isel
Irish Society for European Law

UKAEL
UNITED KINGDOM ASSOCIATION FOR EUROPEAN LAW

CURRENT ISSUES IN EU PUBLIC PROCUREMENT AND STATE AID

3rd bi-annual joint European conference
Goodenough College, Bloomsbury, London
Friday 19 June 2009
9.30 – 17.30

Welcome from UKAEL (**Christopher Vajda QC**) and ISEL (**Emily Gibson BL**)

PUBLIC PROCUREMENT

SESSION I: REMEDIES – CURRENT ISSUES IN IRELAND AND UK
Chair: Lord Justice Girvan, Court of Appeal of Northern Ireland
UK: ***Mark Clough QC***, Partner, Addleshaw Goddard, London
Ireland: ***Anna-Marie Curran***, Partner, A&L Goodbody, Dublin
Commentator: ***Professor Derrick Wyatt QC***, Oxford University and Brick Court Chambers
Discussion followed by Coffee

SESSION II: CASE STUDIES
Chair: Mr Justice Nial Fennelly, **Supreme Court of Ireland**
EU and US Procurement: regulating a change in the contract: ***Michael Bowsher QC***, Monckton Chambers
State engagement of the market through Procurement: the Northern Ireland Experience:
Brian Doherty, Departmental Solicitor's Office, Belfast
Commentator: ***Professor Martin Trybus***, University of Birmingham
Discussion followed by Lunch

STATE AID

SESSION I:
Chair: Mr Justice John Cooke, **High Court of Ireland**
The application of the state aid rules to regeneration and infrastructure projects: ***Bridgette Wilcox****, Partner,* Eversheds
Commentator: ***Anthony M. Collins SC***, Law Library, Dublin
Discussion led by Chair
The Ryanair judgment and its implications: ***Damian Collins***, Partner, McCann FitzGerald, Dublin & Brussels
Discussion followed by Tea

SESSION II
Chair: Professor Sir Francis Jacobs QC KCMG, King's College London
The Commission's response to banking crisis: ***Leo Flynn***, EC Commission, State Aids
Commentator: ***Mark Friend***, Partner, Allen & Overy LLP, London
Discussion led by Chair
Altmark in the light of the CFI Irish BUPA case: ***Professor Philippa Watson***, Essex Court Chambers
Commentator: ***Nicholas Green QC***, Brick Court Chambers
Discussion followed by closing remarks

Drinks reception with access to the gardens of Goodenough College and conference dinner in
The Parliament Chamber at the Honourable Society of the Middle Temple

Accredited with 6 CPD points
Registration Fees: Members £200, Academic Members £120, Student Members £60, Non-Members £250

(*Fees include any materials, lunch and refreshments, but not conference dinner. The organisers will try to adhere to the above programme, but reserve the right to make changes if necessary*)

Conference organisers: Christopher Vajda QC and Margaret Gray BL (UKAEL), Emily Gibson BL (ISEL liaison)

Contact: UKAEL Administrator, School of Law, King's College London, Strand, London WC2R 2LS
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ADDLESHAW GODDARD

Public Procurement Session 1: Remedies - current issues in Ireland and UK

Mark Clough QC
Partner, Addleshaw Goddard LLP

ADDLESHAW GODDARD

Remedies – current issues in Ireland and UK

3 Questions

- Has it become easier for unsuccessful tenderers to successfully challenge the award of public sector procurement contracts in the UK?
- Have recent UK cases contributed to greater legal certainty rather than create areas of risk for contracting authorities and potential opportunities for unsuccessful tenderers?
- Will UK implementation of the new Remedies Directive 2007/66 increase legal certainty or simply make legal challenges even easier?

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Has it become easier for unsuccessful tenderers to successfully challenge the award of public sector procurement contracts in the UK?

- Alcatel case law
- Standstill period and debrief obligations: Regulation 32
- *Amaryllis Ltd v HM Treasury* (8 May 2009)
- *Lightways (Contractors) Ltd v North Ayrshire Council* [2008] SLT 690
- Costs of preparing tenders
- More successful challenges
- E.g. *Letting International Ltd v London Borough of Newham* [2007] EWCA Civ 1522
- *Risk Management Partners Ltd v Brent Borough Council* (CA, 9 June 2009)
- *Amaryllis* case

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Have recent UK cases contributed to greater legal certainty rather than create areas of risk for contracting authorities and potential opportunities for unsuccessful tenderers?

Current issues

- Transparency and equal treatment principles applied to tender criteria and weighting:
  - Case C-532/06, *Lianakis v Demos Alexandroupolis* (14 January 2008)
  - *Letting International Ltd v London Borough of Newham* [2008] EWHC 1583 (QB, 7 July 2008)
  - *McLaughlin & Harvey Ltd v Dept of Finance & Personnel* (22 February 2008) [2008] NIQB 25 (11 September 2008) [2008] NIQB 91, (30 October 2008) [2008] NIQB 122

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Have recent UK cases contributed to greater legal certainty rather than create areas of risk for contracting authorities and potential opportunities for unsuccessful tenderers?

Current issues

- In-house contracts and *Teckal*
  - *Risk Management Partners* (CA 9 June 2009)
  - Case T-125/06, *Centro Studi Antonio Manieri Srl v Council of the European Union* (28 January 2009)
- Changes to contractual terms in breach of transparency and equal treatment
  - Case C-454/06, *Pressetex Nachrichtenagenteur v Republic Osterreich* (19 June 2008)
  - *R (Law Society) v Legal Services Commission* [2008] 2 WNR 803 (CA)
- Can past experience and technical ability be MEAT criteria after *Lianakis*?

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Have recent UK cases contributed to greater legal certainty rather than create areas of risk for contracting authorities and potential opportunities for unsuccessful tenderers?

Current issues

- When does time run for a legal challenge to be made 'promptly and in any event within 3 months from the date when grounds for bringing proceedings first arose…'
  - *Jobsin.co.uk v Dept of Health* [2001] EuLR 685 (CA)
  - *Amaryllis* case (8 May 2009)
  - *Risk Management Partners* (9 June 2009)
  - *Henry Bros (Magherafelt) Ltd & Others v Dept of Education for Northern Ireland* (21 December 2007) [2007] NIQB 116 (3 October 2008) [2008] NIQB 105, (19 December 2008) [2008] NIQB 153

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Have recent UK cases contributed to greater legal certainty rather than create areas of risk for contracting authorities and potential opportunities for unsuccessful tenderers?

- Injunctions – *American Cyanamid* test – Regulation 47(7)(a) Letter before Claim
  - *Letting International* case [2007] EWCA Civ 1522
  - *Lion Apparel Systems Ltd v Firebuy Ltd* [2007] EWHC 2179
  - *Partenaire Ltd v Dept of Finance & Personnel* [2007] NIQB 100
  - *Lightways (Contractors) Ltd v North Ayrshire* [2008] SLT 690
  - *Henry Bros* case
  - *McLaughlin & Harvey* case

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Have recent UK cases contributed to greater legal certainty rather than create areas of risk for contracting authorities and potential opportunities for unsuccessful tenderers?

