Public Procurement[1]

Charles Banner, Landmark Chambers Local Government Seminar, 24 Oct 2013

1. This paper is divided into four sections:
   (1) The proposed new public procurement directive
   (2) When is procurement necessary?
   (3) The procurement process
   (4) Enforcement and remedies

PART ONE: PROPOSED NEW DIRECTIVE

2. The European Commission published proposals to revise the existing EU public procurement Directive (Directive 2004/18/EC) at the end of 2011. The proposal for a new Directive was aimed at achieving more flexibility, facilitating access to contracts for small and medium- sized enterprises, and providing more legal clarity on the application of certain rules.

3. Negotiations on the revised EU procurement directives concluded in July, with a provisional agreement being reached between the EU Council, Commission and Parliament. Three directives are proposed: a revised public sector directive, a revised utilities sector directive, and a new directive containing procedural rules for the award of concessions contracts.

4. The European Parliament is expected to approve the package in a plenary session in November. The directives will then be transposed into domestic regulations. Member States are required to transpose the directive, by making national implementing regulations, within 2 years from the date of EU adoption. However, the Government has stated that it is preparing an *"ambitious transposition timetable."* It is expected that the new rules will come into force in the UK in 2014.

[1]

5. The Government has recently published a very helpful Procurement Policy Note setting out a summary of the proposed changes.[2] The key changes are set out below:

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) 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.

vi) Legal clarity that buyers can take into account the relevant skills and experience of individuals at the award stage where relevant (eg for

[2] Available at: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/225398/PPN_-_outcome_of_negotiations.pdf. The list which follows is taken from the PPN.

consultants, lawyers, architects, etc).

vii) Improved rules on social and environmental aspects, making it clear that:

a. social aspects can now also be taken into account in certain circumstances (in addition to environmental aspects which had previously been allowed).
b. buyers can require certification/labels or other equivalent evidence of social/environmental characteristics, further facilitating procurement of contracts with social/environmental objectives.
c. and refer to factors directly linked to the production process

PART TWO: WHEN IS PROCUREMENT NECESSARY?

6. Directive 2004/18/EC on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts ("the Directive") imposes various procedural requirements whenever a *"contracting authority"*, either by itself or through a third party, seeks offers in relation to a proposed public *"works"*, *"supply"* or *"service"* contract, the value of which exceeds certain thresholds.

7. The Directive is transposed into English law by the Public Constracts Regulations 2006 ("the Regulations").[3]

8. The aims and purposes of the Directive are: "to ensure that public bodies award certain contracts above a minimum value only after fair competition, and that the award is made to the person offering the lowest price or making the most economically advantageous offer": ***Risk Management Partners Ltd v London Borough of Brent*** [2011] 2 A.C. 34 at [10] per Lord Hope.

[3] Although there are some minor differences in their wording, this is unlikely to be significant since the Courts are obliged by EU law to interpret the 2006 Regulations in a manner compatible with the Public Contracts Directive: see e.g. Case C-106/89 ***Marleasing S.A. v. La Comercial Internacional de Alimentación S.A.*** [1992] 1 C.M.L.R. 305.

9. The term *"contracting authority"* is defined by Reg. 3(1) of the 2006 Regulations and includes local authorities. *"Economic operator"* is defined as *"a contractor, a supplier or a services provider"*: see Regs. 2(1) and 4(1).

Does the contract fall under the Regulations?

10. The concept of *"public contracts"* is defined in Article 1(2)(a) of the Directive as follows:

> "'Public contracts' are contracts for pecuniary interest concluded in writing between one or more economic operators and one or more contracting authorities and having as their object the execution of works, the supply of products or the provision of services within the meaning of this Directive."

Public Works Contracts

11. Article 1(2)(b) defines the concept of *"public works contracts"* as:

> *"'Public works contracts' are public contracts having as their object either the execution, or both the design and execution, of works related to one of the activities within the meaning of Annex I or a work, or the realisation, by whatever means, of a work corresponding to the requirements specified by the contracting authority. A 'work' means the outcome of building or civil engineering works taken as a whole which is sufficient of itself to fulfil an economic or technical function."*

12. The 2006 Regulations is in similar terms: see Reg. 2(1) in particular.

13. Annex I of the Directive includes a range of construction, engineering and development activities including demolition, site preparation and construction.

14. Under Article 16(a) of the Directive, an exclusion exists in relation to contracts for –

> *"the acquisition or rental, by whatever financial means, of land, existing buildings or other immovable property or concerning rights thereon; nevertheless, financial service contracts concluded at the same time as, before or after the contract of*

acquisition or rental, in whatever form, shall be subject to this Directive…"

15. This exclusion is replicated in reg. 6(2)(e) of the 2006 Regulations, which provides that the Regulations do not apply to a proposed contract:

> "(e) for the acquisition of land, including existing buildings and other structures, land covered with water, and any estate, interest, easement, servitude or right in or over land."

16. Where a development agreement between a local authority and a developer amounts to a *"public works contract"* then the public procurement requirements in the Directive and the 2006 Regulations apply (provided that the value of the agreement exceeds the relevant threshold, which will almost always be the case with large scale regeneration projects). If the agreement is not a public works contract, it is a pure land disposal and it will be outside of the scope of public procurement law.

17. There have been three significant judgments by the Court of Justice of the European Union ("CJEU") on the application of the Directive in the planning and development context: ***Gestion Hotelera Internacional v. Comunidad Autonoma de Canarias (C-331/92)*** [1994] E.C.R. I-1329, ***Auroux v. Commune de Roanne (C-220/05)*** [2007] E.C.R. I-385, [2007] All E.R. (EC) 918 and ***Helmut Müller GmbH v. Bundesanstalt für Immobilienaufgaben (C-451/08)*** [2011] P.T.S.R. 200. The first two of these related to predecessor versions of the Directive (known at that time as the Public Works Directive), which were in materially identical terms.

