NOTES for PRESENTATION TO THE UK ASSOCIATION FOR EUROPEAN LAW

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UK Rapporteur's Summary of Findings from his Paper on General Topic 3:
FIDE: 2014:

"Public Procurement Law: Limitations, Opportunities and Paradoxes"

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Introduction

Northern Ireland background and professional practice inevitably colours my report:-

-jurisdiction: where more state ownership of assets in NI than in other parts of the UK (water, transport, ports)
-innovation in procurement technique in NI, esp. where particular political and social imperatives
-Belfast: procurement litigation capital of UK?
-N. Ireland has the UK's only land border with another MS.

Structure of these Notes: (following and condensing our general rapporteur's questionnaire):-

A. Systematic challenges in regulating public procurement in UK (Question 1);
B. Defining public contracts: distinguishing them from state measures
C. In-house/consensual/mixed procurement and non-procurement/unilateral arrangements in the UK (2-7);
D. Relationship between public procurement, competition and other EU law - how it works in the UK (8-10);
E. Strategic use of public procurement and innovation in the UK (11&12);
F. Remedies in the UK (13);
G. Conclusions/Reform: Contributing to a new EU public contracts law? (14).

A. Systematic Challenges in Regulating Public Procurement in UK (Question 1)

Transposition in the UK

Different measures in different UK jurisdictions.

By their constitutional settlements, devolved governments "do not have the power to ..." act incompatibly with ... EU law.

Horvath case (CJEU): Policy divergence in transposition/implementation possible in the different legal jurisdictions comprised in the UK.

UK Government: transposition policy: now changed to "copyout", instead of "elaboration".

It is thought this may reduce the risk of incompatibility between the EU and national implementing measures.

Beyond Transposition to Implementation:

Bigger challenge to common law systems - as our rapporteur points out - codification of the law of public purchasing is a much more familiar concept in the civil law jurisdictions.

By tradition in the common law jurisdictions are much less hands-on regulation in public purchasing, and generally, with regulation comes more administration, possibility of disputes, and court cases.

So the UK has moved from private law, "willing seller/willing buyer" in a contract law setting, with the possibility of arbitration or contractual disputes which reach court, to compliance with a detailed prescriptive public law charter restricting purchasing techniques and the availability of judicial scrutiny on whether it is met.

It is accepted by the drive to create the new directives (the classic in particular) that the rules have been too burdensome: this raises the question, I suggest, that lawyers and economists in the common law jurisdictions have a special role to play in answering, where we have had less regulation: I think the question is: how far do we need detailed regulation to protect the single market and what deleterious effects may such rules have on trading? Have we paid enough attention to "proportionality" or "subsidiarity" in this context?

This question is especially relevant, I suggest where public purchasers are increasingly driven to focus primarily on compliance issues, and where:-

- innovation in purchasing techniques necessarily takes second place to meeting the rule of law;

- where innovation itself can become a major compliance issue; and where

- the existence of the rules cause distortions in the market.

I enlarge on these matters in my paper.
M**y key findings are that the EU legislative regime has been dutifully implemented in the UK. The body of law thus created constitutes an unprecedented public law intrusion into UK contract law which causes market distortion and comes at a cost to innovation. Major reductions in the EU regulatory burdens are needed. The current system of judicial dispute resolution in the UK appears to compare unfavourably with specialist systems adopted in many continental states, and should be considered for reform.**

B. **Defining public contracts: distinguishing them from state measures in-house/consensual/mixed procurement and non-procurement/unilateral arrangements in the UK (2-7)**

One could characterise these sections as the rapporteur asking, "what rules do, or should apply to arrangements on the borderline of "simple" procurements, or in circumstances which are not procurements as defined, but are similar to them".

My starting point is to remind readers of, firstly, art 345TFEU (ex 222TEU), which states:-

> "This Treaty shall in no way prejudice the rules in Member States governing property ownership",

and secondly, the way in which the application of the fundamental principles of EU law to the public sector affects the application of the rules.

The new Classic Directive is very helpful at the outset of the recitals, where, in a new departure, it defines which arrangements are caught by the directive and which are not.

In my paper I trek the reader through the UK Government guidance on the areas raised, and case-law from the UK in the areas.

To pick some examples:-

Development Agreements, Auroux and like cases -

When do land development agreements attract the application of the rules?

In particular, do statutory planning agreements do so - particularly where the Muller case confirms that regulatory exercises are not caught by the rules. I refer to the UK Government guidance which takes the line that works contracts only exist where there are specific legally binding obligations to carry out the works.