Setting aside contracts

- Regulation 47(9) and Framework Agreements

  Regulation 47(9) provides that:

  "in proceedings under this regulation the Court does not have power to order any remedy other than an award of damages in respect of a breach of the duty owed in accordance with paragraph (1) or (2) if the contract in relation to which the breach occurred has been entered into."
- *McLaughlin and Harvey Ltd v Dept of Finance and Personnel* (No. 3) [2008] NIQB 122
- *Henry Bros (Magherafelt) Ltd v Department of Education for Northern Ireland* (No. 3) [2008] NIQB 152
- C-503/04 *Commission v Germany* [2007] ECR I-06153

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Have recent UK cases contributed to greater legal certainty rather than create areas of risk for contracting authorities and potential opportunities for unsuccessful tenderers?

Setting aside contracts

- Contract awarded during the standstill period
  - *DR Plumbing & Heating Services v Aberdeen City Council* (unreported) (3 February 2009)
- Changed decision
  - *McConnell Archive Storage Ltd v Belfast CC* [2008] NICh 3
- Decision to abandon
  - *Federal Security Services Ltd v The Northern Ireland Court Service* [2009] NIQB 15

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Will UK implementation of the new Remedies Directive 2007/66 increase legal certainty or simply make legal challenges even easier?

Remedies Directive 2007/66

- Implementation: 20 December 2009
- New rules:
  - Standstill period
  - "Ineffectiveness"

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Will UK implementation of the new Remedies Directive 2007/66 increase legal certainty or simply make legal challenges even easier?

Standstill period

- Legislative implementation of *Alcatel* and *Commission v Austria*
- Minimum standstill period of 10 days after notification of decision to award contract (email or fax notification) or 15 days (notification by post)

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Will UK implementation of the new Remedies Directive 2007/66 increase legal certainty or simply make legal challenges even easier?

Derogations from standstill period?

- Where no OJEU notice required
- Where single tenderer
- Where contracts awarded under framework agreement or dynamic purchasing systems

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Will UK implementation of the new Remedies Directive 2007/66 increase legal certainty or simply make legal challenges even easier?

Ineffectiveness

- Failure to publish OJEU contract notice when required by relevant Directive
- Failure to comply with the rules on review procedures
- Failure to comply with standstill period
- Combined with breach of relevant Directive which affected tenderer's chances of obtaining the contract

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Ineffectiveness

- Choice of retrospective or prospective? OGC favours prospective
- Alternative penalties if cancellation prospective "*effective, proportionate and dissuasive*" – fines or shortening contract
- Possible exception where "*overriding reasons relating to a general interest [which] require that the effects of the contract should be maintained*."
- Alternative penalties
- Economic interests directly linked to the contract concerned not overriding reasons

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Will UK implementation of the new Remedies Directive 2007/66 increase legal certainty or simply make legal challenges even easier?

Ineffectiveness

- Time limit for ineffectiveness application:
  - No later than 30 days after contract award notice publication/notification of contract conclusion
  - In any event, no later than 6 months after conclusion of contract

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Will UK implementation of the new Remedies Directive 2007/66 increase legal certainty or simply make legal challenges even easier?

Implementation issues

- As drafted, the Regulations may allow the 90 day limitation period to challenge the tender process to be reopened when the standstill notice is issued. This cannot be the intention.
- Regulation 47M(5) and (6) probably breach the directive - they require the court not to exercise its power to make a declaration of ineffectiveness in a way that is inconsistent with any contract provisions agreed between the public authority and the successful tenderer.
- There are some real drafting issues with the Regulations. For example Regulation 32(4) and (5) are completely redundant and will cause confusion (need for contracting authority to give reasons if within 2 days following the standstill notice the bidder asks for reasons - but the contracting authority is also required to give these exact same reasons in the standstill notice itself). Also, language used is not helpful ("prospective ineffectiveness", "pre-contractual remedies"). Regulation 32(2)(d) attempts to implement the directive in a way that is unnecessarily complex and will in practice be unworkable.

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Will UK implementation of the new Remedies Directive 2007/66 increase legal certainty or simply make legal challenges even easier?

Implementation issues

- Where a contracting authority fails to give reasons (including characteristics and relative advantages), it seems that the consequence will be the standstill notice is ineffective - and therefore that there is a risk of a declaration of ineffectiveness for up to 6 months. This is not explicit and needs clarification. Real issue for successful bidders as well as contracting authorities - successful bidders will now have a huge interest in ensuring the notice is correctly given!
- Automatic "injunction" if an unsuccessful bidder challenges - (cf American Cyanamid) - will dramatically alter the balance of power when a tenderer is unhappy. Will this mean contacting authorities will be far more thorough in debriefing and will approach debriefs with much trepidation?

UKAEL/ISEL Joint Conference on Public Procurement and State Aid Issues

19 June 2009

Public Procurement: Remedies: Current Issues in Ireland

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1. INTRODUCTION

The issue of remedies for breach of procurement rules is currently centre-stage in Ireland. Ireland is in the process of a consultation process on the draft Regulations which will transpose the revised Remedies Directive[1] into Irish law. There are two infringement cases pending before the European Court of Justice against Ireland in relation to remedies in procurement cases[2]. The change in economic climate in Ireland and the consequences for the private sector in losing lucrative public sector work has also given a greater incentive to unsuccessful tenderers to consider the remedies available to them. This coupled with the fact that a greater number of candidates are being excluded at pre-qualification stage (due to added scrutiny of their balance sheets and the sheer number of candidates seeking to be pre-qualified) gives rise to the inevitability that there will be an increase in procurement challenges. From a contracting authority's perspective, the significant cuts in public expenditure and the added pressure to ensure value for money have created funding issues and delays in contract awards. Moreover, contracting authorities are now being faced with requests from bidders to permit changes to bids submitted prior to the downturn or where contracts have already been awarded, to vary the terms of those contracts. All of these issues give rise to not only greater risk for contracting authorities but a greater incentive for unsuccessful bidders to seek remedies for breach of procurement rules.

2. THE DRAFT REMEDIES REGULATIONS

On 23 April, 2009, the National Public Procurement Policy Unit (**NPPPU**) of the Department of Finance launched a consultation on the draft Regulations which will transpose the revised Remedies Directive into Irish law (a copy of the draft Regulation is annexed to this paper). Submissions on the draft Regulations are currently being considered and a final draft of the Regulations is expected to be published over the coming months. The NPPPU's objective is to ensure that the Regulations are transposed into Irish law in advance of the transposition deadline of 20 December 2009. A summary of the key changes introduced by the draft Regulations is set out below.