18. The case-law can be summarised as follows:

    a. The main purpose(s) of the agreement will determine whether or not it is a contract for public works (see para. 37 of ***Auroux***, expressly following ***Gestion Hotelera***).

    b. It remains the case that, following ***Gestion Hotelera***, where the agreement

involves *"work"* or *"works"* which are not a main object of the contract but are incidental to another object which is outside the scope of the Public Contracts Directive, the Directive and Regulations would not apply.

c. For an agreement to be within the scope of the Public Contracts Directive, its purpose must be to achieve a development which is *"sufficient to fulfil an economic or technical function"* for the contracting authority's immediate benefit: see Art. 1(2)(b). Something more than simply achieving a beneficial development in the public interest by the mere exercise of planning regulatory powers is required (see ***Helmut Müller*** at paras. 48-58). The contracting authority needs to derive an actual economic benefit from the scheme as it did in ***Auroux*** through the financial contribution it made to the project and its assumption of risk by guaranteeing to take over any elements that did not sell.[4] It is not necessary that the contracting authority must be/remain the owner of all or part of the land on which the works take place, although if it does then the works will indeed be for its immediate economic benefit.

d. To fall within the Public Contracts Directive, the contract needs to place the contractor under an enforceable direct or indirect obligation to carry out the works in question (see ***Helmut Müller*** at para. 68)[5].

e. The criterion in Art. 1(2)(b) that, in order to fall within the scope of the Public Contracts Directive, the work must correspond *"to the requirements specified by the contracting authority"* is not met by the mere fact that a development must comply with the local authority's planning policies and objectives. In ***Helmut Müller*** the CJEU held at para. 67 that: *"the authority must have taken measures to define the type of work or, at the very least, have had a decisive*

[4] See ***Helmet Müller*** at paras 48-58.

[5] Note the Commission's decision in ***Flensburg*** (IP/08/867) which suggests that a development obligation might be drafted in the form of conferring a right on a local planning authority to purchase or repurchase land if certain works are not carried out. In other words, the obligation does not impose a requirement to carry out the works but simply confers a right to take the land if the specified works are not carried out, i.e. an indirect means of securing the carrying out or specification or works without imposing a direct obligation to do so.

influence on its design". Precisely where the dividing line lies in practice remains unclear. In ***Auroux***, it was sufficient that *"the work referred to by the agreement is the leisure centre as a whole, including the construction of a multiplex cinema, service premises for leisure activities, a car park and, possibly, a hotel."* (para. 42).

f. Whether or not the commercial party to the agreement will execute the works itself or have them carried out by subcontractors is irrelevant (see ***Auroux*** at para. 38).

g. Any revenue which the agreement envisages the commercial party receiving from third parties is likely to have the following consequences –

   i. It will mean that the agreement is "for pecuniary interest" within the meaning of Art. 1(2)(b) (***Auroux*** para. 45); and

   ii. It will count towards the value of the agreement for the purposes of assessing whether it meets the threshold for the applicability of the Directive (***Auroux***, para. 57).

Developments following ***Helmut Müller***

19. Two UK cases following ***Helmut Müller*** are of particular importance: ***R (Midlands Co-Operative Society Limited) v. Birmingham City Council*** [2012] B.L.G.R. 393 and ***AG Quidnet Hounslow LLP v. London Borough of Hounslow*** [2013] 1 C.M.L.R. 25 (TCC). Neither of these cases cast doubt on the above propositions but rather confirm a more restrictive application of the Directive to development agreements that was taken in ***Helmut Müller***.

R (Midlands Co-Operative Society Ltd) v. Birmingham City Council

20. The Claimant sought judicial review of the decision of Birmingham City Council to

enter into a contract to sell to Tesco its interest in a plot of land in Stirchley, Birmingham consisting of an indoor bowls and community centre ("the Site"), part of which was owned by the Council.

21. Tesco and the Midlands Co-operative had rival proposals for the Site, each of which had planning permission. Following a public tendering process (albeit not undertaken pursuant to the 2006 Regulations) Tesco were selected as the Council's preferred developer and entered into an agreement to purchase the Site. The section 106 agreement to which their planning permission was tied contained an obligation providing that the demolition of the community centre could not be commenced until replacement community facilities had been provided. The s.106 agreement itself did not become effective unless and until Tesco's planning permission was first implemented.

22. The Co-Op sought judicial review of the Council's decision to sell its interests to Tesco. One of the grounds was that the arrangements between the Council and Tesco amounted to a *"public works contract"*, and should therefore have been procured under the 2006 Regulations.

23. The Court held that there was not a *"public works contract"* for the purposes of the 2006 Regulations. In doing so, it noted that in ***Muller*** it was held that for there to be a public works contract there must be a commitment by the contractor, legally enforceable by the contracting authority, to perform relevant works. It is insufficient if, legally, the contractor has a choice and is entitled not to perform the works. The Court found that Tesco was not under any legally enforceable obligation to perform any relevant works. It was not relevant that in the future Tesco might be committed to such an obligation. As it was put by Hickinbottom J:

> *"Tesco are not under any legally enforceable obligation to perform any works; and it is not to the point that, in the future and dependent upon how matters in fact proceed and choices Tesco make, they might at some stage be committed to such an obligation."*

24. The Court took into account a number of factors in reaching this conclusion. These factors are likely to be considered by the Courts in the future in determining whether or not a developer is obliged to perform relevant works:

    a. The Court will consider the whole of a contractual arrangement when deciding on the application of the 2006 Regulations. If the land sale was accompanied by, or dependent on, a binding contractual obligation to carry out works, then the hiving off of the contractual obligation into a separate agreement would not defeat the application of the procurement rules: see paragraphs 36 and 41 of the OGC guidance.

    b. If at the time of the land transaction, the authority merely intends to, or is very likely to, enter into a works contract with the contractor, this is insufficient. What is required is a formal, legally enforceable commitment (paragraph 104).

    c. Statements of intent made by a local authority may be of little assistance in determining the developer's obligation. In ***Midlands Co-operative***, the Council made a declaration that replacement community facilities would be provided. However, nothing in this declaration required this, or obliged Tesco to provide the facilities. The Court found that the declaration did not add to the obligations imposed on Tesco under its contractual agreement with the Council.

    d. The precise obligations on the developer under any section 106 agreement are likely to be particularly important. In ***Midlands Co-operative***, the obligations in the section 106 agreement were not triggered until the planning permission was implemented. Consequently, Tesco was not legally committed to start the development at all, and could still walk away from the Site. As such, the Court found that the section 106 agreement was not an immediately binding obligation to perform the works:

> "Whether they decide to proceed, and take impose upon themselves any obligation to perform any works, is entirely in their own hands. Of course, given their commitment to the Site in terms of money and effort to date, it may well be very likely that they will in fact proceed, if given an appropriate opportunity; but they have no legally enforceable obligation to do so. The Council cannot require them, as yet, to perform any works." (per Hickinbottom J at para. 110)

e. The Court agreed that the evolving intentions of the Council as to what was likely to happen to the replacement Community Facilities was instructive. This showed that the Council had moved towards not requiring the developer of the Site to relocate the Community Facilities.

