PROCUREMENT POST-BREXIT: WHAT DOES THE FUTURE HOLD?

Talk by Tim Buley at Landmark Chambers, 12 June 2017

NOTE: This paper was very largely written[1] on 8 June 2017, before the results of the General Election held on that day were know. It was based on the assumption that government statements, especially in the White Paper of February 2017, would remain government policy after the election. In light of the results of the General Election, that assumption no longer seems safe. However, whilst it now appears at least possible that the approach to Brexit will change, it is (even as at 12 June) simply too early to predict with any confidence what that change will be, let alone what implications that might have for Public Procurement. We appear to have moved from a world of "known unkonwns" to "unknown unknowns".

This document is structured as follows:

I) STRUCTURE AND OBJECTIVES OF PROCUREMENT LAW IN THE UK: AN OVERVIEW

1. Procurement law regulates the procedure by which public bodies award and conclude contracts with outside bodies. Public procurement represents a highly significant economic activity, and has been estimated as comprising some 14% of the UK's GDP and 31% of UK government expenditure.[2] Most of the specific law dealing with procurement is to be found in rules in contract award procedures derived from EU law. The present framework is provided principally by four EU directives ("the Procurement Directives"):

   (i) The Public Contracts Directive 2014/24/EU, governing procedures for the award of public works contracts, public supply contracts and public service contracts;[3]

   (ii) The Utility Contracts Directive 2014/25/EU, governing procedures of entities

[1] I am grateful to Admas Habteslasie, Barrister at Landmark Chambers for his assistance in the preparation of this talk.
[2] OECD figures from 2013, available http://www.oecd-ilibrary.org/governance/government-at-a-glance-2015/general-government-procurement-as-percentage-of-gdp-and-as-share-of-total-government-expenditures-2013_gov_glance-2015-graph88-en;jsessionid=8othmemhh4b8c.x-oecd-live-02 (accessed 7 June 2017).
[3] As implemented in the UK via: the Public Contracts Regulations 2015 and, in Scotland, the Public Contracts (Scotland) Regulations 2015 and Public Contracts (Scotland) Amendment Regulations 2016.

180 Fleet Street London EC4A 2HG | DX: 1042(LDE) | t: +44(0) 20 7430 1221 f: +44 (0)20 7421 6060
e: clerks@landmarkchambers.co.uk | @Landmark_LC
www.landmarkchambers.co.uk

operating in the water, energy, transport and postal services sectors;[4]

(iii) The Concessions Directive 2014/23/EU, which governs procedures for the award of works and services concession contracts;[5]

(iv) The Defence & Security Directive 2009/81/EC, governing procedures of entities operating in the fields of defence and security.[6]

2. The most important of the Procurement Directives, the Public Contracts Directive, is implemented in England and Wales by the Public Contracts Regulations 2015 ("the PCR").

3. In very short summary, the Procurement Directives:

(i) prohibit discrimination in awarding covered contracts and require the use of specified transparent award procedures to support this prohibition and promote competition, specifically:

(a) an obligation to advertise in a single forum by sending a notice to the EU's Official Journal of the EU (OJEU);

(b) an obligation to award contracts by a competitive award procedure;

(c) minimum time limits for different stages of the award procedure;

(d) limits on the criteria that may be used in making decision; and

(e) obligations to set out selection and award criteria for each procedure in advance;

(ii) set out general principles to be applied throughout the process: transparency, equal treatment, non-discrimination on the grounds of nationality, and proportionality;

(iii) provide for a rigorous system of remedies before national review bodies for affected EU undertakings, which was strengthened in 2007.[7]

[4] As implemented in the UK via the Utilities Contracts Regulations 2016 and, in Scotland, the Utilities Contracts (Scotland) Regulations 2016.
[5] As implemented in the UK via the Concession Contracts Regulations 2016 and, in Scotland, the Concession Contracts (Scotland) Regulations 2016 and Concession Contracts (Scotland) Amendment Regulations 2016.
[6] As implemented via the Defence and Security Public Contracts Regulations 2011.
[7] Contracts which are below the thresholds of the procurement directives but still of cross-border interest are subject to non-discrimination and (limited) transparency requirements under the TFEU, which are enforceable by affected undertakings under general TFEU rules. Public procurement contracts may constitute state aid under Article 107 TFEU in amounting to an economic advantage which an undertaking would not have received under normal market conditions; the fact of a contract being awarded under EU procurement rules is a significant consideration in determining whether a contract constitutes state aid. The question

180 Fleet Street London EC4A 2HG | DX: 1042(LDE) | t: +44(0) 20 7430 1221 f: +44 (0)20 7421 6060
e: clerks@landmarkchambers.co.uk | @Landmark_LC
www.landmarkchambers.co.uk

4. A claim under the Procurement Directives can only be brought by undertakings seeking contracts in the public market (termed 'economic operators') and only apply to contracts over a specified monetary threshold.

5. The Procurement Directives are supplemented by specific rules on remedies for economic operators.[8] The principal directive in this connection is the Remedies Directive 89/665, which contains, inter alia:

   (i) a mandatory requirement to notify award decisions to losing participants and to delay the contract for a certain time after notification to allow time for challenges;
   (ii) a specific minimum time limit for legal actions;
   (iii) automatic suspension of the award decision following a challenge;
   (iv) a requirement for concluded contracts to be declared ineffective in the case of failure to advertise.[9]

6. Lord Hodge said this about EU procurement law in *Edenred (UK Group) Ltd v HM Treasury* [2015] UKSC 45 at [28]:

> 'The principal purpose of EU procurement law (…) is to develop effective competition in the field of public contracts: *Sintesi SpA v Autorità per la Vigilanza sui Lavori Pubblici* (Case C-247/02) [2004] ECR I-9215 , para 35. Thus if a public body decides to obtain services by a public contract, and the contract exceeds the prescribed threshold (…), the public body must advertise the opportunity and follow fair and transparent procedures ensuring equality of treatment, to enable potential service providers to compete for the work.'

7. In addition to the overarching aim of developing effective competition, the aims of the regulation of procurement decisions might be described as including:

   (i) facilitating the ability of purchasers to obtain value for (taxpayers') money;
   (ii) improving the quality of decision-making;

of future arrangement for the state aid regime is beyond the focus of this paper.
[8] The Remedies Directive 89/665, the Utilities Remedies Directive 92/13; the Defence and Security Directive also contains provisions on remedies.
[9] These provisions were the result of changes introduced to the Remedies Directive by Directive 2007/66/EC.

180 Fleet Street London EC4A 2HG | DX: 1042(LDE) | t: +44(0) 20 7430 1221 f: +44 (0)20 7421 6060
e: clerks@landmarkchambers.co.uk | @Landmark_LC
www.landmarkchambers.co.uk

(iii) increasing accountability to the public;

(iv) increasing transparency;

(v) (in the context of a free market system) eradicating the use of procurement to protect and develop national industry.