2.1 Internal Review

The objective of the revised Remedies Directive is to improve the effectiveness of review procedures concerning the award of public contracts. Many commentators both in Ireland and abroad have raised the question of whether Ireland's review procedure which establishes the High Court as the sole review body for procurement challenges is an effective regime. Factors such as legal costs, damage to relationships with crucial public sector customers, cross undertaking in damages for injunctive relief, duration of proceedings and evidential issues are factors that often persuade unsuccessful tenderers not to seek a remedy for procurement law breaches. Possibly to address these questions over the effectiveness of the Irish review regime, the NPPPU has opted for an internal pre-contract review procedure in the draft Regulations. It is not compulsory regime i.e. it is not a pre-condition to seeking review by the High Court of the decision (which was an option under Article 1(5) of Directive 2007/66), although one of the questions posed in the consultation process is

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[1] Directive 89/665 as amended by Directive 2007/66/ECwith regard to improving the effectiveness of review procedures concerning the award of public contracts, [2007] OJ L335/31. The NPPPU has not yet consulted on the transposition of the revised Utilities Remedies Directive (Directive 92/13 as amended by Directive 2007/66/EC) although it is anticipated that the implementing Regulations will largely mirror the public sector legislation.

2 Case C-455/08, Commission v Ireland (2009 OJ C32/12) and Case C-456/08, Commission v Ireland (2008 OJ C313/20)

whether the internal review procedure should be made mandatory.

The internal review procedure is set down in Regulation 12 of the draft Regulations. Any "eligible person"[3] may apply to a contracting authority for reconsideration of a reviewable decision on grounds that the decision allegedly infringes Community law or national law transposing Community law. The internal review is only available where the contract has not been concluded. The draft Regulations provide that the review cannot relate to a decision to award the contract to a particular tenderer or candidate. The application for reconsideration must be in writing and must be made within the review period (i.e. 14 or 16 calendar days depending on whether notice of the decision is sent by electronic or other means). The contracting authority must reconsider the decision and notify the applicant in writing of its reconsideration decision within 30 days. Similar information which is required of contract award decisions must be provided for the reconsideration decision. A further standstill period is applied after the notice of the reconsideration decision is sent to the tenderer. A contracting authority cannot conclude the contract for the duration of the reconsideration process and until the end of the standstill period. An aggrieved person may apply to have the reconsideration decision (or the failure to make a reconsideration decision) reviewed by the High Court.

The internal review mechanism set out in Regulation 12 will undoubtedly create resource, time and cost issues for contracting authorities. Moreover, it is questionable whether a complete reconsideration of the decision can be undertaken within the time frame of 30 days (there is no provision for extending this period under the current draft Regulations). There is also the question of the independence of the internal review body. There is no guidance in the draft Regulations in relation to the composition of the review body which carries out the reconsideration exercise. The Regulations merely require that the reconsideration be carried out by the contracting authority. In order to ensure due process, it would be prudent for contracting authorities to ensure that the persons who reconsider the decision are different to those involved in the initial decision. However, there may not be other persons within the contracting authority who would have the expertise and technical knowledge to carry out a reconsideration of the decision within the time frame. This may result in the reconsideration decision being carried out by the persons who were involved in the original decision. All of these issues make it likely that if Regulation 12 finds itself into the final version of the Regulations that there will be challenges in relation to due process of the internal review. Finally, there is also the possibility that the inclusion of the internal review mechanism may create an incentive for the establishment of an independent review body (other than the court) when it becomes apparent that contracting authorities neither have the time or resources to facilitate an effective reconsideration process.

2.2 Pre-contractual Remedies

One of the weaknesses identified by the consultation on remedies prior to the adoption of Directive 2007/66/EC was that the current review mechanism did not always make it possible to ensure compliance with Community law at a time when infringements could still be corrected. Directive 2007/66 therefore sought to tackle the "race to signature" by providing for a standstill period and an added focus on pre-contractual remedies. The Irish draft Regulations reflect this objective and are drafted to ensure that pre-contractual remedies are the primary remedy for breach of procurement rules. Notably, under the Irish Regulations, the review period for initiating a challenge will principally be the same as the standstill period (apart from cases involving an application for

[3] ***An eligible person is defined as any person who has, or has had, an interest in obtaining a reviewable public contract, and who alleges that he or she has been harmed, or is at risk of being harmed, by an infringement of Community law in the field of public procurement or national law transposing that law.***

ineffectiveness). In addition, where an eligible person applies to have a decision reconsidered, the contracting authority is precluded from entering into the contract for the duration of the review procedure and until the expiration of the standstill period after the reconsideration decision is notified. This will mean that in the majority of cases that come before the Court (apart from cases where the applicant is seeking an ineffectiveness remedy), the contract will not have been concluded. Moreover, where proceedings are initiated, a contracting authority is prohibited from concluding the contract until the Court so orders (this is required by Article 2(3) of Directive 2007/66/EC). This emphasis on pre-contractual remedies will raise a number of interesting legal issues in practice.

It is likely that contracting authorities will seek leave from the Court at the earliest opportunity to conclude the contract. It is not clear what the standard of review for such an application will be. In many respects, it will be similar to an appeal of the grant of injunctive relief (i.e. as the mere initiation of court proceedings will entail an automatic suspension of the contract award, a contracting authority will have to apply to have the automatic suspension discharged). The standard of review could entail an application of the criteria normally considered in an interim relief application[4] with the onus for establishing those criteria being on the contracting authority. If such a standard were to be applied, the contracting authority would, for example, have to establish that (i) the plaintiff has not demonstrated that there is a serious case to be tried; (ii) a post-contractual remedy would be an adequate remedy; and (iii) the balance of convenience lies in discharging the automatic suspension. It remains to be seen how a court may approach such an application and the relevant standard of review.

If the automatic suspension is not discharged, the contracting authority will seek to have the proceedings dealt with as speedily as possible. In an Irish context, this will mean that contracting authorities will apply as soon as possible to transfer the case into the Commercial Court, which is a division of the High Court. Entry to the Commercial division is at the discretion of the Court (the Court generally hears cases of particular commercial urgency and where the value of the dispute exceeds €1 million). The Commercial Court actively manages cases and imposes tight time frames on discovery and exchanges of pleadings. Additionally, the Court places strong emphasis on alternative dispute resolution and can order parties to enter mediation. Most of the recent procurement cases initiated in Ireland have been transferred into the Commercial Court.

2.3 The Review Period

The draft Regulations considerably shorten the period for seeking review (except for applications seeking an ineffectiveness remedy). Pursuant to draft Regulation 9, the duration of the review period is 14 calendar days if the notice of the contract award decision is sent by fax or electronic means or 16 calendar days if the notice is sent by any other means. The review period commences to run from the beginning of the day following the date the notice is sent. For all other decisions (e.g. interim decisions), the review period is 14 days from the day following publication of the decision. The review period for contract award decisions mirrors the standstill period set out in the Regulations.