f. The Court was not concerned that the Council had sought a way round to the potential application of the 2006 Regulations, which would have applied to the first tender process. Whilst selling the land without imposing development obligations had the advantage of avoiding the procurement rules, it also meant that the Council had lost the opportunity to impose an obligation on the developer. As Hickinbottom J put it at para. 116 -

> The Council cannot be criticised for formulating a strategy with regard to the development of this Site that, whilst having other downsides (including an absence of development obligations it could enforce against a successful tenderer) avoided the onerous obligations of the Public Works Directive and 2006 Regulations. That is particularly so as the Council's primary objective was of a planning nature – to develop the Site – rather than having performed the works involved in replacing the Community Facility.

g. Finally, whilst the Council committed to sell the Community Facility to Tesco, it did not legally commit itself to meet any conditions relating to the development or to use its CPO powers in support of it. The Council was

prepared to exercise its CPO powers in support of a preferred developer, however as part of the tender process it did not commit to exercising these powers in favour of the purchaser of the Community Facility.

25. The Court was keen to point out that even if Tesco's obligations had been enforceable, it would not necessarily have followed that the transaction represented a public works contract. In particular, the following issues would still fall to be determined: (i) whether those obligations were simply planning obligations that would not invoke the provisions of the 2006 Regulations, (ii) whether the 2006 Regulations would not apply, because the main purpose of the arrangement was not the procurement of works, and (iii) whether the 2006 Regulations only gave rise to private rights, such that a public law claim based upon them is inappropriate. Despite highlighting these issues, the Court did not consider these in any further detail.

26. There are a lot of positives for local authorities in the decision. It is a further example of the Courts moving away from the high watermark position in ***Auroux***. Further, it was expressly held that local authorities can weigh up the pros and cons of bringing a transaction within or outside of the public procurement rules: *"The Council cannot be criticised for formulating a strategy that…avoided the onerous obligations of the Public Works Directive and 2006 Regulations".* In many cases, it may now be possible to avoid the reach of the Directive and the 2006 Regulations by using appropriately drafted 'Grampian' style clauses rather than legally binding positive obligations.

AG Quidnet Hounslow LLP v. London Borough of Hounslow

27. In ***Quidnet***, the High Court considered the circumstances in which Treaty on the Functioning of the European Union ("TFEU") requires a public authority to advertise a development opportunity which falls outside the scope of the 2006 Regulations.

28. The Claimant challenged Hounslow's decision to enter into a development agreement

for a site in Hounslow Town Centre ("the Site"), and to negotiate the terms of this agreement with only one developer. The site is adjacent to the Blenheim Centre, one of two existing shopping centres in Hounslow. During 2011, the Council entered into discussions with Legal and General Assurance Society Limited ("L&G"), the owner of the Blenheim Centre about proposals to develop the site. AG Quidnet Hounslow LLP ("Quidnet"), which owns the other existing shopping centre in Hounslow also approached the Council about the status of the Site. In January 2012, the Council agreed to enter into a Lock-Out Agreement with L&G for the purpose of negotiating a development agreement. The effect of the Lock-Out Agreement was that the Council would grant L&G a long lease of the Site and the Council agreed that, during an exclusivity period, it would not enter into negotiations with any other party.

29. In its claim, Quidnet maintained that:

    a. The proposed agreement comprises a public works contract to which the public procurement rules set out in the 2006 Regulations applied.

    b. Even if the proposed agreement with L&G did not constitute a public works contract, the proposed agreements were in breach of Article 56 of the Treaty on the Functioning of the European Union (TFEU) which prohibits restrictions on freedom to provide services within the EU.

    The first ground has been stayed, pending the High Court's consideration of whether Article 56 TFEU applied.

30. Coulson J found that the general principles of EU law derived from the Treaty do apply to contracts that are not covered by the EU procurement rules: see, for example, Case T-258/06 ***Federal Republic of Germany v Commission*** [2007] 3 C.M.L.R. 50. Further, a number of cases relating to service concessions confirm that where Article 56 applies there is an obligation to take at least some positive steps to ensure transparency. Therefore, whilst a formal tender process is not necessarily required,

there must be a degree of advertising sufficient to enable the service markets to be opened up to competition.

31. The Court then considered whether the proposed agreement provided L&G with an opportunity provide services within the meaning of Article 56, and found that it did not. The following features of the agreement were noted:

    a. The agreement was merely to agree the terms of a long lease of the Site. The granting of the head lease does not oblige L&G to carry out any development. The heads of terms revealed no express obligation on the part of L&G to develop the site or provide any services whatsoever, and the Council would not be required to provide any support to facilitate such development.

    b. On the grant of the lease, L&G would have a proprietary interest in the Site, it would be for L&G to decide what it intended to do with the interest.

    c. Any services under the agreement, such as demolition, the preparation of the land, the construction and the fitting-out of the new buildings, would be provided to L&G, not by them, through contractors, sub-contractors and suppliers. Any future provision of such services to a commercial organisation such as L&G would be outside Article 56.

32. However, what appears to have been decisive is that the effect of Quidnet's arguments would be that EU law could require an authority to grant a lease of land to a party with whom it did not wish to contract:

    > "The Council wants to grant a long lease on property they either own or are in a position to acquire. They want to grant that long lease to a particular lessee (L&G), not anyone else, because of L&G's ability to raise the necessary capital for the potential project. In my view, it would be stretching the ambit of Articles 56 and 57 beyond breaking point to suggest that European or

> domestic law requires a landowner in that situation, who happens to be a public authority, to grant a lease of its land to a party with whom it does not wish to contract. None of the authorities, whether in the UK or the EU, support such a radical proposition; indeed, for the reasons which I have endeavoured to explain, I consider that the cases run counter to any such suggestion."

33. The Court concluded that the proposed agreement was not a contract for the provision of services and fell outside Article 56 of the TFEU. As a result, Quidnet's claim based on the application of Article 56 failed.

34. In any event, the Court found that even if the proposed agreement did amount to the provision of services, Article 56 was not engaged, as (i) there is no relevant restriction on the provision of services. L&G remains free to contract with whom it likes if and when they decide to develop the site. No restrictions are placed on any contractors or suppliers who may play a part in any development (ii) there was no cross-EU inter-state element necessary to trigger the application of Article 56, in particular there was no evidence that any undertaking in any other EU member state was interested in the development of the site.