II) BREXIT

8. As we all know, on 23 June 2016, the majority of voters in the United Kingdom European Union membership referendum voted in favour of the UK leaving the EU. The UK government triggered Article 50 of the Treaty on European Union on 29 March 2017, thus beginning the formal process of negotiating the UK's withdrawal from the EU.

9. In October 2016, the Prime Minister announced plans to introduce a 'Great Repeal Bill' ("the Repeal Bill") in the next Queen's Speech (19 June 2017), which will repeal the European Communities Act 1972 and convert or transpose EU law into domestic law 'wherever practical'.[10] The Government has indicated that the legal changes to be effected by the Repeal Bill would take effect on the day that the UK officially leaves the EU.

10. The uncertainty around the details of what will follow the UK's exit from the EU has been a topic of intense discussion prior to, and particularly since, the referendum result. In light of the fact that procurement is principally regulated through EU directives, and the importance both of procurement to the UK economy, and of the objectives underpinning the regulatory regime more broadly, the question of the UK's post-Brexit regulatory landscape for public procurement is a one worth pondering.

11. This paper considers some of the likely options for regulation of procurement decisions in the absence of the present regime. It deals, first, with the position in relation to the common law's ability to address some of the issues to which the Procurement Directives

[10] HC Deb October 2014 c40.

180 Fleet Street London EC4A 2HG | DX: 1042(LDE) | t: +44(0) 20 7430 1221 f: +44 (0)20 7421 6060
e: clerks@landmarkchambers.co.uk | @Landmark_LC
www.landmarkchambers.co.uk

are directed. Second, it considers the government's proposed alternative to the EU framework, namely (other) multilateral treaties and specifically the World Trade Organisation system.

12. Before dealing with those issue, it might be thought of interest to consider briefly some of the practical issues that might arise in the immediate aftermath of the UK's exit from the EU, in relation to the application of EU law in the UK.

13. The Prime Minister indicated in a speech at the Conservative conference that one of the main aims of the Repeal Bill is to end the jurisdiction of the Court of Justice of the EU[11] and the government has said that the Bill will end the 'general supremacy of EU law'.[12] The government's Brexit White Paper, *The United Kingdom's exit from and new partnership with the European Union,* published in February 2017 ("the White Paper"), has outlined that the Repeal Bill will provide that:
    (i) preserved EU law post-Brexit should continue to be interpreted as it is currently; the way in which this will be achieved will be by converting directly-applicable EU law (EU regulations) into UK law; preserving all the laws we have made in the UK to implement our EU obligations; and by providing that rights in the EU treaties that can be relied on directly in court by an individual will continue to be available in UK law;
    (ii) EU-derived law post-Brexit is to be accorded primacy over domestic law enacted before Brexit;
    (iii) Judgements of the CJEU given before the Brexit day will have the status of UK Supreme Court judgments; CJEU judgments will bind UK courts, unless the Supreme Court says otherwise[13].

14. Of course, in light of the result of the General Election on 8 June 2017, the continued relevance of this statement of government policy has become unclear. But it is far too

[11] Theresa May's Conservative conference speech on Brexit, 2 October 2016
[12] Department for Exiting the European Union, *Legislating for the United Kingdom's withdrawal from the European Union* (March 2017)
[13] See paragraphs 2.12 to 2.17 of the White Paper.

180 Fleet Street London EC4A 2HG | DX: 1042(LDE) | t: +44(0) 20 7430 1221 f: +44 (0)20 7421 6060
e: clerks@landmarkchambers.co.uk | @Landmark_LC
www.landmarkchambers.co.uk

early to say that policy (if any) may replace it.

15. With those points in mind, there might be thought to be a number of potential uncertainties around the transition away from EU law in the context of the Procurement Directives, such as:

i) Post-Brexit, it may no longer be possible for UK authorities to publish notices in the OJEU, meaning that the procedures for contract notices, contract award notices, VEAT notices and so forth may become impossible to comply with. This is an example of a much more general problem with the proposals in the Great Repeal Bill to simply legislate so as to convert pre-existing EU laws into domestic legislation post-Brexit, which I have elsewhere labelled the co-ordination problem. The problem is that many, and perhaps the majority, of EU law that is effective in the UK depends for its operation, practicability, and even to some extent for its coherence, upon the existence of, and interaction with, EU laws and institutions. Where those EU laws and institutions cease to be available, law becomes impossible to operate or even meaningless.

ii) The status of EU case law. The proposal in the White Paper is to accord CJEU judgement the status of Supreme Court judgments, *where issued before* Brexit. But whilst that provides a degree of legal certainty in relation to such judgments, it leaves wholly unclear the status of judgments of the CJEU which are issued thereafter. The White Paper, at paragraph 2.13, says only that the Bill will not "require" domestic courts to consider the CJEU's jurisprudence other than in the way just identified. But that does not necessarily make them irrelevant, and UK courts may still feel free to consider CJEU judgments which relate to the interpretation of, in substance, the very measure they are themselves considering. This gives rise to real complexities.

16. The extent of those difficulties will clearly vary depending on the extent to which the UK replicates the present framework in its post-Brexit arrangements.

III) PROCUREMENT LAW POST-BREXIT?

180 Fleet Street London EC4A 2HG | DX: 1042(LDE) | t: +44(0) 20 7430 1221 f: +44 (0)20 7421 6060
e: clerks@landmarkchambers.co.uk | @Landmark_LC
www.landmarkchambers.co.uk

This paper will consider three possible post-Brexit approaches to the regulation of procurement post-Brexit:

A) The UK joining the EEA: EU-lite
B) The WTO framework: the Government Procurement Agreement
C) The common law

A) THE EUROPEAN ECONOMIC AREA

17. The 'softest' of post-Brexit outcomes might be thought to be the possibility of the UK's re-joining the European Economic Area (EEA) through the European Free Trade Association (EFTA).[14]

18. Article 128 of the EEA Agreement provides that:

'Any European State becoming a member of the Community shall, and the Swiss Confederation or any European State becoming a member of EFTA may, apply to become a party to this Agreement. It shall address its application to the EEA Council.'

19. Thus, in order to join the EEA, the UK would have to join the EFTA. The EFTA is a free trade association consisting of four states: Iceland, Liechtenstein, Norway and Switzerland. It was established on 4 January 1960 by the EFTA Convention.[15] It seeks to promote free trade and economic integration between its member states within Europe and globally. The EFTA is not directed the goal of political integration and does not issue legislation or establish a customs union. While EFTA member states are able to enter into bilateral third-country trade arrangements, the EFTA has a co-ordinated trade policy, as a result of which EFTA member states have jointly concluded free trade agreements with the EU (and other countries). To participate in the EU's single market, Iceland, Liechtenstein, and Norway are parties to the EEA agreement.[16]

[14] All members of the EU are also members of the EEA: Article 128 of the EEA Agreement.
[15] The EFTA is also known as the Stockholm Convention. The UK was originally a party but, in common with other founding members who are no longer members of the EFTA(Austria, Denmark, Portugal, Sweden), left the EFTA (and the EEA) when it joined the EU.
[16] Compliance is regulated by the EFTA Surveillance Authority and the EFTA Court. Switzerland takes a different approach and has a set of bilateral agreements with the EU instead.