This is a significant change to the current review period under Irish law. Pursuant to Order 84A, rule 4 of the Rules of the Superior Courts, "*an application for the review of a decision to award or the award of a public contract shall be made at the earliest opportunity and in any event within three months from the date when grounds for that application first arose*". This provision has been the subject of a number of cases involving

[4] ***i.e. the criteria laid down in American Cyanamid Company v Ethicon Limited [1975] 1 All ER 504 as applied in Ireland by the Irish Supreme Court in Campus Oil v. the Minster for Energy [1983] 1 IR 88***

circumstances where applicants were alleged to have initiated proceedings outside the time limit for review[5]. The Irish courts have consistently held that time begins to run from the date when the events giving rise to the grounds for challenge actually occur. In *Veolia v. Fingal County Council (No. 1)*[6], the Court held that the assessment of when grounds arise is an objective assessment. The date when the bidder actually acquires knowledge is not relevant to this objective assessment. However, the acquisition of knowledge may be relevant to a decision of the court on whether to extend time where proceedings are out of time.

The new review period appears to be more clear cut. In relation to contract award decisions, the period begins on the day following the day on which notice of the decision, including or accompanied by a summary of the relevant reasons, is sent to the applicant tenderer or candidate (draft Regulation 9(1)). For all other decisions, the period (of 14 days) begins at the beginning of the day following the day of publication of the decision. It is likely that applicants who are out of time for initiating proceedings against contract award decisions may seek to argue that a valid notice was never sent (e.g. because it lacked a complete summary of the relevant reasons). It is also likely that there will be a significant increase in the number of applicants seeking to have time extended. Regulation 16 provides that the rules of court "may" provide for the court to grant leave "in exceptional circumstances" to make an application out of time. This procedure therefore would appear to envisage an applicant who is out of time first seeking leave of the court to make an application under the Regulations. This is similar to the current requirement in judicial review cases where leave must first be sought before an application for judicial review can be initiated.

Given the considerable tight time frame for initiating a review under the draft Regulations, it is to expected that most candidates and/or tenderers will first exercise their right to seek a reconsideration of the relevant decision. This will effectively extend the review period to, at a maximum, 58 days where the relevant notices have been sent electronically (i.e. 14 day standstill + 30 day reconsideration period + 14 day standstill period).

2.4 Information Requirements

The information deficit is often the greatest problem facing would-be procurement litigants. On the one hand, a contracting authority will have full knowledge of the process that it followed in reaching a decision, the evaluation process conducted and how it dealt with each tenderer. On the other hand, a tenderer will only have knowledge of the information it submitted, the information published by the contracting authority, how the contracting authority dealt with it and the often limited reasons it will have been provided with at the end of the process. An unsuccessful tenderer will therefore wish to fill the information deficit by obtaining both the reasons for not winning the contract (or being excluded from the process) and with information to verify that the contracting authority has carried out the tender procedure and evaluation in accordance with procurement rules and the process established in advance by the contracting authority.

The draft Regulations seek to address the information deficit (in accordance with the Directive) by requiring that the communication of the award decision to each tenderer be accompanied by the reasons or a summary of the reasons for the rejection of his or her tender. However, more importantly, the draft Regulations contain a critical new requirement as follows:

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[5] ***See, for example, Dekra Eireann v. Minister for Environment [2003] 2 IR 270; SIAC Construction v. National Roads Authority [2004] IEHC 262***

[6] ***[2007] 1 IR 690***

"In any event, the notice shall provide sufficient information to enable an successful tenderer to decide whether there are grounds for seeking review of the contracting authority's decision".[7]

This requirement reflects the language in recital 6 of Directive 2007/66/EC which provides that when the award decision is notified, "*the tenderers concerned should be given the relevant information which is essential for them to seek effective review*". If this provision finds itself into the final draft of the Regulations, it is probable that it will be relied upon in many cases to argue that the notice is deficient in the requisite information to enable the tenderer to decide whether to seek review. This deficiency may be relied upon to seek to have time extended (i.e. on the grounds that the review period has not started to run because a valid notice has not been served) and/or to obtain as much information as possible about the process actually followed and the evaluation undertaken by the contracting authority.

Article 2(a)(2) of Directive 2007/66/EC requires that the communication of the award decision to each tenderer and candidate "*shall be accompanied by a summary of the relevant reasons as set out in Article 41(2) of Directive 2004/18/EC, subject to the provisions of Article 41(3) of that Directive and a precise statement of the exact standstill period*…" (**Article 41(2) reasons**).[8] The draft Regulations provide that the Article 41(2) reasons should be provided "*if the tenderer so requests in writing*". However, it is questionable whether the revised Remedies Directive can be interpreted as permitting two separate provisions of reasons i.e. first a summary of reasons (which might not be in the detail required by Article 41(2)) and secondly, the reasons as required by Article 41(2) but only on written request of the unsuccessful candidate or tenderer. Article 2(a)(2) does not distinguish between a summary of the reasons and the Article 41(2) reasons – Article 2(a)(2) specifically refers to "*a summary of the relevant reasons as set out in Article 41(2)…".* The timing of the provision of this summary of Article 41(2) reasons is therefore clearly stated to be at the time of the communication of the award decision and it would appear not to be permissible to delay the provision of the Article 41(2) reasons until the contracting authority has received a written request.

2.5 INEFFECTIVENESS

The principle of ineffectiveness is one of the key changes introduced by the Directive and the draft Regulations. It is aimed at deterring illegal direct award of contracts and breaches of the Regulations which unlawfully deprive candidates and tenderers of pre-contractual remedies. It must be applied in the following circumstances (unless there are overriding reasons relating to a general interest):

- there has been an award of contract without prior publication of a mandatory OJEU notice unless the contracting authority (a) considered it was permitted under the circumstances for use of the negotiated procedure; (b) published a voluntary notice in the OJEU stating that it intended to conclude the contract; and (c) applied a 14 day standstill period;

- there is a breach of any of the suspension/standstill requirements and that breach has deprived the tenderer of the possibility of pursing pre-contractual remedies and was combined with an infringement of the procurement Directives which has affected the chances of the tenderer's applying for a review to

[7] ***Draft Regulation 7(5)***

[8] ***Article 41(2) of Directive 2004/18/EC sets out details of the reasons i.e. characteristics and relative advantages of the tender selected, the name of the successful tenderer or the parties to a framework agreement and the reasons for non-equivalence or why the works, supplies or services do not meet the performance or functional requirements.***

obtain the contract; or

- the contracting authority awarded a contract which did not require prior publication in the OJEU or awarded a call off contract unless (i) in the case of call-offs, it considered that it complied with procurement rules for call offs; (ii) it sent a notice of the contract award decision; and (iii) it sent a summary of reasons to the tenderers concerned and (iv) it applied a standstill period.