35. The latter finding, albeit obiter, is particularly significant as it required the Court to reconcile two conflicting lines of CJEU authority. The first line of authority, derived from ***Parking Brixen*** [2005] E.C.R. 1-8585, found an inter-state element on the basis that undertakings in other Member States might have been interested in providing the relevant services, had they been advertised. A different line of CJEU authority, preferred by Coulson J, ignored the possibility of interest had the contract been advertised, and focused on whether there was any positive evidence that any undertaking in any other Member State was interested in the development. If Coulson J is correct, it will be much harder for developers to raise a claim based on Treaty obligations in the future.

36. Overall, this is a new form of challenge to development agreements. Coulson J noted that the application of Article 56 of the TFEU was novel claim, and had not been raised in any of the EU case law on development agreements and was not considered in ***Midlands Co-Operative***. Ironically, Quidnet's claim failed for the same reason as those in ***Helmut Müller*** and ***Midlands Co-Operative***: there was no obligation on L&G to deliver anything. Quidnet's claim under the 2006 Regulations is likely to fail for the same reason.

Public Supplies Contracts

37. Public supply contracts are defined in reg. 2(1) of the Regulations as follows:

> *"public supply contract" means a contract, in writing, for consideration (whatever the nature of the consideration)—*
>
> *(a) for the purchase of goods by a contracting authority (whether or not the consideration is given in instalments and whether or not the purchase is conditional upon the occurrence of a particular event), or*
>
> *(b) for the hire of goods by a contracting authority (both where the contracting authority becomes the owner of the goods after the end of the period of hire and where it does not);*
>
> *and for any siting or installation of those goods.*

38. The definition is given a wide interpretation. As it is put in European Commission "Guide to the Community Rules on Public Supply Contracts":

> *The definition covers the whole range of the various forms of remuneration, quantifiable in money terms, which the contracting authority undertakes to make to the supplier. The Directive also covers all forms in which the supplier, in consideration for the remuneration, undertakes to make the goods available to the contracting authority, whether immediately or in the future.*

39. As set out in reg. 2(1), where the delivery of goods also includes siting and installation activities, the contract will be viewed as a public supplies contract. However, where under such a contract services are also to be provided, the contract

shall only be a public supply contract where the value of the consideration attributable to the goods and any siting or installation of the goods is equal to or greater than the value attributable to the services.

40. It was held in ***Commission v Italy*** (Case C-272/91 [1994] ECR-I-1409, ECJ) that the public procurement regulations will apply even where a contract for supplies provides that the goods do not become the property of the contracting authority until the end of the contractual relationship and the consideration paid takes the form of an annual payment.

Public Services Contracts

41. A public services contract is defined in reg. 2(1) of the Regulations as follows:

> *"public services contract" means a contract, in writing, for consideration (whatever the nature of the consideration) under which a contracting authority engages a person to provide services but does not include—*
>
> *(a) a public works contract; or*
>
> *(b) a public supply contract;*

42. However, regulation 2(1) also provides that a contract for both goods and services shall be considered to be a public services contract if the value of the consideration attributable to those services exceeds that of the goods covered by the contract and a contract for services which includes activities specified in Schedule 2 that are only incidental to the principal object of the contract shall be considered to be a public services contract,

43. The Regulations do not define what is meant by the word "service". It is also left undefined in the Directive. Article 50 of the EC Treaty provides that services include activities of an industrial or commercial character, activities of craftsmen and of the professions. The fact that the services provided may be for the benefit of the

contracting authority does not prevent the Regulations applying.

44. The Regulations distinguish between two categories of services. These are set out in Schedule 3. Part A of Schedule 3 lists 16 types of services. These are known as Part A services and are subject to the full application of the Regulations. These services are included in the Part A list because they are most eligible for cross-border trade. On the other hand, the 10 services set out in Part B of Schedule 3 are not subject to a full application of the Regulations. The only substantive obligations imposed relate to technical specifications and publication of award notice (see reg. 5(2)). The reason for this is that these services are considered to be of less interest to service providers from other member states for technical or practical reasons. That said, Part B contracts should still be let in accordance with the fundamental EC Treaty principles of non-discrimination and transparency, and subject to a degree of advertising sufficient to enable the market to be opened up to competition.

45. Regulation 2(3) of the Regulations provides that where services specified in both Parts A and B of Schedule 3 are to be provided under a single contract, then the contract shall be treated as a Part A services contract if the value of the consideration attributable to the services specified in Part A is greater than that attributable to those specified in Part B and a Part B services contract if the value of the consideration attributable to the services specified in Part B is equal to or greater than that attributable to those specified in Part A.

The Teckal exception

46. In order to save costs, local authorities are increasingly sharing services in order to gain economies of scale. Often this takes the form of a public sector joint venture. This raises questions as to whether such a venture would fall under the Regulations. This question was first considered in Teckal, and further considered by the Supreme Court in ***Brent London Borough Council v. Risk Management Partners Ltd*** [2011] UKSC 7.

47. The ***Teckal*** exception is named after the case of ***Teckal SRL v. Commune di Viano*** (C-107/98) [1999] ECR I-8121. Teckal was a private heating company which complained of a breach of procurement law by the decision of Viano municipal council to use a consortium of several municipalities to supply fuel and heating services. This new contract had not been subject to an award procedure under the appropriate procurement regulations. The ECJ held that the fact that the new consortium was a contracting authority under the Directive did not prevent its application. The key passage is at paragraphs 50-51:

> *"50. ... it is, in principle, sufficient if the contract was concluded between, on the one hand, a local authority and, on the other, a person legally distinct from that local authority. The position can be otherwise only in the case where the local authority exercises over the person concerned a control which is similar to that which it exercises over its own departments and, at the same time, that person carries out the essential part of its activities with the controlling local authority or authorities. 51. The answer to the question must therefore be that Directive 93/36 is applicable in the case where a contracting authority, such as a local authority, plans to conclude in writing, with an entity which is formally distinct from it and independent of it in regard to decision-making, a contract for pecuniary interest for the supply of products, whether or not that entity is itself a contracting authority." (Emphasis added.)*

48. The test for the ***Teckal*** exception is therefore comprised of two limbs. The first limb, the control test, requires the Court to ask, whether the contracting authority *"exercises over the person concerned a control which is similar to that which it exercises over its own departments."* The second limb, the function test, requires the Court to ask whether the tenderer *"carries out the essential part of its activities with the controlling local authority or authorities"*.