180 Fleet Street London EC4A 2HG | DX: 1042(LDE) | t: +44(0) 20 7430 1221 f: +44 (0)20 7421 6060
e: clerks@landmarkchambers.co.uk | @Landmark_LC
www.landmarkchambers.co.uk

20. Since 2001, the EFTA Convention has been updated on a continuous basis in order to align its content with the EEA Agreement.[17] The Procurement Directives are incorporated into the EEA Agreement.[18] Thus, in the event that the UK were to join the EEA, the EU procurement framework would remain in place.

21. There are some minor adaptations to the EU procurement framework through the EEA Agreement. In particular, EFTA states may not send procurement notices to the OJEU in their own language but must use of the official languages of the EU.[19] However, this would be of little relevance to the UK as English is an official language of the EU (and, it is presumed, will remain so after Brexit).

22. It would thus appear that the upshot of membership of the EEA as a post-Brexit possibility would lead to continuity in the procurement regime. Under the EEA Agreement, the UK would also be obliged to maintain a number of other EU law rules, including those relating to state aid, product standards and mutual recognition of qualifications.

23. Prior to the outcome of the 8 June election, a "soft Brexit" which kept the UK within EFTA might have appeared very unlikely. As matters stand at 12 June, all bets are off.

B) THE WORLD TRADE ORGANISATION and the GOVERNMENT PROCUREMENT AGREEMENT

24. The Prime Minister, in a speech delivered on 17 January 2017 at Lancaster House, said:

> *'I know my emphasis on striking trade agreements with countries outside Europe has led to questions about whether Britain seeks to remain a member of the EU's Customs Union. And it is true that full Customs Union membership prevents us from negotiating our own comprehensive trade deals.*
>
> *Now, I want Britain to be able to negotiate its own trade agreements. But I also want tariff-free trade with*

[17] As well as the Swiss-EU bilateral agreements. The EFTA Convention includes, inter alia, provisions on the free movement of persons between all of the EFTA States.
[18] As of 1 January 2017: see Decision of the EEA Joint Committee, No 97/2016; available here: http://www.efta.int/media/documents/legal-texts/eea/other-legal-documents/adopted-joint-committee-decisions/2016%20-%20English/097-2016.pdf (accessed 7 June 2016); and 2016 list of adopted decisions: http://www.efta.int/sites/default/files/documents/legal-texts/eea/other-legal-documents/List-Adopted-Joint-Committee-Decisions/2016%20List%20of%20Adopted%20Joint%20Committee%20Decisions.pdf (accessed 7 June 2016)
[19] EEA Agreement, Article 65(1) and Annex XVI

180 Fleet Street London EC4A 2HG | DX: 1042(LDE) | t: +44(0) 20 7430 1221 f: +44 (0)20 7421 6060
e: clerks@landmarkchambers.co.uk | @Landmark_LC
www.landmarkchambers.co.uk

Europe and cross-border trade there to be as frictionless as possible.

That means I do not want Britain to be part of the Common Commercial Policy and I do not want us to be bound by the Common External Tariff. These are the elements of the Customs Union that prevent us from striking our own comprehensive trade agreements with other countries. But I do want us to have a customs agreement with the EU.

(…) I want to remove as many barriers to trade as possible. And I want Britain to be free to establish our own tariff schedules at the World Trade Organisation, meaning we can reach new trade agreements not just with the European Union but with old friends and new allies from outside Europe too.'

25. As the Prime Minister acknowledges in the extract above, the government has focused on possibilities arising out of multilateral trade treaties, particularly within the context of the World Trade Organisation (WTO) framework, as possible alternatives to the arrangements under the EU. It is instructive to consider what these frameworks have to offer and how, in substance, procurement arrangements under such a framework might differ from the the framework provided by the Procurement Directives.

(i) <u>The WTO</u>

26. The World Trade Organisation (WTO) was established in 1995. The WTO system comprises two central features. First, it incorporated existing multilateral trade agreements, the most important of which was the 1947 General Agreement on Tariffs and Trade (GATT), which had established a round-table discussion forum based on a multilateral approach to trade and a system of internationally recognised trade rules. The GATT described its underlying object as the creation of a level playing field for all members through the 'substantial reduction of tariffs and other barriers to trade and the elimination of discriminatory treatment in international commerce'.[20] The WTO, as well as incorporating the GATT, expanded the underlying approach in the GATT to areas including trade in services and intellectual property rights through new agreements. Second, the WTO established a dispute settlement body which has the power to rule on trade disputes and to enforce its decisions. This dispute settlement mechanism works on the basis of rules enabling WTO members to lodge complaints over alleged breaches of WTO rules and to seek reparation.

[20] Introductory paragraph of the GATT

180 Fleet Street London EC4A 2HG | DX: 1042(LDE) | t: +44(0) 20 7430 1221 f: +44 (0)20 7421 6060
e: clerks@landmarkchambers.co.uk | @Landmark_LC
www.landmarkchambers.co.uk

27. In common with all EU countries, the United Kingdom has been a member of the World Trade Organisation (WTO) since 1 January 1995.[21] The EU itself is also a member of the WTO. By virtue of the Common Commercial Policy, the EU operates as a single actor at the WTO and is represented by the Commission rather than by the Member States. [22] Thus, the EU negotiates trade agreements and represents the EU's interests before the WTO Dispute Settlement Body on behalf of Member States.

(ii) The GPA

28. The Agreement on Government Procurement (GPA) is an international agreement within the framework of the WTO.[23] The GPA regulates the government procurement of goods and services by public authorities of the parties to the agreement. It sets out rules requiring that certain conditions directed at openness, fairness and transparency of competition be ensured in government procurement. The GPA rules do not automatically apply to all the procurement activities of each state party, but set out certain criteria for the application of the rules in schedules. Only procurement activities that are carried out by 'covered' entities purchasing listed goods, services or construction services of a value exceeding specified threshold values are covered by the Agreement. The enforcement of the GPA is through two mechanisms: a domestic review mechanism at the national level and the WTO dispute settlement mechanism at the international level. A revised GPA entered into force on 6 April 2014, incorporating changes directed principally at further liberalising procurement markets.

29. The basic principles underpinning the GPA are non-discrimination, transparency and procedural fairness. The main aspects of the GPA regime are as follows:

(i) guarantees of national treatment and non-discrimination for the suppliers of

[21] The UK has been a member of the GATT since 1 January 1948.
[22] The EU's Common Commercial Policy is one of the areas in which the EU's competency is exclusive: case 1/75, *Low Cost Standard*, 1975 E.C.R. 1355; Case 41/76, *Suzanne Criel, nee Donckerwolcke and Henru Schou v. Procureur de la Republique*, 1976 E.C.R. 1921.
[23] The GPA has 19 parties (including the EU), which comprise 47 WTO members.

