

# WHAT IS THE PLAN FOR PROCUREMENT AND STATE AID GOING FORWARD, POST-BREXIT, INCLUDING THE IMPACT OF UK ACCESSION TO THE WTO GPA?

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Jonathan Davey, Partner



# WHAT HAPPENS AT THE END OF THE TRANSITION PERIOD?(1)

- Transition Period ends 2300, 31 December, unless extended
- Thereafter, public procurement in the UK is governed by the relevant existing regulations, as amended (See PPN 02/19). Amendments include:
  - Removal of references to Commission
  - Use of “Find a Tender” rather than OJEU Advertisement
  - Existing ECJ case-law interpreting Directives binds UK courts, until overturned by the Supreme Court (or CoA according to published draft SI)
  - GPA as basis for access for EU-based economic operators
- Transition provisions (Articles 75-78 Withdrawal Agreement) state that:
  - Procurements commenced before end of transition continue to be governed by Directives (including remedies); applies to Framework call-offs
  - E-Certis will be accessible for 9 months

# WHAT HAPPENS AT THE END OF THE TRANSITION PERIOD?(2)

- GPA is basis for procurement relationship with EU, until something else replaces it:
  - Political Declaration on future relationship, agreed alongside the UK-EU Withdrawal Agreement, looked to the parties improving on GPA commitments
  - Was in EU's mandate for the current trade negotiations, which envisaged partnership re mutual opportunities beyond parties' commitments under GPA in specific areas at all levels of government (incl sub-central level) as well as utilities, and standards going beyond GPA. But procurement not included in HMG mandate.
- UK will be an independent signatory to GPA
- UK internal market:
  - Homogeneity no longer assured via implementation of Directives
  - Discussions underway to avoid divergence (via Common Frameworks Programme)

# GPA POINTS TO NOTE

- Access to procurements outside EU largely as before Brexit
- Coverage schedules: exclusions compared to Directives include defence hardware, light touch services, some concessions, and some utility activities including procurements by private sector utilities. No below-threshold coverage
- Implications include (from 2300 on 31.12.20):
  - A freer hand for MoD on some defence procurement
  - Private utilities do not need to afford access to procurements to EU bidders; EU bidders might establish a UK-based subsidiary?
- Remedies not required to be as effective as EU (eg no requirement for standstill, auto suspension or ineffectiveness)
- UK could agree different coverage schedules with EU as a result of ongoing negotiations

# WHERE DO STATE AID ISSUES ARISE IN A PROCUREMENT CONTEXT?

- Today's focus on procurement-related state aid
- Normally, procurements effected via a competitive process will not constitute state aid (see London Underground, but cp Corsica Ferries (2013) (single bid capable of acceptance) and Clonee/Kells Commission Decision)
- State aid issues arise in a procurement context in:
  - Regulation 13: subsidised works and associated services contracts where funding >50%
  - ALT's: specific right to exclude where state aid (note that state aid references will fall out of PCR in the absence of a "deal")
  - Contract change benefitting supplier
  - Purchases by CA's in excess of actual need (BAI, 1999)

# STATE AID POST-TRANSITION (1)

- Unlike slow-burn changes to PCR, UK is looking to establish a domestic subsidy control regime soon after end of transition:
  - BEIS announced in September that UK will follow WTO Regime: principally in Agreement on Subsidies and Countervailing Measures (**ASCM**) and anything agreed in FTA's; no details as yet; noted unique nature of EU state aid rules
  - UK does not intend to revert to *“the 1970s approach of trying to run the economy or bailing out unsustainable companies”*
  - ASCM already applies between UK and other WTO members; will (from 1.1.21) also apply as between UK and EU members, subject to ongoing negotiations!
- Guidance promised by end 2020
- Note draft SI to disapply EU-derived state aid rules (State Aid (Revocations and Amendments) (EU Exit) Regulations 2020); doesn't affect NI Protocol

# STATE AID POST-TRANSITION (2)

- Mind the Gap(s)?
  - ASCM doesn't cover services
  - *Ex post* only; no recovery of subsidies (only countervailing duties)
  - Goods issues actionable at state level only, through WTO DS Mechanism (ie not in private litigation)
  - “Free for all” for a period post-Transition if no rules are in place? HMG has said it wants to avoid a “subsidy race”
- BEIS has promised opportunity for comment: need for pan-UK approach stressed in Internal Market White Paper
- Watch for interplay between procurement rules as amended and new domestic subsidy control regime
- EU developments: White Paper on foreign subsidies (Press Release June 2020) to address perceived gap (eg where foreign subsidies distort a public procurement)

# WHAT MIGHT WE EXPECT FROM THE GREEN PAPER?

- Stakeholder meetings held 2019 and 2020; Procurement Transformation Advisory Panel
- Could be out as early as this month; or at least by end of year
- Remember that it won't go below GPA level
- What we might expect:
  - Focus on “cutting red tape” (Telegraph, 4.11.19)
  - Sue Arrowsmith set out 7 proposed principles for reform, including a single set of regulations based on (“old”) utilities regime
  - Reduced number of procedures, relaxation on participant numbers (eg why 5 in RP?)
  - Possibly, a new tribunal to offer an alternative in contentious matters?
- Not likely to be rapid change

# GREEN PAPER: WHAT ELSE WOULD I LIKE TO SEE?

- A decent transition period
- Whitewash procedure instead of Fastweb and Faraday
- Longer duration frameworks, and ability to “admit late”
- Greater latitude on contract change including:
  - some relationship between contract size and “substantiality”
  - test by reference to sector-specific and contract-specific norms
- Increased thresholds, especially for services (NB GPA contains thresholds)
- Some right to make direct awards in appropriate cases
- Remedies changes eg ineffectiveness
- Less prescription around SQ and award criteria

# SOME PRACTICAL THOUGHTS

- Interesting to see whether CA's "game" transition issues...
- And whether there will be a rush to litigate before remedies weaken
- Will devolved administrations/regions aid bidders? Would provision of subsidies be a legitimate basis for exclusion? (Presumably not). Reg 69 harder to apply without state aid references?
- How will subsidised competition (for example from Asia) be handled? (WTO mechanisms likely to be impractical) (issue addressed by EU White Paper on foreign subsidies)
- UK companies falling foul of EU White Paper on foreign subsidies? But aid post-31.12 to UK companies doesn't "count" as state aid under Directives
- No private law claims based on unlawful aid

# ADDENDUM

## Update:

- New draft (2020) amending regulations have been published to amend the existing UK procurement regulations
- The changes are to ensure that the PCR (etc) work effectively after the end of the Transition Period
- They will replace the 2019 amending regulations referred to in PPN 02/19, but largely mirror the changes to the way the PCR (etc) work set out in the 2019 regulations

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