Central Tenders Board v White(Montserrat)* (PC)(6 October 2015):
“*tenderers for public contracts should be afforded fair and equal treatment*”
- ▶ Judicial review: lack of clarity as to ambit of JR? Compare *R v LCD ex p Hibbit and Sanders* with *R v Legal Aid Board ex p Donn*

The domestic policy agenda

- ▶ Public Services (Social Value) Act 2012
- ▶ Single Source Regulations 2014
- ▶ Chapters 7, 8 and 9 of PCR:
 - ▶ advertising in *Contracts Finder*
 - ▶ Rules as regards PQQ/ no PQQ
- ▶ Remember *Norwich Airport* and *Pimlico Schools*: domestic agenda clashing with EU obligations

Third Country Access

- ▶ Is this a place the UK could end up in a Hard Brexit?
- ▶ Checkered history of proposal: first published 2012, but some ms's (including UK) objected
- ▶ Commission published revised draft Regulation on 29 January 2016
- ▶ Centralised procedure:
 - ▶ “*serious and recurrent impairment of access*”
 - ▶ Commission can investigate, then exclude tenders or apply “price adjustment” (up to 20%) in the absence of remedial measures
- ▶ An encouraging “big stick”(!)
- ▶ Does not affect GPA

Conclusions

- ▶ The Directives are here to stay in the short to medium term, and beyond for businesses selling in to the EU
- ▶ Strong domestic agenda in addition to international considerations
- ▶ Procurement law will not be an afterthought but is key, and is here to stay! Likely outcome is continued regulation of procurement
- ▶ Approach taken likely to have profound effects on inward and outbound trade

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