Directive 2007/66/EC provides for a choice between retroactive and prospective cancellation of contractual obligations. The draft Regulations have opted for both retroactive and prospective cancellation. Regulation 18 provides as follows:

> *"(1) …If the court declares a contract ineffective—*
>
> *(a) any contractual obligations already performed are retroactively cancelled,*
>
> *(b) any contractual obligations not already performed are cancelled,*
>
> *(c) goods provided under the contract shall be returned (or in a case where goods provided under the contract have been consumed, an equivalent quantity of similar goods shall be returned to the party that provided the consumed goods), and*
>
> *(d) all money paid shall be refunded.*
>
> *(2) …However, nothing in these Regulations prevents action taken in good faith in reliance on an ineffective contract having legal consequences."*

If retroactive cancellation remains in the final version of the Regulations, there will be significant legal and administrative consequences where the Court grants an order of ineffectiveness. These consequences are heightened by the time it may take for an ineffectiveness remedy to be granted (i.e. depending on the duration of the proceedings). In practice, it is difficult to envisage how retroactive cancellation could be executed. If the contract related to works, the works could be partially or fully completed by the time an order of the court is handed down. If contractual obligations already performed are retroactively cancelled, the successful tenderer would not be entitled to payment for the works (or would have to repay all money paid). This would not only have enormous financial consequences for the successful tenderer, it could result in court actions for unjust enrichment against the contracting authority by the successful tenderer. It would also raise a myriad of issues vis-à-vis any sub-contractors engaged by the successful tenderer. In relation to service contracts, employees may have transferred to the successful tenderer under TUPE Regulations. There would therefore be significant financial and human resources consequences if a contract subject to TUPE was retroactively cancelled. The prospect of retroactive cancellation could also result in untimely delays as parties may delay commencement of the contract until the review period (of up to 6 months) has expired. Moreover, if proceedings are initiated and ineffectiveness is a possible remedy, even though the contract has been awarded, execution may be delayed until the outcome of the court case.

If retroactive cancellation remains in the final version of the Regulations, Regulation 18(2) is likely to be the saving provision for successful tenderers. They will need however to be able to demonstrate that their actions were taken in good faith in reliance on the contract having legal consequences. It remains to be seen whether putting a successful tenderer on notice of the proceedings and the case made against the contracting authority would compromise a successful tenderer's ability to rely on this good faith exception.

3. INFRINGEMENT PROCEEDINGS

There are two infringement cases currently pending before the European Court of Justice against Ireland in relation to remedies. The first case alleges that the timescale for standstill and the information requirements under Irish law do not guarantee that tenderers are informed of the reasons for the rejection of their tender in due time and well before the expiry of the standstill period thereby impeding tenderers' rights to effective legal remedies. The second case alleges that the time limit for initiating legal proceedings in relation to decisions made by a contracting authority during a tender procedure is unclear. Both of these infringement cases are considered in further detail below.

3.1 *Case C-455/08 –Commission v. Ireland*

The first of the infringement proceedings concerns Ireland's timescale for the provision of information to bidders following a contract award decision. This timescale is set out in Regulation 49 of the European Communities (Award of Public Authorities' Contracts) Regulations 2006[9] (**the Public Sector Regulations**) which provides as follows:

> *49.(1) As soon as practicable after reaching a decision about entering into a public contract or framework agreement or admission to a dynamic purchasing system, a contracting authority shall inform candidates and tenderers of the decision by the most rapid means of communication possible (such as by electronic mail or by telefax). If the authority notifies its decision by electronic mail or telefax, it shall confirm the decision in writing if a candidate or tenderer so requests.*
>
> *(2) If a contracting authority decides—*
>
> (a) *not to enter into a framework agreement or a contract for which there has been a call for competition, or*
>
> (b) *to restart the procedure, or*
>
> (c) *not to implement a dynamic purchasing system,*
>
> *the authority shall include in the decision the grounds on which it is based.*
>
> *(3) As soon as possible, and in any event no later than 15 days after the date on which a contracting authority receives a request to do so, the authority shall inform—*
>
> (a) *a candidate whose application is rejected of the reasons for the rejection, or*
>
> (b) *a tenderer whose tender is rejected of the reasons for the rejection (including, in a case referred to in Regulation 23(9) or (10), the reasons for the authority's decision of non-equivalence or that the works, supplies or service do not meet the authority's performance or functional requirements), or*
>
> (c) *a tenderer that has made an admissible tender of the characteristics and relative advantages of the tender selected as well as the name of the successful tenderer or the parties to the framework agreement.*

[9] ***SI 329 of 2006 which came into force on 22 June 2006. A similar provision is contained in Regulation 51 of the European Communities (Award of Contracts by Utility Undertakings) Regulations 2007 (SI 50 of 2007 which came into force on 3 March 2007)***

(4) However, a contracting authority may decide not to disclose information referred to in paragraph (3) relating to entry into a public contract or framework agreement, or to admission to a dynamic purchasing system, if the release of the information—

(a) would impede law enforcement, or otherwise be contrary to the public interest, or

(b) would prejudice the legitimate commercial interests of economic operators (whether public or private), or

(c) *might prejudice fair competition among them."*

The requirement for a standstill period is set out in Regulations 49(5)-(6) as follows:

"(5) A contracting authority shall not enter into a public contract with a successful tenderer unless at least 14 days have elapsed since the date on which tenderers were informed of the contract award decision in accordance with paragraph (1).

(6) A contracting authority may reduce the 14-day period referred to in paragraph (5) to 7 days if an accelerated procedure has been used. However, if within this 7-day period, the authority is notified in writing of the intention of a tenderer to seek a review of the contract award decision, it shall not enter a public contract until at least 10 days have elapsed since tenderers were informed of the contract award decision in accordance with paragraph (1)."

In its application to the European Court of Justice, the Commission submits that in practice the above provisions may imply that by the time tenderers are fully informed of the reasons for the rejection of their offer, the standstill period for the conclusion of the contract has already expired. This is on the basis that reasons need only be provided upon request from a candidate or tenderer within 15 days of that request. As the standstill period is 14 days (7 days for accelerated procedures), there is a real possibility that the contract may be concluded by the time the contracting authority provides reasons for its decision. Accordingly, the Commission considers that Ireland has not fulfilled its obligations under Articles 1(1) and 2(1) of the Remedies Directive as interpreted by the European Court of Justice in the *Alcatel*[10] case and *Commission v. Austria*[11]. The Commission considers that in order to comply with the requirements that derive from these cases, it is essential to ensure that the award decision is reasoned in due time to allow it to be the subject of an effective appeal, undertaken within the standstill period. The Commission argues that the Irish rules are not in line with this requirement as they do not guarantee that tenderers are informed of the reasons for the rejection of their offer in due time and well before the expiry of the standstill period. This impedes the tenderers' right to effective legal remedies, as required by the Remedies Directive.

The draft Regulations transposing the revised Remedies Directive into Irish law would appear to partially address the Commission's concerns in regard to the timescale for provision of information. As set out in draft Regulation 7(5), the notice of the contracting authority's decision must contain a statement of reasons. However, as discussed above, following a contract award decision, the contracting authority is only required to provide "a summary of the reasons for the rejection of his or her tender" and to provide the more detailed Article 41(2) reasons "if the tenderer so requests in writing". There is no timescale set out in the draft Regulations for providing the Article 41(2) reasons. However, there is the general requirement that the notice "*shall provide sufficient information to enable an unsuccessful tenderer to decide whether there are grounds for seeking*

[10] ***Case C-81/98, Alcatel Austria AG and Others v Bundesministerium für Wissenschaft und Verkehr [1999] ECR I-07671***

[11] ***Case C-212/02, Commission v. Austria [2004] ECR1-0000, judgment of 24 June 2004***

review of the contracting authority's decision". It is questionable whether this latter provision will be sufficient to address the Commission's concerns particularly as there may be uncertainty over the extent of the information to be provided on the basis of this provision.

