

Retained EU Law in Procurement Law



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THE CONTEXT

- The UK has left the EU (31/01/2020), and the Implementation Period is over (31/12/2020)
- UK no longer subject to the EU Treaties, but has signed up to a number of separate international treaties with EU including:
 - Withdrawal Agreement, 2019
 - Trade and Co-operation Agreement, 2020
- UK Procurement law was derived almost exclusively from EU law, but the European Communities Act 1972 (which gave effect to EU law in the UK) has been repealed
- So what is current position for procurement law after Brexit? Will address two points:
 - Legal basis for procurement law as “retained EU law”
 - Practical changes following Brexit
- Do not cover implications of TCA which will be covered in next talk

RETAINED EU LAW: THE EU (WITHDRAWAL) ACT 2018

- Prior to Brexit, EU law is largely given effect in domestic law under section 2 ECA 1972.
- 2018 Act *repeals* ECA, but provides for *retention* of most pre-existing EU law through one of three routes:
 - Section 2, EU derived legislation
 - Section 3, directly effective EU law
 - Section 4, miscellaneous including certain Treaty rights and directly effective Directives
- EU law is preserved in the form it took on “IP completion day” i.e. the end of the transitional period, 11pm 31 December 2021

RETAINED EU LAW: INTERPRETATION

- Section 6 2018 Act deals with interpretation of retained EU law. Section 6(3) provides that a question as to the “*validity, meaning or effect of any retained EU law*” is to be decided:
 - ... *in accordance with any retained EU case law and any retained general principles of EU law.*
- Further (section 6(7)):
 - “Retained EU case law” means CJEU or domestic case law which “relate[s] to anything to which section 2,3 or 4 applies”.
 - Retained general principles of EU law are principles which must “relate to” sections 2, 3 or 4
 - Retained EU law:
 - ... *means anything which, on or after IP completion day, continues to be, or forms part of, domestic law by virtue of section 2, 3 or 4 or subsection (3) or (6) above*
- Section 6 also draws important distinction between pre- and post-exit case law:
 - Domestic courts may “have regard” to CJEU case law in interpreting retained EU law,
 - Domestic courts are “bound” by CJEU case decided pre-IP completion day, subject to the right of the Supreme Court and certain other courts (now the Court of Appeal) to depart

RETAINED EU LAW: PRIMARY AND SECONDARY CATEGORIES

- Three “primary” categories of retained EU law:
 - EU derived domestic legislation (section 2)
 - Directly effective EU law (section 3)
 - Treaty rights etc (section 4)
- Two “secondary categories”:
 - Retained EU case law
 - Retained principles of EU law
- Difference between primary and secondary categories is that *primary* categories are retained in their own right as sources of law. *Secondary* categories are retained only as relevant to *interpretation* of primary categories
- For procurement law, most important categories will be EU derived domestic legislation, as interpreted etc via case law and retained principles

AMENDMENT OF RETAINED EU LAW UNDER SECTION 8 OF THE 2018 ACT

- Retained EU law can always be amended by primary legislation.
- Section 8 of the 2018 Act provides for secondary legislation to amend retained EU law so as to deal with “deficiencies arising from withdrawal”, namely:
 - ... to prevent, remedy or mitigate-*
 - (a) any failure of retained EU law to operate effectively, or*
 - (b) any other deficiency in retained EU law ...*
- Deficiencies defined in subsection (2)
- Broad “Henry VIII” power which gives government wide-ranging powers to amend primary and secondary legislation. But note limits in statutory wording, as confirmed in Hansard debates, white paper, explanatory notes etc. EG David Lidington, Secretary of State for Justice, 11 September 2017, HC Deb:

A Minister cannot make regulations because he dislikes the underlying policy

RETAINED EU LAW IN PROCUREMENT LAW: RETENTION OF THE PUBLIC CONTRACTS REGS

- Prior to Brexit, UK procurement law derived from EU law, in particular Public Contracts Directive. Given effect in UK law via Public Contracts Regulations 2015
- PCA are therefore “EU derived domestic legislation”, originally made under section 2 ECA 1972 but retained, following Brexit, by section 2 of the 2018 Act.
- PCA provide very pure example of retained EU law which will not be able to operate effectively post-Brexit without amendments. EG:
 - Basic requirement to commence a tender process was to publish a notice in the Official Journal of the European Union (OJEU), but OJEU no longer accessible to UK public bodies post-Brexit
 - Extensive reference made in 2015 Regs to EU Commission
- Absent amendment under section 8, PCA would be incoherent, imposing obligations to do things which cannot be done or are meaningless

WHAT ARE THE MAIN CHANGES TO THE PCA?

- 2020 Regs make detailed changes to PCA text, but largely to effect to a small number of key changes.
- Main difference is that contracting authorities are no longer required to publish notices in OJEU, but must instead publish on the new UK e-notification service “Find a Tender” (FTS).
- Other changes:
 - Transferral of supervisory powers from EU Commission to Cabinet Office
 - Replacing the European Single Procurement Document with SPD
 - Omitting provisions addressing joint cross border procurement with EU member states
 - In reg 57, deleting the mandatory ground for exclusion from participation in procurement of “fraud affecting the European Communities’ financial interests”
- 2020 Regs make similar changes to other procurement legislation: The Concession Contracts Regulations 2016, Utilities Contracts Regulations 2016
- Thus changes are largely procedural, relating to identity of institutions and the like. In practice there is not much changes for UK businesses and contracting authorities

TRANSITIONAL ARRANGEMENTS: ONGOING TENDER PROCESSES

- Reg 1(6) of the 2002 Regs gives effect to the Schedule which “makes provision in relation to procurements tht are ongoing on IP completion day”, including by “disapplying” amendments to the procurement regime.
- Basic effect is that procurement exercises which commenced prior to 31 December will continue to be governed by EU procurement rules, in accordance with the Withdrawal Agreement.
- Most significant for Framework Agreements, because call-offs under any Framework Agreement will need to be conducted under EU procurement rules for lifetime of Framework Agreement. This may become important if UK simplifies its procurement rules before that time.

Thank you for listening

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