49. In **Brent**, the Supreme Court held that the Teckal exemption to the public procurement regime contained in the Directive applied equally to the Regulations which sought to give effect to that Directive. The Court of Appeal's decision was that the Respondent was entitled to damages for breach of the Regulations. Contracts of insurance had been awarded to a mutual insurance company ("LAML") which had been established by a number of local authorities in London. LAML was a company

limited by guarantee, and each of the nine member local authorities had subscribed to the memorandum and articles of association of the company and paid a capital contribution and guaranteed a further contribution. Brent tendered for an insurance contract under the Regulations. A company called Risk Management Partners submitted a tender. However, the contract award procedure was then abandoned, because Brent proposed to award the contract to LAML, which had not taken part in the public procurement exercise.

50. The appeal centred on three questions (i) whether there was incorporated into English law the exemption enunciated in ***Teckal***, namely that where a public body exercised control over an entity similar to that which it exercised over its own departments, and at the same time the entity carried out the essential part of its activities with the controlling public body, that public procurement rules such as those contained in the Regulations did not apply; (ii) if so, whether the exemption was applicable where the contract was for insurance; (iii) whether, for the ***Teckal*** exemption to apply, individual control by a local authority was necessary or whether it was sufficient that the contracting authorities exercised that control collectively.

51. Allowing the appeal, the Supreme Court held that Brent's arrangement with LAML fell within the ***Teckal*** exception. The Supreme Court answered the three main issues as follows:

    a. The ***Teckal*** exemption applied to the Regulations. The exemption in favour of certain contracts which satisfied control and function tests was read into the Directive by ***Teckal*** because it was thought to be undesirable for contracts of that kind to be open to public procurement. At paragraph 22, Lord Hope observed that the "underlying purpose" of the Regulations was to give effect to this Directive, and therefore a purposive approach to construction of the 2006 Regulations was thus required. This finding has a wider significance. It will make it difficult in the future for parties to argue that the scope of the Regulations is different from the Directive in any material respects (see also

Marleasing at fn 1).

b. The ***Teckal*** exemption was capable of being applied where the contract in question was for insurance.

c. The Supreme Court then found that it was not necessary for local authorities to individually control the entity which the services are procured from, provided that the local authorities collectively exercise such control. This is because no injury would be caused to the policy objective of the Directive if public authorities were allowed to participate in the collective procurement of goods and services, as long as no private interests were involved and they were acting solely in the public interest in the carrying out of their public service tasks. As it was put at paragraphs 52 and 53:

> *"52. .... There is now a much clearer focus on the purpose of the Community rules on public procurement so as not to inhibit public authorities from co-operating with other public authorities for the purpose of carrying out some of their public service tasks .... Collective control is enough, and para 47 [of Commission v. Germany (C- 480/06) [2009] ECR I-4747] tells us that public authorities do not require to follow any particular legal form in order to take advantage of it. So long as no private interests are involved, they are acting solely in the public interest in the carrying out of their public service tasks and they are not contriving to circumvent the rules on public procurement (see para 48), the conditions are likely to be satisfied. As to the last point, it should be noted that the management agreement between LAML and Charles Taylor & Co was put out for public tender, as were all LAML's reinsurance contracts .... 53. I would sum up my conclusions on the control test, in the light of the guidance offered by these authorities, as follows. Individual control is not necessary. No injury will be caused to the policy objective of the Directive if public authorities are allowed to participate in the collective procurement of goods and services, so long as no private interests are involved and they are acting solely in the public interest in the carrying out of their public service tasks. Asemfo1 shows that the decisive influence that a contracting public authority must exercise over the contractor may be present even if it is exercisable only in conjunction with the other public authorities .... Where such a body takes its decisions collectively, the procedure used for the taking of those decisions is immaterial ...."*

d. On the facts, the local authorities had collective control over the strategic objectives and significant decisions of LAML at all times and the ***Teckal***

control test was therefore satisfied. The ***Trekal*** function test was also satisfied. It followed that, as the ***Teckal*** exemption applied and the arrangements between LAML and the local authorities satisfied both tests and that there was no breach of the Regulations.

52. Overall, *Brent* should make it significantly easier for local authorities to co-operate between themselves in obtaining services without having to carry out a procurement exercise under the Regulations.

Thresholds

53. Once it is established that the body concerned is a "contracting authority" under the Regulations, and that the contract is a public "works", "supply" or "service contract" it is then necessary to decide whether the contract itself falls under the Regulations. This is because only contracts which exceed a specific value are subject to the Regulations.

54. The current financial thresholds until January 2014 are as follows:

a. **£4,348,350** (€5,000,000) for the procurement of works;
b. **£113,057** (€130,000) for the procurement of supplies and so called Part A services by Central Government bodies; and
c. **£173,934** (€200,000) for the procurement of supplies and Part A services by other public sector bodies.

PART THREE: THE PROCUREMENT PROCESS

55. Contracting authorities covered by the Directive and Regulations must use one of five types of award procedure: (1) open procedure (2) restricted procedure (3) competitive dialogue (4) negotiated procedure with a notice (5) negotiated procedure without a notice.

Open procedure:

56. Under the open procedure, all those interested in tendering may respond to the advertisement in the OJEU by tendering for the contract. No negotiation is permitted with tenderers. Not all tenders must be evaluated by the contracting authority. Instead, the contracting authority may choose to evaluate only those tenders that meet any selection criteria it may have set out. There are no restrictions as to when the procedure can be used, and the procedure is often used when a complex tender process is not required.

Restricted procedure:

57. Under the restricted procedure, bidders must initially submit any information required by the contracting authority as part of its selection stage. The contracting authority then makes a selection on the basis of this information, and only the chosen candidates are invited to submit a tender for the contract. As with the open procedure, no negotiation with the tenderers is permitted. However, the advantage of the restricted procedure is that contracting authorities can avoid having to process a large number of tenders, as may be the case with the open procedure. Further, there are no restrictions on when the restricted procedure may be followed.

Competitive dialogue

58. The competitive dialogue procedure was introduced in the Directive in order to provide more flexibility in the case of a particularly complex contract. As with the open and restricted procedure, the process starts with an OJEU notice. As with the restricted procedure, bidders may then express an interest in tendering, and the contracting authority may reduce the number of potential bidders through applying its selection criteria. However, following this, the contracting authority may enter into a dialogue with bidders in order to develop potential solutions for its requirements. It is

only following this that chosen bidders will be invited to tender. There is only very limited scope to make further changes once the tenders have been submitted.

59. The competitive dialogue procedure can only be used for specified cases. These are set out in Article 29 of the Directive. These can be broadly categorised as "complex" procurements, where the contracting authority may be unable at the initial stage to defined the detailed financial and technical aspect of the project. These detailed issues can be discussed following the OJEU notice with individual bidders, before a tender is submitted.