180 Fleet Street London EC4A 2HG | DX: 1042(LDE) | t: +44(0) 20 7430 1221 f: +44 (0)20 7421 6060
e: clerks@landmarkchambers.co.uk | @Landmark_LC
www.landmarkchambers.co.uk

parties to the GPA with respect to procurement of covered goods, services and construction services;

(ii) detailed procedural requirements regarding the procurement process, which seek to ensure that covered procurement under the Agreement is carried out in a transparent and competitive manner that does not discriminate against the goods, services or suppliers of other state parties to the GPA;

(iii) additional requirements regarding transparency of procurement-related information (including statutes and regulations);

(iv) requirements regarding the availability and nature of domestic review procedures for supplier challenges which must be put in place by all GPA parties;

(v) provisions regarding the application of the WTO dispute settlement mechanism.[24]

30. As the UK's accession to the GPA is at present through its membership to the EU, the UK would need to independently accede to the GPA on leaving the EU. As can be seen by the broad outline of the GPA regime, it operates on very similar principles to the EU system. The European Parliament study, *Consequences of Brexit in the Area of Public Procurement* ("the EP Report"),[25] notes that most of the EU's agreements with other states on public procurement that do not deal with pre-accession relationships use the GPA as a starting point. Such agreements generally provide for award procedures and remedies for affected undertakings that parallel those of the GPA.[26] In a number of agreements, the EU has used the GPA as a starting point and gone further. For example, the EU's agreement with Switzerland on procurement extends, unlike the GPA, to additional utility sectors as per the Procurement Directives and to private utilities with special or exclusive rights.[27] Where the EU has made agreements with candidates for acces-

[24] The revised GPA reworded the older version and introduced new provisions, such as a new requirement for participating governments and their relevant procuring entities to avoid conflicts of interest and prevent corrupt practices; and a commitment from state parties to undertake further negotiations to progressively reduce and eliminate discriminatory measures and to achieve the greatest possible extension of coverage within three years.
[25] *Consequences of Brexit in the Area of Public Procurement,* March 2017, Section 5.3.
[26] See for example the recently negotiated EU-Vietnam Trade Agreement, which deals with procurement in Chapter 9 and contains certain temporary derogations from procedural requirements modelled on the GPA: http://trade.ec.europa.eu/doclib/docs/2016/february/tradoc_154216.pdf (accessed 7 June 2017).
[27] Agreement between the European Community and Swiss Confederation on certain aspects of government procurement [2002] OJ L114/430.

180 Fleet Street London EC4A 2HG | DX: 1042(LDE) | t: +44(0) 20 7430 1221 f: +44 (0)20 7421 6060
e: clerks@landmarkchambers.co.uk | @Landmark_LC
www.landmarkchambers.co.uk

sion, it has generally sought to conclude agreements based on the EU acquis on procurement. The logic in doing so is obvious: such agreements are part of an arrangement that envisages a move towards adoption of the EU acquis as a whole.[28]

31. As is suggested by its role in the negotiation of procurement agreements with the EU, the GPA is in substance a simplified version of the system under the EU directives. It sets minimum standards, rather than a detailed regime. As set forth in the GPA's fourth recital, '[t]he procedural commitments under this Agreement should be sufficiently flexible to accommodate the specific circumstances of each Party.' For example, the GPA requires the implementation of a remedies regime, but does not go into the level of detail that the Procurement Directives do. State parties also have a greater degree of control in designating to which government entities, and goods and services, the GPA is to apply.

32. As the EP Report notes, the UK's position is somewhat different to pre-accession countries, in that it is (uniquely) moving *away* from the EU acquis. This creates an obvious incentive, for practical reasons, to use the EU acquis as a starting point in negotiations: the UK already has, or just had, the EU acquis. A similar approach is being taken by the UK in relation to its WTO goods and service schedule.[29]

33. It is also relevant that the EU aims at reciprocal opening of procurement markets covered by the EU regime.[30] The EU Commission's policy has, for a number of years, been to seek to ensure that the EU can close its public procurement markets to entities from states that do not offer reciprocal and enforceable access to their own public procurement markets.[31]

---

[28] EP Report, 5.2

[29] All WTO members undertake specific commitments which are set out in goods and services schedules. Goods schedules set out details and upper limits for tariffs and detail any tariff rate quotas. Services schedules set out commitments and reservations across all sectors and list sector-specific commitments and reservations. A country's WTO schedules provide the baseline for negotiating bilateral trade agreements. As a EU Member State, the WTO commitments to the UK are part of the EU's shared schedules. The Secretary of State for International Trade notified Parliament on 5 December 2016 that the UK would prepare UK-specific draft schedules and that the UK's policy is, at least in the first instance, to replicate as far as possible the UK's current obligations (i.e. as under the EU schedules) 'to minimise any grounds for objection'.

[30] EP Report, 5.2

[31] 2012/0060 (COD) *Amended proposal for a Regulation of the European Parliament and of the Council on the access of third-country goods and services to the Union's internal market in public procurement and procedures supporting negotiations on access of Union goods and services to the public procurement markets of third countries* . 'The proposal on an International Procurement Instrument (IPI) is the EU response to the lack of level playing field in world procurement markets. While our public

180 Fleet Street London EC4A 2HG | DX: 1042(LDE) | t: +44(0) 20 7430 1221 f: +44 (0)20 7421 6060
e: clerks@landmarkchambers.co.uk | @Landmark_LC
www.landmarkchambers.co.uk

34. Thus, the position in relation to the GPA can be characterised by two competing impetuses. The first is the weight of practical considerations in favour of inertia, which impels retention of existing EU standards on procurement as the path of least resistance, particularly if the UK seeks to maintain a strong trading relationship with the EU. The second is the opportunity, and what appears to be a desire on the part of the government, to exploit the flexibility afforded by the GPA (or other multilateral) regime to have a greater degree of control over either the extent of regulation via agreements, or the context in which such agreements will operate. Where precisely the line will be drawn will, of course, depend on what occurs in the various negotiations the British government will have to undertake over the course of the next few (or perhaps many) years. What appears reasonably clear from a survey of the GPA scheme is that its adoption does not suggest the prospect of the EU regime for procurement regulation being replaced by something dramatically different.[32]

C) COMMON LAW

35. Whether or not a combination of government policy and circumstance lead to a 'hard' Brexit, it is instructive, in considering the possibilities for the regulation of procurement, to analyse what the common law might have to offer in a scenario where the Procurement Directives regime are no longer in play. This section of the paper will consider the extent to which public law and contract law principles might be able to address some of the regulatory objectives which underpin the EU procurement regime.

Public law

procurement market is open to foreign bidders, the procurement markets for foreign goods and services in third countries remain to a large extent closed de iure or de facto. The IPI aims at encouraging partners to engage in negotiations and opening participation for EU bidders and goods in third countries' tenders.'

[32] It might be noted that the proposed Transatlantic Trade and Investment Partnership between the EU and the United States appears to propose public procurement provisions along similar lines to those contained in the EU framework: see EU Report on 15th round on negotiations, October 2016. The UK will not be a party to TTIP as it is leaving the EU, but, given the clearly stated support for TTIP from the UK government, it is reasonable to expect that future multilateral treaties might reflect TTIP provisions.