2.2 *Case C-456/08 – Commission v. Ireland (Dundalk Bypass)*

The second case currently pending before the Court of Justice relates to a complaint made in relation to the Dundalk Western Bypass Project tender process which has already been the subject of national proceedings. In the national proceedings[12], SIAC (which was a member of an unsuccessful tenderer consortium) challenged the use of the negotiated procedure by the contracting authority (the National Roads Authority) and certain changes made to the funder support letter at the best and final offer stage. In addition, SIAC alleged that the NRA failed to ensure the integrity of the procurement process by reason of the fact that it did not ensure that certain traffic data relevant to the development of each bidders' best and final offer was correct and comprehensively audited. SIAC was informed in October 2003 that the NRA was proposing to award the contract to another tenderer (CRG) but that if discussions broke down with the preferred bidder, the NRA reserved the right to invite the consortium which SIAC was a member of to replace the preferred bidder. A contract was signed with the preferred bidder in February 2004 and SIAC commenced proceedings in April 2004.

SIAC argued that the relevant date for the commencement of the three month time limit set out in Order 84A was February 2004, i.e., the date when the contract was signed with the preferred bidder. However, the Court looked at the specific dates that the grounds arose for each of SIAC's complaints. With regard to the challenge to the use of the negotiated procedure, the Court held that the grounds for that complaint arose on 10th August, 2001, the date when the contract notice was published in the OJEU indicating that the procedure being utilised was the negotiated procedure. With regard to the complaints relating to the changes to the funder support letter and the allegedly incorrect traffic data, the Court held that the grounds for those complaints at the latest arose on 14th October 2003 which was the date when SIAC's consortium was informed of the identity of the preferred bidder. The Court also refused SIAC's request that the three month period be extended. Accordingly, all of the applicant's complaints were held to be time-barred.

Arising from a complaint to the Commission in regard to the Dundalk Western Bypass tender process, the Commission has now initiated proceedings in relation to the review period under national law. The Commission's application to the Court seeks a declaration that, "*by way of the rules on time limits in the national legislation regulating the exercise of the right of tenderers to judicial review in public procurement procedures and by failing to notify the award decision to the complainant in the award decision in question, Ireland has failed to fulfil its obligations under, concerning the applicable time limits, Article 1(1) of Council Directive 89/665/EEC1 on the application of review procedures to the award of public supply and public work contracts as interpreted by the Court and, concerning the lack of notification, under Article 1(1) of Directive 89/665/EEC as interpreted by the Court and Article 8(2) of Council Directive 93/37/EEC2 on the coordination of procedures for the award of public works contracts*".

In its application, the Commission argues that Irish law does not appear to be in line with the fundamental principle of legal certainty and the requirement of effectiveness under the Remedies Directive which is an application of this principle, since tenderers are left in uncertainty as to their position if they intend to challenge

[12] ***SIAC Construction v. National Roads Authority, [2004] IEHC 262***

an award decision of a contracting authority in two-phase award procedures where a preferred bidder is selected prior to the final award decision. The Commission considers that Ireland must take measures to ensure that tenderers have clarity and certainty as to which decision of the contracting authority they may challenge and from which date time limits are to be considered. It must be made clear to tenderers if Order 84A applies not only to the award decisions but also to interim decisions of a contracting authority taken during the contract award procedure (e.g. regarding the selection of the preferred bidder), with the effect that the circumstances embodied in the interim decision cannot be challenged following the lapse of the time limit reckoned from that interim decision nor may the award decision be challenged on the basis of the circumstances already embodied in the interim decision.

The Commission argues that the formulation of the review period which is set down in Order 84A (i.e. that proceedings be brought "at the earliest opportunity and in any event within three months") leaves tenderers in uncertainty regarding their position when they consider making use of their Community law right to effective legal remedy against a decision of a contracting authority. In the Commission's view it needs to be made clear for tenderers which deadline applies for bringing an action against the contracting authority's decisions and that, with a view to the obligation to respect the fundamental principle of legal certainty, the applicable time limit needs to be a fixed one which can be interpreted in a clear and foreseeable manner by all tenderers.

As discussed above, under the proposed draft Regulations, the review period is more clear cut i.e. in relation to interim decisions, the review period will be 14 days following the day of publication of the decision. The new review period should therefore address the concerns of the Commission going forward.

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European Communities (Revised Remedies Directive) Regulations 2009

I, BRIAN LENIHAN, Minister for Finance, in exercise of the powers conferred on me by section 3 of the European Communities Act 1972 (No. 27 of 1972), and for the purpose of giving effect to Council Directive 89/665/EEC([13]), as amended by Directive 2007/66/EC([14]), hereby make the following regulations:

Citation.

1. These Regulations may be cited as the European Communities (Revised Remedies Directive) Regulations 2009.

Commencement.

2. These Regulations come into operation on _____2009.

Interpretation—general.

3.—(1) In these Regulations—

"concluded", in relation to a contract, has the same meaning as in the Public Authorities Contracts Directive;

"court" means the High Court;

"eligible person" has the meaning given by Regulation 6(2);

"Official Journal" means the official Journal of the European Union;

"PAC Regulations" means the European Communities (Award of Public Authorities' Contracts) Regulations 2006 (S.I. No. 329 of 2006);

"Public Authorities Contracts Directive" means Directive 2004/18/EC([15]) of the European Parliament and of the Council of 31 March 2004;

"reviewable public contract" means a contract to which the PAC Regulations apply;

"Revised Remedies Directive" means Council Directive 89/665/EEC of 21 December 1989, as amended by Directive 2007/66/EC of the European Parliament and of the Council of 11 December 2007.

(2) A word or expression used in both these Regulations and the Revised Remedies Directive has, unless the contrary intention appears, the same meaning in these Regulations as in that Directive.

Interpretation—kinds of infringement.

4.—(1) In these Regulations—

(a) an Article 1(5) infringement is an infringement where—

(i) a tenderer or candidate has applied to a contracting authority in accordance with Regulation 12 for review of a decision of the contracting authority in relation to a reviewable public contract, and

(ii) the contracting authority has concluded the contract during the period during which, under Regulation 13, it is required to not do so,

(b) an Article 2(3) infringement is an infringement where—

(i) a tenderer or candidate has applied to the court in accordance with Regulation 14 for review of a contract award decision in relation to a reviewable public contract,

(ii) the contracting authority has concluded the contract before the court has made its decision, and

(c) an Article 2a(2) infringement is an infringement where—

(i) the relevant contract is one to which a standstill period applies, and

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(13) O J No. L395, 20.12.1989, p. 33.

(14) O J No. L335, 11.12.2007, p. 33.

(15) O J No. L134, 30.4.2004, p. 114.

(ii) the contracting authority has concluded the contract during the standstill period, and

(d) an Article 2d(1)(a) infringement is an infringement where a contracting authority has awarded a contract without first publishing a contract notice in the Official Journal although the prior publication of such a notice was required by the Public Authorities Contracts Directive.