However, it is seen to be a difficult area where individual analysis of the circumstances is appropriate.

Then there is the *Teckal* case exemption – ie where a contract is let to a third party, it is not a public service contract if it is under close control of the contracting authority and its essential function is for the contracting authority.

In the UK we have the Brent London Borough Council -v- Risk Management Partners case.

In this case the Council was challenged when an insurance contract was awarded to London Authorities Mutual without a regulated procedure. Teckal was pleaded in defence, where the Teckal exception had not been specifically included in the national

transposition of 2004/18. The court however held that the implementing regulations could be interpreted teleologically so that the Teckal exception could be read in.

This ability to "read in" shows an interesting flexibility in the national measure, a flexibility which the Commission has not shown in its prescriptive interpretation of the directives - ie if a technique is not specifically provided for in the directives, it appears not to be permitted. On this issue I refer, for example, to the early use of frameworks arrangements in Northern Ireland which it considered impermissible; and to the necessarily contorted nature of measures adopted (to meet the requirements of the rules) in order to deliver social policy of great importance to establishing stability in N. Ireland through procurement. (see below)

As to in-house arrangements: I explore the concept of Crown Bodies, and the indivisibility of the Crown, how far that concept stretches where government has become so splintered, and how arrangements between Crown Bodies are regulated by "service level agreements", which are less than contractual.

I also comment on "compulsory competitive tendering" where government in-house bodies were made to tender against private sector providers and on how that technique fell out of fashion.

On consensual and mixed procurement/non-procurement arrangements: Our rapporteur refers us to various techniques - and there are even more. In addition to in-house arrangements, this heading encompasses; consortia arrangements; subcontracting; step-in rights; contracts incidental to the main contracts; privatisations; contracts below threshold. This is a cornucopia of complexities! But too many to explore in the time available.

However, I refer readers to London Underground case - a Commission state aid case - interesting insights to extensions renewals and mixed procurements; and to Severn Trent Welsh Water case on when privatisations combined with a buying-back of services comprises procurement. In this context the UK regards the inclusion of a provision on creating "Mutuals" which gives cover from the application of the rules in the draft Classic Directive a particular success.

Further, I refer to the provision by national authorities of financial provision ("grant-giving") as a "unilateral measure".

In this respect as the recitals explain, most grant giving is likely to escape the rules because generally with grant-giving, government doesn't buy a service, it chooses to encourage an activity. So for example – Query: why commission on a service when there are operators in the field who you can encourage with grants, especially where you are at once freed from the procurement compliance regime? If you do choose to do this to escape the burdens of the procurement rules - does not this cause a distortion of the economic activities that would otherwise occur? I suggest it does.

My finding is that there is dutiful implementation of these rules in the UK, with issues particular to the UK arising from peculiarities of the structure and development of public sector trading in the UK.

Whilst Art 345TFEU is not breached by the procurement rules, I suggest that the existence and operation of the rules is too inflexible, and can unnecessarily influence how the state decides on commissioning/arranging major projects.

C. Relationships between public procurement, competition and other EU law - how it works in the UK (Questions 8-10)

As I mentioned, in the past, in the UK contracting was essentially seen as a private law matter, and private law contractual rules also applies in contracts between government and the private sector.

Equally, in general, discretionary acts of government will on the other hand attract the application of public administrative law, though with a lighter hand in contractual matters.

I do identify, however some key interactions where contract law is overridden by public administrative law for overriding public interest reasons.

Similarly, EU law also took a light touch approach to limiting the discretion of contracting authorities which came into play only where the fundamental principles regarding inter member-state trade were in play (and of course competition law) - that is, until the public procurement rules so particularised processes of purchasing that a new regulatory environment was created.

In effect the inter-member-state rules "metamorphosed" into single market rules with internal application. It is worth asking whether the EU procurement should have their ambit restricted by a "inter-member-state effect" test? The NI experience: none of the procurement litigation in Northern Ireland has involved a nationality discrimination issue. Of course one can draw the inter-MS trade test more widely so that it is triggered with "potential" effect on inter-MS trade. This seems fine for advertising contracts, but do we really need EU supervision of contracting technique after that stage in a procurement process? Even if we do, do we need it in the detail we have at present? Is it a proportionate response to preserving the single market? I believe we need to keep costs and constraints to a minimum in order to preserve the essence of healthy trading- that is that free flowing variable known as "doing the deal".