180 Fleet Street London EC4A 2HG | DX: 1042(LDE) | t: +44(0) 20 7430 1221 f: +44 (0)20 7421 6060
e: clerks@landmarkchambers.co.uk | @Landmark_LC
www.landmarkchambers.co.uk

36. There are two principles of public law the application of which to procurement decisions should be reasonably uncontentious. The first is the principle that a power must be exercised only to the extent governed by the legislation and for the purpose contemplated by the legislation.[33] The second is what has been described by the courts as a general duty on public bodies to pursue value for money, as part of a fiduciary duty imposed under general principles of judicial review.[34] This duty is based on the concept that the money that government holds and spends is public money and is effectively held on trust for citizens by government, to be spent in a proper manner for the purposes agreed via the democratic processes.

37. More contentious, and relevant for the purposes of a discussion as to how public law might be able to supplant aspects of the function served by the Procurement Directives regime, is the question of the application of public law concepts of fairness, such as the requirement that persons affected by administrative decisions be given a hearing before a decision is made; the requirement that an authority should not act arbitrarily or unreasonably; and the principle of legitimate expectation.

38. The traditional approach of the courts to contracting decisions of public authorities has been to treat such decisions as falling within the sphere of private law and therefore only reviewable in private law courts. A key case in this connection is the judgment of the Divisional Court in the case of *R v Hibbit and Sanders ex parte the Lord Chancellor's Department* [1993] COD 326, where it was held that public law principles of fairness did not apply to procurement unless there was a statutory underpinning to the decision in question, or some special element of public law could be found.

39. The effect of *Hibbit* was summarised in the judgment of McCombe J in *R (Menai Collect Limited and Others) v The Department of Constitutional Affairs and another*, [2006] EWHC 724 Admin as follows:

[33] See, for example, *R v Lewisham London Borough Council ex parte Shell UK* [1998] 1 All ER 938
[34] See, for example, *R (Maria Stella Nash) v Barnet London Borough Council* [2013] EWHC 1067 (Admin), in the context of a council's fiduciary duty to council taxpayers.

180 Fleet Street London EC4A 2HG | DX: 1042(LDE) | t: +44(0) 20 7430 1221 f: +44 (0)20 7421 6060
e: clerks@landmarkchambers.co.uk | @Landmark_LC
www.landmarkchambers.co.uk

'28... Rose LJ noted that the test to be applied is to look at the subject matter of the decision which it is suggested should be the subject of judicial review and by looking at that subject matter to come to a decision as to whether judicial review is appropriate. In applying that test the learned Lord Justice found that neither the statutory requirement for the appointment of shorthand writers nor the importance of their functions provided a framework for the appointment of persons to perform those functions. Further, while the fact that a commercial function was being performed did not take the case out of the ambit of public law, it was not appropriate to equate tendering conditions, attendant on a common law right to contract, with a statement of practice or policy in a public sphere which is in the especial province of the State and where, in consequence, a sufficient public law element is apparent.

29. Waller J (as he then was) agreed and said.

'... it is critical to identify the decision and the nature of the attack on it. Unless there is a public law element in the decision, and unless the allegation involves suggested breaches of duties or obligation owed as a matter of public law, the decision will not be reviewable.'

A little later he said:

'it is not sufficient in order to create a public law obligation simply to say that the Lord Chancellor's Department is a governmental body carrying out governmental functions and appointing persons to public office.'

On the subject of contractual negotiations Waller J added.

'A governmental body is free to negotiate contracts, and it would need something in addition to the simple fact that the governmental body was negotiating the contract to impose on that authority any public law obligation in addition to any private law obligations or duties there might be.'

30. Turning to 'statutory underpinning' as a foundation for judicial review, Waller J said:

'If the government body has a statutory obligation to negotiate a contract in a particular way, with particular terms, and fails to perform that statutory obligation, one immediately has the additional public law obligation ...The point, however, is that to have a right which can then be the subject of review that right must flow from the statute if it is to a statute that one has had to look for providing the public law element. It is not enough to say that the governmental authority is acting by reference to certain statutory provisions without the additional factor that it is those statutes which impose the obligation which is said to have been broken."

40. The Court of Appeal found an example of a tendering decision with a statutory underpinning in *Mass Energy Limited v Birmingham City Council* [1994] Env LR 298. *Mass Energy Limited* concerned the amenability to judicial review of a tendering process conducted by a local authority. The powers to undertake the tender process and related procedure were under statute (the Environmental Protection Act 1990). Glidewell LJ said this at p.306:

'In my view, these arguments raise matters for our consideration which I can summarise as follows: first of all, is this a proper matter for judicial review at all? (...) On its face, this is really a commercial dispute between a successful and an unsuccessful tenderer; a situation which is not, of course, at all uncommon. If there were no statutory requirement that the city council should enter into a contract for its waste disposal operations, and particularly the construction of the incinerator to be the subject of a contract entered into by tender, but if the council had sought voluntarily to enter into a contract by tender deciding to adopt that process of its own volition, then in my view there would be no public law element in such a dispute at all.

180 Fleet Street London EC4A 2HG | DX: 1042(LDE) | t: +44(0) 20 7430 1221 f: +44 (0)20 7421 6060
e: clerks@landmarkchambers.co.uk | @Landmark_LC
www.landmarkchambers.co.uk

> Mass Energy could then only hope to bring an action against the council on some contractual basis, for instance, if they could persuade a court that there was some sort of implied term which entitled them to recover the wasted costs of tendering....
>
> However... I accept that because the statutory powers of the council not to contract by means other than those described in Part II of Schedule 2 of the Act, there is a public law element in this dispute to this extent (but only to this extent): that it is a proper subject for judicial review to consider whether the council have complied with section 51(1) and entered into a contract as a result of following the procedure laid down in Schedule 2, Part II of the Act. In my judgment, judicial review has no further place in my judgment in this dispute.'

41. In *Mennai,* however, it was held that the existence of a statutory power to contract did not provide the statutory underpinning for review because the statute did not set out the precise obligations alleged to be broken. In the words of McCombe J at [41]:

> 'It is sufficient for present purposes to refer again to the last passage cited to see that the fact that the Defendant here proposes to exercise the power to contract conferred by Section 2(4) of the 2003 Act does not confer the necessary public element to subject the decision criticised in this case to judicial review. Again, Waller J's analysis is helpful in the present context pointing out that it is critical to identify the decision and the nature of the attack on it; unless there is a public law element in the decision, and unless the obligation involves suggested breaches of duties or obligations owed as a matter of public law, the decision will not be reviewable.'

42. The backdrop to the question of when a public law principles of fairness apply to procurement challenges is fundamentally a broader question about the scope of public law. The *Hibbit* line of cases might thus be said to represent a narrow answer to that broader question, predicated on a view of what kinds of challenges should fall within the purview of private, rather than public, law.