Application of these Regulations to contracts and decisions.

5.—(1) These Regulations apply in relation to reviewable public contracts.

(2) The decisions that are reviewable under these Regulations are decisions taken by a contracting authority that are required, under the third paragraph of Article 1(1) of the Revised Remedies Directive, to be reviewable.

Persons to whom review procedures are available.

6.—(1) The review procedures established by these Regulations are available to any person—

(a) who has, or has had, an interest in obtaining a reviewable public contract, and

(b) who alleges that he or she has been harmed, or is at risk of being harmed, by an infringement of Community law in the field of public procurement, or of a law of the State transposing that law.[Art 1(3)]

(2) For the purposes of these Regulations, a person is an eligible person in relation to a reviewable public contract if the review procedures established by these Regulations are available to the person in relation to the contract.

Standstill period.

7.—(1) A contracting authority shall not conclude a reviewable public contract (other than such a contract of a kind for which a standstill period is not required) within the standstill period for a contract of that kind.

(2) The contracts for which a standstill period is not required are the following—

(a) a contract where the Public Authorities Contracts Directive does not require prior publication of a contract notice in the Official Journal;

(b) a contract where the only tenderer concerned is the one who is awarded the contract and there are no candidates concerned;

(c) a contract based on a framework agreement;

(d) a specific contract based on a dynamic purchasing system.

(3) The standstill period for a contract begins at the beginning of the day following the day on which each tenderer and candidate concerned is sent a notice, in accordance with paragraph (5), of the decision to award the contract.

(4) The duration of the standstill period is—

(a) if the notice is sent by fax or electronic means, 14 calendar days, or

(b) if the notice is sent by any other means, 16 calendar days

(5) The notice—

(a) shall inform the candidates and tenderers of the decisions reached concerning the conclusion of a framework agreement, the award of the contract or admittance to a dynamic purchasing system, including the grounds for any decision not to conclude a framework agreement or award a contract for which there has been a call for competition or to recommence the procedure or implement a dynamic purchasing system,

(b) shall state the exact standstill period applicable to the contract, and

(c) for each unsuccessful tenderer or candidate concerned, shall be accompanied by a statement of—

(i) in the case of an unsuccessful candidate, the reasons for the rejection of his or her application,

(ii) in the case of an unsuccessful tenderer, the reasons for the rejection of his or her tender, the reasons or a summary of the reasons for the rejection of his or her tender, and if the tenderer so requests in writing—

(aa) the characteristics and relative advantages of the tender selected,

(bb) the name of the successful tenderer, or, in the case of a framework agreement, the names of the parties to it, and

(cc) in the cases referred to in Article 23, paragraphs 4 and 5 of the Public Authorities Contracts Directive, the reasons for the contracting authority's decision of non-equivalence or its decision that the works, supplies or services do not meet the performance or functional requirements.

In any event the notice shall provide sufficient information to enable an unsuccessful tenderer to decide wither there are grounds for seeking review of the contracting authority's decision.

(6) However, a contracting authority may decide to withhold any information referred to in paragraph (5) regarding the contract award, the conclusion of a framework agreement or admittance to a dynamic purchasing system if—

(a) the release of such information would impede law enforcement,

(b) would otherwise be contrary to the public interest,

(c) would prejudice the legitimate commercial interests of economic operators, whether public or private, or

(d) might prejudice fair competition between them.

(7) For the purposes of this Regulation—

(a) a tenderer is concerned if he or she has not been definitively excluded, and

(b) a candidate is concerned if the contracting authority has not made available information about the rejection of his or her application before the notification of the contract award decision to the tenderers concerned.

(8) For the purposes of paragraph (6)(a), the exclusion of a tenderer is definitive if it has been notified to the tenderer in accordance with paragraph (5) and—

(a) has been declared lawful by the court, or

(b) is not, or is no longer, subject to a review procedure.

Time limits for applying for review.

8. An application for the review of a contracting authority's decision that is reviewable under these Regulations, or for a declaration that a contract is ineffective, shall be made within the review period for the decision or contract.

Review period for contract award decisions.

9.—(1) In the case of an application for the review of a decision of a contracting authority taken in the context of, or in relation to, a contract award procedure falling within the scope of the European Communities (Award of Public Authorities' Contracts) Regulations 2006, the review period begins at the beginning of the day following the day on which notice of the decision, including or accompanied by a summary of the relevant reasons, is sent to the applicant tenderer or candidate.

(2) The duration of the review period is—

(a) if the notice is sent by fax or electronic means, 14 calendar days, or

(b) the notice is sent by any other means, 16 calendar days.

Review period for certain other decisions.

10. In the case of an application for review concerning a decision referred to in Article 2(1)(b) of the Revised Remedies Directive that is not subject to a specific notification, the review period is 14 days beginning at the beginning of the day following the day of publication of the decision.

Review period in relation to declaration that contract is ineffective.

11.—(1) The review period for application for a declaration that a contract is ineffective is as set out in the Table to this paragraph.

TABLE

Case	*Duration of period*	*Beginning of period*
Where the contracting authority published a notice in accordance with Regulation 17(6)(b) that included a justification of the decision of the contracting authority to award the contract without prior publication of a contract notice in the Official Journal of the European Union	14 calendar days	at the beginning of the day following the day on which the authority published the notice
Where the contracting authority published a contract award notice in accordance with Articles 35(4), 36 and 37 of the Public Authorities' Contracts Directive	30 calendar days	at the beginning of the day following the day on which the authority published the notice
Where the contracting authority notified the tenderers and candidates concerned of the conclusion of the contract, and that notice contained a summary of the relevant reasons that complied with Regulation 7(5)(c)	30 calendar days	at the beginning of the day following the day on which the authority gave the notice
The case of a contract based on a framework agreement, where the contracting authority has given notice in accordance with Regulation 7(5).	30 calendar days	at the beginning of the day following the day on which the purchasing authority gave the notice
The case of a specific contract based on a dynamic purchasing system, where the contracting authority has given notice in accordance with Regulation 7(5).	30 calendar days	at the beginning of the day following the day on which the contracting authority gave the notice
Any other case	6 months	at the beginning of the day following the day on which the contracting authority had concluded the contract

(2) For the purposes of this Regulation—

(3) For the purposes of this Regulation—

(a) a tenderer is concerned if he or she has not been definitively excluded, and

(b) a candidate is concerned if the contracting authority has not made available information about the rejection of his or her application before the notification of the contract award decision to the tenderers concerned.

(4) For the purposes of paragraph (2)(a), the exclusion of a tenderer is definitive if it has been notified to the tenderer and—

(a) has been declared lawful by the court, or

(b) is not, or is no longer, subject to a review procedure.

Application to contracting authority for reconsideration.

12.—(1) Subject to paragraph (2), an eligible person may apply to a contracting authority for reconsideration of a decision that is reviewable under these Regulations on the grounds that—

(a) the decision allegedly infringes Community law, or a law of the State that transposes that law,

(b) the person has or had an interest in obtaining the relevant contract, and

(c) the person alleges that he or she has been harmed by the alleged infringement.