My experience and therefore my finding is that EU procurement regime has given rise to distortions in how the single market might otherwise operate. To avoid the burdens of operating the rules, contracting authorities can, and do for example:-

- **bring provision in-house;**
- **offer grants, instead of buying services;**
- **overlap procurements to ensure continuity of supply where regulated procurements often entail delays; and from a private sector perspective,**
- **bidders often avoid public contracts, as they are expensive to bid for, often delayed and prone to often longsome disputes by unsuccessful tenderers.**

In addition, contacting authorities are more likely to run simpler (though not necessarily better) procurements largely based on price to avoid complexities and disputes concerning the rules on evaluation.

D. Strategic use of public procurement and innovation in the UK (Questions 11&12)

Here I give some examples of innovative techniques in their day in the UK with particular reference to Northern Ireland.

At an early point, the Commission took issue with the use of simple framework arrangements in NI as not compliant, as they were not provided for in the EU directives - only to subsequently find the CJEU "ok" them, and the Commission then to legislate for them.

Another example is the development of social policy integration where again the Commission were slow off the mark, with the Beentjes case (CJEU) opening the way for some alleviation of the strictures of the rules, and the more recent Dutch "fair trade case" can be viewed in a similar way. Again, developments were CJEU led, before finally being given legislative recognition at EU level.

I give the example of the NI struggle to attempt to alleviate unemployment with smart procurement techniques. This was an early initiative of the NI Executive of great importance as by addressing unemployment problems, it was in effect addressing the major imbalance in the unemployment of the two religious community groups - this was a vital democratically arrived at and therefore cross-community initiative intended to help stabilise the political settlement. However, for compliance reasons it ended up being a complex scheme, whereby bidders had to submit a plan to absorb long-term unemployed with the rest of their bid. Absence of this would disqualify. This plan could not be taken into account in bid evaluation, not being a part of the subject matter of the contract. However, under the Nord Pas de Calais decision (CJEU), it could be taken into account in the event of a tie between bidders. The winner's scheme became a part of the contract entered into. The NI Executive adopted the scheme which had to be designed in this convoluted way in order to meet the requirements of the rules.

I believe similarly that the innovative "partnership procurement" technique struck down as incompatible with the EU rules by judicial decision in Northern Ireland deserves, and in the end may be made legitimate by legislation. The innovation partnership provisions in the new draft Classic Directive is a step in the right direction, but I suggest is too limited, applying only where no current solution exists.

My finding is that, even with the new draft directive, the regulatory regime stifles innovation.

E. Remedies in the UK (13)

For reasons of time, I will pass through this quickly, raising one issue from the paper:

In various continental systems, disputes can be dealt with by specialist tribunals, with minimal time and costs, and low appeal rates and with the approbation from the

Commission, while our system appears to operate more slowly and at very considerable expense.

The UK needs a better adjudication system, and should be prepared to learn from the systems used in other EU countries to guide reform.

My finding is that the resolution of procurement disputes in the UK is less efficient and more expensive than that available in various continental legal systems. Reforms should be considered.

F. Conclusions/Reform: Contributing to a new EU Policy Contracts Law? (14)

In conclusion, I recite some of the key changes in the draft new classic directive. I refer to the UK governments' "take" on the exercise which is overwhelmingly positive, in a nutshell, welcoming the provisions for mutuals, the shortening of processes, more flexibility in a number of areas and encouragements for SMEs.

I describe the key milestones in EU public procurement law - to show that they have come a long way from treaty provisions on free movement without established direct effect, from earlier barrier removal to the detailed regime of today. I comment on the rationale for this development which seems to have been on the basis that inter Member State barriers could not be adequately addressed by general rules, so positive obligations of increasing complexity were placed on contracting authorities and, in many ways, the question raised by our rapporteur points accurately at the emerging new reality. In the EU public contracting regime, there is substantive law covering all the old common law elements of contracts, especially in respect to offer, but also concerning acceptance, consideration, illegality and remedies. This is in a setting of an EU law framework within which national discretions can be exercised, but it nevertheless poses the question of the proportionality of the regulatory regime to preserving healthy trading in the Single Market.

By any measure, I believe we remain with a complex regulatory regime with compliance at a premium. In the area of free trade, initiative and innovation, speed and flexibility are usually seen as the hallmarks of success. That the initiative for the new directives was to simplify is, in itself recognition that what we have is too complex. We in the common law jurisdictions should see this better than most, and be in a good position to contribute to further review of the law in this area.

My report finds that there is still a very long way to go to balance effective single market maintenance with optimum trading conditions for public procurement.

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