43. That said, and perhaps importantly for the future, the courts have not uniformly followed the approach set out in *Hibbit* and there are clear indications of a broader approach in the case law.[35]

44. First, there have been a number of decisions in which procurement decisions have been reviewed on public law principles without reference to any further requirement per *Hibbit*: see, for example, *R (Greenwich Community Law Centre) v Greenwich London*

[35] An approach which itself has come under criticism; see, for example, S Arrowsmith, *Judicial Review and the Contractual Powers of Public Authorities* (1990) 106 LQR 277; and S Bailey *Judicial Review of Contracting Decisions* [2007] PL 444

180 Fleet Street London EC4A 2HG | DX: 1042(LDE) | t: +44(0) 20 7430 1221 f: +44 (0)20 7421 6060
e: clerks@landmarkchambers.co.uk | @Landmark_LC
www.landmarkchambers.co.uk

Borough Council;[36] *Allan Rutherford LLP Solicitors v Legal Services Commission*;[37] and *Sidley Ltd, Re Judicial Review*.[38] The Court held that public law principles of fairness did apply in relation to decisions to remove a contractor from an approved list in *R v London Borough council of Enfield ex parte T.F. Unwin*[39] and *R v Bristol City Council ex parte D.L. Barrett & Sons*.[40] In considering a contract made outside the PCR in *R (Molinaro) v Kensington and Chelsea RLBC* [2001] EWHC Admin 896, Elias J (as he then was) said this:

'65. In my view, the fact that a local authority is exercising a statutory function ought to be sufficient to justify the decision itself being subject in principle to judicial review if it is alleged that the power has been abused. Nor do I see any logical reason why an abuse of power made pursuant to some policy should be treated differently to one made on a specific occasion.

66. Of course, in many circumstances the nature of the complaint is one that identifies no public law principle. In such cases the fact that the defendant is acting pursuant to statute is irrelevant. For example, if the Council sues for the rent due from a tenant, no public law issue arises. Indeed, in general questions of construction of the contract or breach will attract no special public law principles, and judicial review is not an appropriate procedure to resolve such disputes. The fact that a public body is a party to the proceedings is, in such cases, irrelevant to the action formulated or to the relief granted. There is no justification then for treating the local authority in any different way to private bodies.

67. But public bodies are different to private bodies in a major respect. Their powers are given to them to be exercised in the public interest, and the public has an interest in ensuring that the powers are not abused. I see no reason in logic or principle why the power to contract should be treated differently to any other power. It is one that increasingly enables a public body very significantly to affect the lives of individuals, commercial organisations and their employees.

68. Moreover, there are a host of important cases were decisions relating to contracts have been subject to the principles of judicial review to prevent the power being unlawfully exercised....

69. In my opinion, the important question in these cases is the nature of the alleged complaint. If the allegation is of abuse of power the courts should, in general, hear the complaint. Public law bodies should not be free to abuse their power by invoking the principle that private individuals can act unfairly or abusively without legal redress. But sometimes the application of public law principles will cut across the private law relationship and, in these circumstances, the court may hold that the public law complaint cannot be advanced because it would undermine the applicable private law principles.'

45. Elias J's reasoning suggests that, once a statutory power is shown, the decision becomes

[36] [2011] EWHC 3463 (Admin), decision of Cranston J, particularly at [43]-[44]; issue of judicial review not considered on appeal in [2012] EWCA Civ 496.
[37] [2010] EWHC 3068. Both in and in the *Greenwich* case, the court does not appear to have had *Hibbit* cited to it.
[38] [2011] COSH 194
[39] [1989] COD 466, DC
[40] CO/4181/1999. Both *Unwin* and *Barrett & Sons* were cited in the decision of Plender J in *First Real Estates (UK) Ltd v Birmingham City Council* [2009] EWHC 817 (Admin). The judge distinguished the application of public law principles of fairness in those two cases on the basis that (i) those cases concerned a power derived from public law; and (ii) there was a public interest in the maintenance of the list, and suggested that the fact that the public authority in question 'was taking a policy decision in pursuit of its public duties as an education authority as to the suitability of the claimant to act on behalf of the authority in the discharge of those particular functions' was particularly important: [30].

180 Fleet Street London EC4A 2HG | DX: 1042(LDE) | t: +44(0) 20 7430 1221 f: +44 (0)20 7421 6060
e: clerks@landmarkchambers.co.uk | @Landmark_LC
www.landmarkchambers.co.uk

amenable to judicial review in the ordinary way; the judge resists putting the power to contract in a special category, unless the application of public law principles would undermine any applicable private law relationship. This broad approach is clearly in tension with the *Hibbit* line of cases.[41]

46. Second, the Court of Appeal, in the case of *R (Chandler) v Secretary of State for Children, Schools and Families* [2009] EWCA Civ 1011, dealt with the issue of standing to bring a judicial review in respect of breaches of the PCR without reference to any requirement to show an additional public law element. Where the claimant is an economic operator, a judicial review action would in the ordinary course of events be precluded by the presence of an alternative remedy under the PCR.[42] *Chandler* considered such a claim but brought by an individual who was not an economic operator, that is, an individual without a right to bring a claim under the PCR. Arden LJ in *Chandler* said this at [77]:

> '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 CC* [1994] Env LR 298 , 306 cf *Kathro*, where Richards J held 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. However, while the court is in general bound to ask itself why a public law remedy is necessary when private law remedies are available, once permission to bring judicial review proceedings has been given, then, unless it is appropriate to deal with standing as a preliminary issue, there is likely to be little point in spending valuable court time and costs on the issue of standing. In that situation, we would not encourage the court to embark on a complex argument about standing. This will especially be the case where standing is a borderline issue.'

47. Third, there have also been a number of decisions of the Judicial Committee of the Privy Council (JCPC) suggesting that public law principles of fairness apply in a general way to procurement decisions.[43] In the Barbados case of *CO Williams Construction v*

[41] See also the judgment of Parker J in *R (A) v Chief Constable of B Constabulary* [2012] EWHC 2141 at [42], where the judge arrives at a similar approach to public/private law overlap to Elias J by a different analytical route.
[42] See *Cookson & Clegg* at [20].
[43] See also *Mercury Energy Limited v Electricity Corporation of New Zealand* [1994] 1 WLR 521, where it was said that, in principle, the exercise of statutory powers may be susceptible to judicial review on the basis of irrationality; however Lord Templeman observed that 'It does not seem likely that a decision by a state enterprise to enter into or determine a commercial contract to

180 Fleet Street London EC4A 2HG | DX: 1042(LDE) | t: +44(0) 20 7430 1221 f: +44 (0)20 7421 6060
e: clerks@landmarkchambers.co.uk | @Landmark_LC
www.landmarkchambers.co.uk

Blackman [1995] 1 WLR 102, the JCPC indicated that a procurement award was an 'administrative act' for the purposes of judicial review under the Barbados Administration of Justice Act.[44] In *Central Tenders Board v White* [2015] UKPC 39, the JCPC considered a public law challenge to a procurement exercise in Montserrat. The appellant (CTB) sought to defeat a claim in contract by the respondent by contending that the contract it had entered into with the respondent was void on the basis that it had acted ultra vires. Lord Toulson, giving the judgment of the Committee, dismissed the appeal because the CTB had a clear statutory power to decide which tender to accept and said (albeit strictly obiter) that 'there is no dispute as a general principle of public law that tenderers for public contracts should be afforded fair and equal treatment'.[45] It might be noted that the statutory framework in question did not provide for any procedural requirements as to how a tender should be carried out.[46]

48. In summary, therefore, the position as to the circumstances in which public law principles of fairness apply to a procurement decision are far from clear, although the *Hibbit* line of cases probably still represents the orthodox position.