Negotiated procedure:

60. The directive also provides for use of procedures called negotiated procedures which, like competitive dialogue, can be used only in specific cases set out in Article 28. There are two types of negotiated procedure. The first is negotiated procedure with prior advert. Under this procedure, the contract must be advertised, and a competition held (with strict rules as to selection of firms and disclosure of award criteria). However, the nature of the competition is very flexible and a contracting authority may simply hold discussions with firms. There is no requirement for a final tender. The precise grounds and the conditions for the use of the negotiated procedure with a notice are laid down in regulation 18.

61. Under the negotiated procedure without prior advert, the authority is not required to issue an OJEU notice. Instead, it may simply negotiate a contract directly with one or more bidders. Unsurprisingly, this procedure is only permitted in very exceptional circumstances. The grounds for using the negotiated procedure without a notice are also set out in regulation 18.

<u>Advertising the contract</u>

62. As a general rule, contracts which are covered by the Regulations must be the subject

to a call for competition by publishing a contract notice in the Official Journal of the EU (OJEU). The standard form for an OJEU notice is mandatory.

63. The date at which the advertisement must be published depends on the procedure which is being followed. If the open procedure is followed, the contract must be advertised at least 52 days before the closing date for responses. Where the restricted, negotiated and competitive dialogue procedures are followed, the advertisement must be published at least 37 days before the closing date for expressions of interest.

64. An OJEU notice can be amended once it has been published, but if any material changes are made, the dates for responding to the notice should be extended to permit the relevant minimum timeframe following the date on which the amendments are submitted to the OJEU.

How many candidates should be invited to tender?

65. Provided that there is a sufficient number of candidates to do so: under the restricted procedure, a minimum of 5 candidates should be invited to tender; under the negotiated procedure, a minimum of 3 candidates should be invited; under the competitive dialogue procedure a minimum of 3 candidates should be invited.

Exclusion

66. Under the Regulations, an economic operator can be excluded from entering into public contracts. Such exclusion can either be mandatory or discretionary.

67. Regulation 23(1) sets out the mandatory exclusion categories. It provides that a contracting authority shall treat as ineligible and shall not select an economic operator in accordance with the Regulations if the contracting authority has actual knowledge that the economic operator or its directors or any other person who has powers of representation, decision or control of the economic operator has been convicted of the

following offences, as further defined in the regulation: (i) conspiracy (ii) corruption (iii) bribery (iv) fraud (v) money laundering (f) any other offence within the meaning of Article 45(1) of the Public Sector Directive as defined by the national law of any relevant State.

68. A contracting authority has the discretion to exclude suppliers, contractors and service providers from entering into public contracts if the economic operator has: (i) been declared bankrupt (if an individual) or insolvent (if a company) (ii) been convicted of a criminal offence relating to the conduct of its business or profession.

PART FOUR: ENFORCEMENT/REMEDIES

69. There is no internal appeal process for aggrieved tenders under the Regulations. Instead, any challenge to the procurement process must be brought under the Regulations (or by way of judicial review in appropriate cases).

70. Enforcement is dealt with in Part 9 of the Regulations, which were amended in 2009[6] to transpose the requirements of the Remedies Directive (Directive 2007/66/EC), which came into force on 20 December 2009. Enforcement in the national courts lies only at the instance of those entitled under reg. 47A of the Regulations, subsection (2) of which establishes that the obligation of an authority to comply with the Regulations "*is a duty owed to an economic operator*."

71. An "economic operator" is defined by reg. 4(1):[7]

> "(1) In these Regulations, an "economic operator" means a contractor, a supplier or a services provider."

72. A "contractor" is defined by reg. 2(1) as:

[6] Public Contracts (Amendment) Regulations 2009, SI 2009 No. 2992.

[7] Note also the extension to this definition in Reg. 47A(3) following the coming into force of the new Remedies Directive.

"… a person who offers on the market work or works and—

(a) who sought, who seeks, or would have wished, to be the person to whom a public works contract is awarded; and

(b) who is a national of and established in a relevant State…"

73. The Regulations provide that any economic operator who suffers, or risks suffering, loss or damage as a result of a breach of the Regulations can bring a claim. This includes those taking part in a tender process, as well as third parties who would have been interested in being awarded the contract.

74. Proceedings must be brought in the High Court.

75. There are two main types of claim that can be brought under the Regulations once a contract has been entered into:

a. a claim for damages
b. a claim for a declaration of ineffectiveness.

76. First, however, it is necessary to consider the provision for automatic stays under the new remedies regime.

Automatic stays under the new remedies regime

77. Once a contracting authority is aware that a claim has been issued in the Courts, it is automatically prohibited from entering into the contract, pursuant to reg. 47G(1) of the 2006 Regulations as amended by the 2009 Regulations. The automatic suspension starts at the date that the contracting authority becomes aware that a claim form has been issued in relation to the contract.

78. Before the amendments brought in by the 2009 Regulations, there was no provision for automatic stays. Instead, a bidder would need to apply to the Court for an interim injunction to prevent a contracting authority from entering into a contract. This was difficult since the bidder would have only a very short period in which to make the application. Further, the claimant had to bear the costs of bringing the claim.

79. The position is now reversed. Now, on application by a contracting authority reg. 47H(1) a Court may lift this automatic suspension and allow the contract to be awarded. The cost of applying to lift the automatic suspension rests with the contracting authority. In deciding whether to lift the automatic suspension the Court will consider whether, had the suspension not been made, it would have granted an interim injunction preventing the contracting authority from entering into the contract.

80. As set out in Reg. 47H:

(2) When deciding whether to make an order under paragraph (1)(a)—

(a) the Court must consider whether, if regulation 47G(1) were not applicable, it would be appropriate to make an interim order requiring the contracting authority to refrain from entering into the contract; and

(b) only if the Court considers that it would not be appropriate to make such an interim order may it make an order under paragraph (1)(a).

(3) If the Court considers that it would not be appropriate to make an interim order of the kind mentioned in paragraph (2)(a) in the absence of undertakings or conditions, it may require or impose such undertakings or conditions in relation to the requirement in regulation 47G(1).”

81. The test on the familiar ***American Cyanamid*** principles. As Akenhead J explained at paragraph 26 of ***Exel Europe Ltd v. University Hospitals Coventry and Warwickshire NHS Trust*** [2010] EWHC 3332 (TCC)*:*

“The first question which must be answered is whether there is a serious question to be tried

and the second step involves considering 'whether the balance of convenience lies in favour of granting or refusing interlocutory relief that is sought' .... The 'governing principle' in relation to the balance of convenience is whether or not the claimant 'would be adequately compensated by an award of damages for the loss he would have sustained as a result of the defendant's continuing to do what was thought to be enjoined between the time of the application and the time of the trial.'"

