

# Lessons learnt from *Faraday*: Voluntary Transparency Notices

**James Neill**

## Topics covered

- Legislative framework to VEAT Notices / VTNS
- *Ministero dello Interno v Fastweb SpA* C-19/13
- Why was the VEAT notice in Faraday held to be invalid

# The purpose of VTNS: balancing the need for legal certainty against the need for effective remedies

- **Recital 26 of the 2007 Remedies Directive:**

“In order to avoid legal uncertainty which may result from ineffectiveness, Member States should provide for an exemption from any finding of ineffectiveness in cases where the contracting authority or contracting entity considers that the direct award of any contract without prior publication of a contract notice in the Official Journal of the European Union is permissible in accordance with Directives 2004/18/EC and 2004/17/EC and has applied a minimum standstill period allowing for effective remedies.”

## The role of VTNS in precluding Declarations of Ineffectiveness under Reg 99(3) PCRs

- (3) The first ground [of ineffectiveness] does not apply if all the following apply:—
- (a) the contracting authority considered the award of the contract without prior publication of a contract notice to be permitted by Part 2;
  - (b) the contracting authority has had published in the Official Journal a **voluntary transparency notice** expressing its intention to enter into the contract; and
  - (c) the contract has not been entered into before the end of a period of at least 10 days beginning with the day after the date on which the voluntary transparency notice was published in the Official Journal.

## A summary of the limited protection to contracting authorities provided by VTNS

- Precludes the remedy of declaration of ineffectiveness in cases where no prior advertisement of contract
- Cannot prevent damages being sought as a remedy
- BUT will trigger the 30 day limitation periods within which damages claims have to be brought

## The 3 statutory requirements for a valid VTN under the PCR under PCR Reg 99(3)

“voluntary transparency notice” means a notice in the standard format set out in Annex XII to Commission Implementing Regulation (EU) 2015/19862 as amended from time to time and which contains the following information—

- (a) the name and contact details of the contracting authority;
- (b) a description of the object of the contract;
- (c) a justification of the decision of the contracting authority to award the contract without prior publication of a contract notice;

# *Ministero dello Interno v Fastweb SpA* C-19/13

## (1): justification has to be transparent

- [48]: the 'justification' must disclose clearly and unequivocally the reasons that moved the contracting authority to consider it legitimate to award the contract without prior publication of a contract notice, so that interested persons are able to decide with full knowledge of the relevant facts whether they consider it appropriate to bring an action before the review body and so that the review body is able to undertake an effective review.

## ***Fastweb (2): the need to show decision taken diligently***

- [50] In its review, the review body is under a duty to determine whether, when the contracting authority took the decision to award a contract by means of a negotiated procedure without prior publication of a contract notice, it acted diligently and whether it could legitimately hold that the conditions laid down in Article 31(1)(b) of Directive 2004/18 were in fact satisfied

## Why was the *Faraday* VTN not transparent enough?

- Did not set out the correct object of the contract: was misleading/incorrect in describing it as an “exempt land transaction”. This was more than ‘mere simplification’ [89]
- Did not provide a sufficiently transparent justification: stated that it imposed “no binding obligation” on St Modwen, even if read as meaning “no immediately enforceable binding obligation”, left too much unclear [90]

## Faraday, VTNs and the standard of due diligence

- Officer's report to Exec Committee referred to legal advice, but that was not disclosed.
- “In the absence of the relevant “legal advice”, I would not be able to conclude in the light of the officers’ reports alone that the council did not act “diligently” [88]

## What are the main lessons learnt/areas of uncertainty?

- Reminder of the limited utility of VTNS – not a silver bullet for authorities.
- CA in Faraday has confirmed reasonably high standard of justification expected. VTNs must contain objective, relevant factual details AND adequate justification of reasons why authority has proceeded without a PCR compliant competition.
- Main area of uncertainty is over the “due diligence”/*Fastweb* test:
  - What level of risk is acceptable? the VTN procedure necessarily assumes some level of risk acceptable.
  - What is the standard of review when assessing whether an authority could “legitimately” decide contract is not a PWC?
  - Where does the onus of proof lie – and how can it be met without disclosure of privileged legal advice?

## Questions?

[jneill@landmarkchambers.co.uk](mailto:jneill@landmarkchambers.co.uk)

[cbanner@landmarkchambers.co.uk](mailto:cbanner@landmarkchambers.co.uk)

[clerks@landmarkchambers.co.uk](mailto:clerks@landmarkchambers.co.uk)

0207 4301221