49. It is clear that that the presence of a statutory regime has exercised some influence over the manner in which the scope of public law fairness has developed in relation to challenges to procurement decisions. The presence of a specific statutory regime with provisions for the award of damages,[47] and the preclusion of judicial review claims where an alternative remedy exists, may be considered to have had the unsurprising effect of limiting the number of challenges to procurement brought through judicial review. There have also been suggestions in the case law that the PCR sets out an exhaustive legal regime for procurement, and that judicial review in fact adds nothing to that regime.[48]

---

supply goods or services will ever be the subject of judicial review in the absence of fraud, corruption or bad faith.'(page 529A).
[44] Albeit the Judicial Committee made it clear that the scope of review under the Barbados Act need not bee be the same as under the common law.
[45] Per Lord Toulson at [4].
[46] See judgment of Lord Toulson at [25].
[47] The PRC also requires a court to impose a penalty in any circumstance where it declares a contract ineffective: r.102. An economic operator can, in addition, seek damages for losses resulting from the breach.
[48] *R (Venture) Projects v Secretary of State for the Home Department,* 20 October 2000 (unreported); *JBW Group v Ministry of Justice* [2012] EWCA Civ 8

180 Fleet Street London EC4A 2HG | DX: 1042(LDE) | t: +44(0) 20 7430 1221 f: +44 (0)20 7421 6060
e: clerks@landmarkchambers.co.uk | @Landmark_LC
www.landmarkchambers.co.uk

50. With that in mind, it can hardly be said that it is entirely clear that the restrictive approach set out in the *Hibbit* line of cases would survive a shift towards greater reliance on public law challenges/arguments in procurement litigation in the wake of a post-Brexit perceived regulatory gap. Might the Monserrat case of *Central Tenders Board* provide an indication of the approach the courts are likely to take where the existing framework is considered to be inadequate or likely to lead to unfairness? It might well be considered improbable that the courts would be unaffected by the absence of a regulatory regime when considering the question of how flexibly to apply public law principles of fairness. The statements of Buxton LJ in *R (Cookson and Clegg) v Ministry of Defence* [2005] EWCA Civ 811 appear to support such a view; considering the freestanding public law claim brought alongside a failure to follow the Public Supply Regulations 1995, Buxton LJ said this at [18]

> 'Th[e] analysis [of Glidewell LJ in *Mass Energy Limited*] makes a distinction between statutory fault in not following statutory rules (here, the failure to follow Regulations) on the one hand; and actions of what might be called a normal commercial nature in awarding the contract itself. I would, however, immediately agree that that analysis does not and should not exclude public law entirely from the contract-awarding process, even if there were no statutory breaches involved; for instance, if there were bribery, corruption or the implementation of policy unlawful in itself, either because it was ultra vires or for other reasons, as was the case in *Roberts v Hopwood* and *Wheeler v Leicester City Council*, both of which were cited by Elias J in *Molinaro v Kensington and Chelsea Borough Council* [2002] LGR 336 . But it is much more difficult to fit this allegation of irrationality or unfairness into the framework of a separate application different from complaints under the Regulations. That is because the award of the contract, where the irrationality in this case is said to have arisen, as well as the tendering process, is governed by the Regulations. That is demonstrated by Regulation 21 in Part 5 of the Regulation headed 'The Award of a Public Supply Contract' …'[49]

Private law

51. It is well-established in common law that a contract may be implied on the basis of the conduct of the parties. The test for implying a contract was set out by the Court of Appeal in *The Aramis* [1989] 1 Lloyds Rep. Bingham LJ (as he then was) said this at page 274:–

[49] Buxton LJ's comments (at least arguably) differ in tenor from those of Glidewell LJ in *Mass Energy Limited v Birmingham City Council*. The implication in Glidewell LJ's judgment is that the choice is between a complaint under the regulations and a private law claim. The Court did not address the question of whether judicial review principles can add to the specific obligations contained in the statutory regime, despite being invited to do so both in *Cookson* and in *R (Venture Projects) v SSHD* October 20, 2000 (unreported); see *Law of Public Utilities Procurement, Vol 1,* 3rd Edition, at 2-151.

180 Fleet Street London EC4A 2HG | DX: 1042(LDE) | t: +44(0) 20 7430 1221 f: +44 (0)20 7421 6060
e: clerks@landmarkchambers.co.uk | @Landmark_LC
www.landmarkchambers.co.uk

'... it would, in my view, be contrary to principle to countenance the implication of a contract from conduct if the conduct relied upon is no more consistent with an intention to contract than with an intention not to contract. It must, surely, be necessary to identify conduct referable to the contract contended for or, at the very least, conduct inconsistent with there being no contract made between the parties to the effect contended for. Put another way, I think it must be fatal to the implications of a contract if the parties would or might have acted exactly as they did in the absence of a contract.'

52. Staughton LJ said at page 320:–

'... it is not enough to show that the parties have done something more than, or something different from, what they were already bound to do under obligations owed to others. What they do must be consistent only with there being a new contract implied, and inconsistent with there being no such contract. The paradigm cases of the shipowner giving up his lien, or the receiver paying the freight, illustrate that.'

53. The possibility of analysing complaints about the manner in which a public authority has carried out a procurement process in terms of an alleged breach of an implied contract has been accepted in a number of judgments, particularly in the context of invitations to tender. Scott LJ said this in *Mass Energy Limited v Birmingham City Council* at page 313:

'The submission of a tender may constitute a contract between the tender and the invitor whereunder the invitor becomes contractually bound to observe the terms of the invitation to tender. A breach by the invitor of those terms may entitle a disappointed tenderer to some contractual remedy for breach of contract, whether damages or injunction, as the case may be. All of this may, in a particular case, result from an invitation to tender issued by a waste disposal authority pursuant to paragraph 20(4) of Part II of the second Schedule to the Act. If so, the aggrieved tenderer's remedy lies, in my opinion, in private law ...'