82. Therefore, in effect, the test the court uses is the same as if the unsuccessful tenderer *were* seeking an interim injunction. See also ***Indigo Services (UK) Ltd v. Colchester Institute Corp*** [2010] EWHC 3237 (QB). On the question of whether the balance of convenience supports a stay, see most recently ***Covanta Energy Ltd. v. Merseyside Waste Disposal Authority*** [2013] EWHC 2922 (TCC) where Coulson J. held that damages would not be an adequate remedy in the event that a breach was made out following the final determination of the claim, given the ability for a trial to be listed expeditiously.

83. As noted above, Reg. 47H(3) provides that: *"If the Court considers that it would not be appropriate to make an interim order of the kind mentioned in paragraph (2)(a) in the absence of undertakings or conditions, it may require or impose such undertakings or conditions in relation to the requirement in regulation 47G(1)."* In the majority of cases it is likely that the Court will grant this protection to the contracting authority, which existed prior to the 2009 Amendments.

Declarations of ineffectiveness

84. Declarations of ineffectiveness allow the court to overturn an awarded contract.

85. A declaration of ineffectiveness may be made in three circumstances. First, where the contract was "directly" awarded without notice or appropriate competition. Second, where the contracting authority did not run a compliant standstill period. Third, where the contract was awarded under a framework arrangement and the rules on "mini-competitions" were not correctly followed.

86. If a contract is declared ineffective, it is terminated. However, this does not affect any works, services or supplies that were carried out prior to that declaration. Instead, these remain treated as steps which have been carried out under a valid and binding contractual obligation.

87. This new regime gives rise to its own time limits. Such limits are separate from the general time limits for procurement damages claims. A claimant has up to 6 months from the day after the contract was entered into. However, the time limit may be reduced to 30 days if a contract award notice is published in the OJEU or the bidder is informed of the award by the contracting authority, and a summary of reasons is provided. In this situation, the time limit of 30 days runs from the day after the notice is published or the reasons are given.

88. The Court does have discretion to refuse to make a declaration of ineffectiveness. This is where *"overriding reasons relating to a general interest require that the effects of the contract should be maintained"*. This exception is narrowly applied, and will often only apply where delay or interruption to the contact will not be in the public interest. In considering what is in the public interest, the economic benefits of continuing the project, or the costs of not, will be considered in only exceptional circumstances, where a declaration would lead to "disproportionate consequences".

89. The Court has further flexibility and powers in the order it may make. Instead of granting a declaration of ineffectiveness, the Court has power to shorten the duration of the contract, in order to give time for a fresh procurement process and the grant of a new award. Further, the parties may between themselves enter into a short-term, transitional arrangement. Indeed, such arrangements may be made not only if a declaration of ineffectiveness has been made, but also in cases where an automatic stay is in force (see above).

90. If the Court orders a declaration of ineffectiveness, it must also order that the contracting authority pays a fine. The Court also has power to order the payment of

compensation, and make an order addressing restitution.

91. Therefore, the court has wider powers in ordering a declaration of ineffectiveness. However, in exercising these powers, the overriding principle set out in regulation 47M(1), namely that the contract must be declared ineffective from the date when the declaration is made, should be complied with.

Damages

92. The Claimant will seek damages in most claims. Until recently, the principles which would be applied by the Courts in awarding damages were very consistent. Damages would be awarded where there is a breach which causes loss. The damages would reflect the loss of a chance. Therefore, the claimant will seek the profit it would have made on the contract, together with its wasted tendering costs.

93. In Case C-568/08, ***Combinatie Spijker Infrabouw***, the CJEU cast doubt on this approach. This judgment suggests that the previous approach may have been too generous. The Court considered the conditions by which damages would be awarded in a procurement case under EU law. The CJEU stated, at paragraph 92:

> *".. as regards State liability for damage caused to individuals by infringements of EU law for which the State may be held responsible, the individuals harmed have a right to redress where the rule of EU law which has been infringed is intended to confer rights on them, the breach of that rule is sufficiently serious, and there is a direct causal link between the breach and the loss or damage sustained by the individuals. In the absence of any provisions of EU law in that area, it is for the internal legal order of each Member State, once those conditions have been complied with, to determine the criteria on the basis of which the damage arising from an infringement of EU law on the award of public contracts must be determined and estimated, provided the principles of equivalence and effectiveness are complied with."*

94. Therefore, no damages would occur from a technical breach. Instead, the breach must be "sufficiently serious" to give rise to a damages award. This requires an examination of the culpability of the state. This approach is arguably applicable to the award of damages domestic procurement cases. ***Combinatie Spijker Infrabouw*** can be relied upon to say that damages should not be awarded because the breach in

question was not serious or blatant enough.

95. A further challenge for those seeking damages is establishing a causal link between the breach of the Regulations and the loss of profits. In determining whether damages should be payable, and the amount, the Court will assess the likelihood that the claimant would have won the contract and/or been included in the tender process had the breach not occurred. Often it will be possible to show that, even if the process had been carried out lawfully, the bidder would not necessarily have won the contract. In such a situation, the Court will reduce the amount of damages awarded to take this into account, to a greater or lesser extent depending on the likelihood of the contract being awarded.

Remedies where the contract has not been entered into

96. Where proceedings are started and the contract has not yet been entered into, the contracting authority must refrain from entering into the contract pending the determination of the claim unless the Court orders otherwise (reg. 47G).

97. Where the Court finds that the contracting authority has been in breach of the Regulations, but the contract has not yet been entered into, it may order the setting aside of the contracting authority's relevant decision/action, and/or order the contracting authority to amend any document and/or award damages to the aggrieved economic operator in respect of any loss or damage suffered as a consequence of the breach (reg. 47I).

98. Until recently, it had been assumed that the usual remedy would be a re-running of the tender process, or at least the stages of the tender procedure affected by the breach of the Regulations.