54. Lord Toulson, in the *Central Tendering Board* case, referred with approval to the analysis of the Court of Appeal on the same issue in the case of *Blackpool and Fylde Aero Club Ltd v Blackpool Borough Council* [1990] 1 WLR 1195 as follows:

'27 What if something goes wrong in the process of awarding a contract by tender, giving rise to a legitimate grievance on the part of an unsuccessful bidder that if he had been fairly and properly treated, he would have secured the contract, or have had a good chance of doing so? If so, there is a possible remedy which does not involve setting aside a contract lawfully made with the successful bidder. The decision of the Court of Appeal in *Blackpool and Fylde Aero Club Ltd v Blackpool Borough Council* (...) is instructive. The council invited tenders for a concession to operate pleasure flights from Blackpool airport. Relevant parts of the council's Standing Orders with respect to contracts were attached to the instructions to tenderers. These included the words "No tender which is received after the last date and time specified shall be admitted for consideration". The plaintiff club was the highest tenderer, but a mistake on the part of a council employee resulted in its tender being wrongly marked as received late. So it was not considered by the council's relevant committee, which awarded the concession to the highest under-bidder in the belief that it was the top bidder. When it discovered the error, the council attempted to declare the process invalid and to seek

180 Fleet Street London EC4A 2HG | DX: 1042(LDE) | t: +44(0) 20 7430 1221 f: +44 (0)20 7421 6060
e: clerks@landmarkchambers.co.uk | @Landmark_LC
www.landmarkchambers.co.uk

tenders for a second time. But the under-bidder contended that the council was contractually bound by the council's acceptance of its tender and threatened to bring legal proceedings. At that stage the council decided to honour the contract made with the under-bidder, and it was then sued by the club.

28 The Court of Appeal held that there was an implied contract between the council and a person who was invited to tender that if he submitted a conforming tender in time, it would be opened and considered in conjunction with all other conforming tenders. In reaching that conclusion Bingham LJ asked rhetorically what the position would have been if the council had opened the first tender and accepted it, although the deadline had not expired and other invitees had not responded; or if the council had accepted a tender admittedly received well after the deadline. The import of his reasoning was that the council owed a duty to treat all invitees fairly and equally, which was enforceable by way of an implied contract....'

55. In *JBW Group Ltd v Ministry of Justice* [2012] EWCA Civ 8, Elias LJ addressed an argument to the same effect as follows:

57 The argument here was that by offering the contract out to tender, the MoJ was impliedly entering into a contract which would oblige it to treat all tenders equally and with transparency and in accordance with the terms of the tender document.

58 Mr Knox accepted that if he had succeeded in establishing that there was a service contract, this would add nothing to his case. It would then be unnecessary to imply any contract. Initially he suggested that even then the implied contract argument might entitle him to bring a claim for six years rather than within the much stricter three month period permitted under the Directive. However, in reply he resiled from that position and conceded that it would be inconsistent with the purpose of the Directive to imply any such contractual right.

(...)

60 However if, as I have found, the Regulations are not applicable, the same argument cannot be advanced. I reject a submission of Mr Vajda that it would be illogical to find that an implied term can be excluded if the arrangement is analysed as a service contract but not if it is a concession. The reason it would be excluded in the first situation is that it is unnecessary and would, if implied, be inconsistent with the statutory scheme. Those arguments do not apply where the arrangements constitute a concession. Nor do I accept an argument he advanced, which was accepted by the judge below, that by excluding concessions from the scope of the Directive and hence the Regulations, the draftsman intended that provisions of a kind found in the Regulations positively ought not to apply to them. I would not be prepared to read the effect of the exclusion in that way. A tendering authority is not obliged to comply with the Regulations where a service concession is in play, but there is in principle no reason why it could not choose to do so and I do not see how it could be illegal for it to do so. The parties could expressly agree to contractual terms mirroring the Directive and the Regulations if they so wished, and therefore there is no reason in principle why implied terms could not cover that same ground. Having said that, the difficulties of implying terms akin to those found in the Regulations, terms necessarily premised on the assumption that this was the common intention of the parties, in circumstances where the MoJ has throughout been acting on the assumption that the Regulations did not apply, is obvious.

61 When considering the implied contract question, two issues arise for consideration: first, is there any implied contract? Second, if so, what is its scope? As to the first issue, I would be prepared to accept, in line with the well-known judgment of Bingham LJ, as he then was, in *Blackpool Aero Club v Blackpool Borough Council* [1990] 1 WLR 1195 that the MoJ would in principle be under an obligation to consider the tender. Also, contrary to the submissions of the MoJ, I would have no difficulty in implying that any such consideration should be in good faith. Mr Vajda contended that this was an obligation under public rather than private law, but I do not see why this should preclude the obligation arising in private law also. Indeed, if a tender is not considered in good faith, I do not think that it can sensibly be said to have been considered at all.'

180 Fleet Street London EC4A 2HG | DX: 1042(LDE) | t: +44(0) 20 7430 1221 f: +44 (0)20 7421 6060
e: clerks@landmarkchambers.co.uk | @Landmark_LC
www.landmarkchambers.co.uk

56. What is clear from the case law is that there appears to be clear scope for claims on the basis of an implied contract to provide a mechanism for challenging procurement decisions. Such claims which would allow for damages and for a significantly longer limitation period than under the PCR.

57. The nature of the term breached is normally characterised in terms of a duty of good faith. In *Montpellier Estates Ltd v Leeds City Council*,[50] the claimants characterised the contractual term as a duty (1) to consider a bid fairly, honestly and in good faith and in accordance with published evaluation methodology, and (2) base any decision to exclude a tendering party from the procurement on objectively justified, reasonable and consistent criteria.

58. As with the development of public law in relation to procurement decision challenges, the development of contract law in the same field has been constrained by the presence of a statutory scheme under the PCR and its predecessors. Claims on the basis of an implied contract have generally been considered to add nothing to a claim under the PCR and/or seen as an attempt to circumvent the strict limitation period in the PCR.[51] Such a position will of course become untenable if the PCR is repealed.

CONCLUSION

59. The drivers for the development of procurement law have, in general, been private parties who, based on certain expectations as to market conditions and legal rights, have sought to challenge procurement decisions.

60. As a starting point, it might be thought surprising, and, given the importance of the

[50] [2013] EWHC 166 (QB)
[51] *JBW Group Ltd v Ministry of Justice* at [59]; and also *Montpellier Estates Ltd v Leeds City Council* [2013] EWHC 166 (QB) [463]-[467]. Under the PCR, proceedings must be started within 30 days beginning with the date when the economic operator first knew or ought to have known that grounds for starting the proceedings had arisen: r.93.

180 Fleet Street London EC4A 2HG | DX: 1042(LDE) | t: +44(0) 20 7430 1221 f: +44 (0)20 7421 6060
e: clerks@landmarkchambers.co.uk | @Landmark_LC
www.landmarkchambers.co.uk

procurement market to the UK economy, self-harming for the government to propose a drastic recalibration of those expectations, which after all are likely to represent a significant incentive for the choice to undertake economic activity in the UK. The picture that emerges from a consideration of the possibility of regulation of procurement decisions under legal mechanisms other than the Procurement Directives is that, first, any agreement in the international sphere is likely to, at the very least, use the existing framework as a starting point; and, second, that common law principles are clearly capable of developing to, at least to *some* extent, achieve some of the underlying goals of the present procurement regime in the absence of any framework. Even before 8 June 2017, it might have been doubted whether even a "hard" Brexit would have led to a complete abandonment of procurement law in its current form, let alone any form. As matters stand, all bets are off.

12 June 2017

Tim Buley
Landmark Chambers
180 Fleet Street, London