99. However, in ***Mears v Leeds CC (No. 2)*** [2011] EWHC 1031 (TCC), Ramsey refused to set aside the procurement award in a case where there had been a failure to

disclose tender evaluation criteria and weightings which had been contained in an evaluation table and in model answers used by officers who evaluated the tenders. It was held that the claimant was entitled to relief because there was a real and significant chance that the claimant would have been selected for the next stage of the procurement if it had been provided with the undisclosed matters. Therefore, reg. 47C was met as the claimant was an "economic operator" which had "suffer[ed], or risk[ed] suffering loss or damage". However, in refusing to set aside the procurement, Ramsey J stated as follows as paragraphs 224-225:

"The remedy must be proportionate. There will obviously be cases at one end of the scale where the impact of the breach of the Regulations is so serious or obvious that it can only be met by setting aside a decision or action. At the other end of the scale there will be cases where the impact is less serious or obvious where damages will deal adequately with the breach. In between there will be many cases where the court must perform a balancing exercise of the various interests in deciding on the appropriate remedy.

In this case, I am clear that the overall balance favours awarding Mears the remedy of damages alone and not setting aside the Procurement. The prejudice in terms of the housing arrangements for a significant number of tenants and the delay in the provision of those arrangements weigh heavily against requiring the procurement process to start again. This is a case where Mears loss or risk of loss can be adequately compensated by damages and that provides a proportionate remedy."

Time Limits

(i) Under the Regulations

100. A claimant must make a claim for a remedy other than ineffectiveness, such as damages, within 30 days from the initial knowledge that grounds for starting proceedings had arisen. The Court has the discretion to extend the 30 day period to a maximum of 3 months, although this is only likely to apply in exceptional circumstances.

101. The requirement of promptness has formally been removed. As opposed to the date when grounds for starting the proceedings had arisen, time starts from the date when the claimant first knew or ought to have known that grounds for proceedings

had arisen. These aspects of the new time limit give effect to the decision in *Uniplex.* Importantly, the time limit will be 30 days from the date of actual or constructive knowledge rather than, as at present, three months.

102. The decision of the Court of Appeal in ***Sita UK Ltd v Greater Manchester Waste Disposal Authority*** [2011] EWCA Civ 156 provides guidance on the question of the degree of actual/constructive knowledge of the alleged infringement which is required to set time running. Elias LJ held, at paragraph 31, that the test was that which had been applied by Mann J at first instances, namely that *"the standard ought to be a knowledge of the facts which apparently clearly indicate, thought they need not absolutely prove, an infringement."*

103. It was held that:

a. The question is when is the information known or constructively known to the appellant sufficient to justify taking proceedings for an infringement of the public procurement requirements (at paragraph 19).

b. In ***Uniplex***, it was held that this would be when an unsuccessful bidder had been told the "essential reasons" why their bid had failed (at paragraph 21)

c. In ***Uniplex*** the ECJ is drawing a clear distinction between the reasons for a decision and the evidence necessary to sustain those reasons. It does not envisage that the prospective claimant should be able to wait until the underlying evidential basis for the reasons is made available (at paragraph 22).

d. Once the prospective claimant has sufficient knowledge to put him in a position to take an informed view as to whether there has been an infringement in the way the process has been conducted, and concludes that there has, time starts to run (at paragraph 22)

e. ***Uniplex*** does not, however, assist in determining what degree of knowledge is sufficient to provide the informed view that a legal claim lies and how strong the evidence of infringement has to be before time starts to run (at paragraph 23)

f. The issue the ECJ was considering was simply whether time ran from the date of the (alleged) infringement or the date of actual or constructive knowledge about it. The Court was not addressing an argument how strong the evidence of infringement has to be before time starts to run (at paragraph 23).

g. Instead the standard ought to be a knowledge of the facts which apparently clearly indicate, though they need not absolutely prove, an infringement (see paragraphs 26 and 31)

104. From the date of the contract, a claim for a declaration of ineffectiveness has to be started within 6 months from the date of the contract. With respect to this, the knowledge or expected knowledge of the claimant is irrelevant as time will have started running.

(ii) Judicial Review

105. In addition to challenge under the 2006 Regulations, procurement decisions are subject to claims brought by way of judicial review in certain circumstances. As it was put by Arden LJ in ***R (Chandler) v Secretary of State for Children, Schools and Families*** [2010] LGR 1 at [77]:

"The judge accepted the submission that a failure to comply with any of the regulations gives rise only to a private law claim (see [2009] LGR 417 at [138]-[140]). Such a conclusion has potentially far-reaching implications. It means that a person who is not an economic operator entitled to a specific remedy under reg 47 can never bring judicial review proceedings in respect of that failure unless he can bring himself within the exceptional type of claimant in R (on the application of the Law Society) v Legal Services Commission. We consider that the judge's proposition goes too far. The failure to comply with the regulations is an unlawful act, whether or not there is no economic operator who wishes to bring

proceedings under reg 47 , and thus a paradigm situation in which a public body should be subject to review by the court. We incline to the view that an individual who has a sufficient interest in compliance with the public procurement regime in the sense that he is affected in some identifiable way, but is not himself an economic operator who could pursue remedies under reg 47 , can bring judicial review proceedings to prevent non-compliance with the regulations or the obligations derived from the Treaty, especially before any infringement takes place (see generally Mass Energy v Birmingham City Council [1994] Env LR 298 at 306, cf Kathro's case [2001] 4 PLR 83 , where Richards J held that that the claimants were not affected in any way by the choice of tendering procedure). He may have such an interest if he can show that performance of the competitive tendering procedure in the directive or of the obligation under the Treaty might have led to a different outcome that would have had a direct impact on him. We can also envisage cases where the gravity of a departure from public law obligations may justify the grant of a public law remedy in any event. …

106. The principle that, in certain circumstances, a breach of the Regulations might give rise to public law remedies was recently applied in ***R (on the application of Unison) v NHS Wiltshire Primary Care Trust*** [2012] A.C.D. 84. It was held to be fundamental that Unison could have a public remedy, as it was not an "economic operator" under the Regulations and otherwise would have no right to enforce any statutory duty, whether owed to itself or to its members. However, on the facts, it was held that Unison had not demonstrated that it had a sufficient interest in compliance with the public procurement regime, in the sense that its members were affected in some identifiable way, to bring a judicial review claim.

107. In terms of time limits, the Civil Procedure (Amendment No. 4) Rules 2013, SI 2013/1412 came into force on 1 July 2013.

108. The new rules reduce the time limit for bringing a claim for judicial review of certain types of procurement decisions from three months to 30 days. The amended time limits are applicable to any decision taken by a contracting authority that is or may be affected by the duties set out in regulation 47A of the 2006 Regulations. The amended time limits will not apply to other "procurement related" judicial reviews.

109. The amended time limit applies to judicial review claims *"where the grounds arose"* after 1 July 2013.