(2) Paragraph (1) does not apply—

(a) if the contract has been concluded, or

(b) in relation to a decision to award the contract to a particular tenderer or candidate.

(3) The application shall be in writing and must set out details of—

(a) the decision,

(b) the alleged infringement of Community law, or law of the State transposing that law,

(c) the person's interest, and

(d) the alleged harm that was suffered by the person or of which the person is at risk.

(4) The application shall be made within the review period for the decision.

(5) Within 30 days (beginning at the beginning of the day following the day on which it receives an application that complies with paragraphs (3) and (4)), the contracting authority—

(a) shall reconsider the decision in accordance with the applicable law, and

(b) shall notify the applicant in writing of its reconsideration decision.

(6) The notice of the authority's reconsideration decision—

(a) shall inform the applicant of the decisions reached concerning the conclusion of a framework agreement, the award of the contract or admittance to a dynamic purchasing system, including the grounds for any decision not to conclude a framework agreement or award a contract for which there has been a call for competition or to recommence the procedure or implement a dynamic purchasing system,

(b) shall be accompanied by a statement of—

(i) in the case of an unsuccessful candidate, the reasons for the rejection of his or her application,

(ii) in the case of an unsuccessful tenderer, the reasons for the rejection of his or her tender, including, in the cases referred to in Article 23, paragraphs 4 and 5 of the Public Authorities Contracts Directive, the reasons for the contracting authority's decision of non-equivalence or its decision that the works, supplies or services do not meet the performance or functional requirements,

(iii) in the case of a tenderer who has made an admissible tender, the characteristics and relative advantages of the tender selected and the name of the successful tenderer or the names of the parties to the framework agreement.

(7) However, a contracting authority may decide to withhold information referred to in paragraph (7) regarding the contract award, the conclusion of a framework agreement or admittance to a dynamic purchasing system if—

(a) the release of such information would impede law enforcement,

(b) would otherwise be contrary to the public interest,

(c) would prejudice the legitimate commercial interests of economic operators, whether public or private, or

(d) might prejudice fair competition between them.

Effect of application to contracting authority for reconsideration.

13.—(1) If an eligible person applies to the contracting authority for reconsideration of a decision in relation to a reviewable public contract, the contracting authority shall not conclude the contract until the end of the relevant period.

(2) For paragraph (1), the relevant period begins at the beginning of the day after the authority sends the eligible person a notice of its reconsideration decision in accordance with paragraphs (5) and (6) of Regulation 12 and ends at the end of—

(a) if the notice is sent by fax or electronic means, 14 calendar days, or

(b) if the notice is sent by any other means, 16 calendar days.

Application to court.

14.—(1) If a person who is an eligible person in relation to a reviewable public contract that has not been concluded has applied to the contracting authority concerned for reconsideration of a decision in relation to the contract, and—

(a) if the authority has sent the person a notice of its reconsideration decision in accordance with paragraphs (5) and (6) of Regulation 12, the person is aggrieved by the contracting authority's reconsideration decision, or

(b) if the authority has not sent the person such a notice, 45 days has expired since the person applied for that reconsideration,

the person may apply to the court for review of the authority's reconsideration decision or failure to make such a decision, as the case requires.

(2) A person who is an eligible person in relation to a reviewable public contract that has not been concluded may apply to the court—

(a) for interlocutory orders with the aim of correcting an alleged infringement or preventing further damage to the interests concerned, including measures to suspend or to ensure the suspension of the procedure for the award of a public contract or the implementation of any decision taken by the contracting authority, or

(b) for review of a decision of the contracting authority to award the contract to a particular tenderer or candidate.

(3) If a person applies to the court under paragraph (1) or (2), the contracting authority shall not conclude the contract until the court so orders.

(4) A person who is an eligible person in relation to a reviewable public contract that has been concluded may apply to the court for a declaration that the contract is ineffective.

(5) An application under paragraph (1), (2) or (4) may include a claim for damages or other relief.

(6) A person who has applied to the court under paragraph (1), (2) or (4) shall give the authority notice of the application by serving a sealed copy of the originating motion on the authority as soon as reasonably practicable.

(7) Nothing in this Regulation prevents an eligible person from applying to the court for any other remedy that may be available in the particular circumstances.

Powers of the court.

15.—(1) The court may—

(a) by order—

(i) set aside, vary or affirm a reconsideration decision of a contracting authority (that is, a decision of the authority made on reconsideration of a decision), or remit such a decision to the contracting authority with appropriate directions,

(ii) set aside, vary or affirm a decision of a contracting authority in relation to a reviewable public contract,

(iii) declare a reviewable public contract ineffective,

(iv) impose alternative penalties on a contracting authority, or

(b) make such other order as it considers just and equitable in the circumstances,

and may make any necessary consequential order.

(2) The court may make interlocutory orders with the aim of correcting an alleged infringement or preventing further damage to the interests concerned, including measures to suspend or to ensure the suspension of the procedure for the award of a public contract or the implementation of any decision taken by the contracting authority.

(3) In particular, the court may set aside any discriminatory technical, economic or financial specification in an invitation to tender, contract document or other document relating to a contract award procedure.

(4) When considering whether to make an interim order, the court may take into account the probable consequences of interim measures for all interests likely to be harmed, as well as the public interest, and may decide not to make such an order when its negative consequences could exceed its benefits.

(5) The court may by order suspend the operation of a decision or a contract.

(6) The court may award damages as compensation for loss resulting from a decision that is an infringement of Community law, or of a law of the State transposing Community law. [Art2(1)(c), (6)]

Rules of court.

16.—(1) The rules of court may provide for a preliminary procedure to decide whether an applicant under Regulation 14 is an eligible person in relation to a particular reviewable public contract.

(2) The rules of court may provide for the court to grant leave, in exceptional circumstances, to make an application under Regulation 14 out of time.

Declaration by court that contract ineffective.

17.—(1) Subject to paragraphs (2), (6) and (7), the court shall declare a reviewable public contract ineffective in the following cases—

(a) the case where the contracting authority has awarded the contract without first publishing a contract notice in the Official Journal and concluding the contract without publishing such a notice is not permitted by the Public Authorities Contracts Directive,

(b) the cases of an Article 1(5) infringement, an Article 2(3) infringement or an Article 2a(2) infringement, where the infringement—

(i) has deprived the tenderer applying for review of the possibility of pursuing pre-contractual remedies, and

(ii) was combined with an infringement of the Public Authorities Contracts Directive that has affected the chances of the tenderer's applying for a review to obtain the contract,

(c) the cases referred to in paragraphs (a), (c) and (d) of Regulation 7(2).

(2) Despite paragraph (1), the court may decline to declare a contract ineffective if it finds, after having examined all relevant aspects, that overriding reasons relating to a general interest require that the effects of the contract should be maintained.

(3) Economic interests in the effectiveness of the contract may only be considered as overriding reasons if in exceptional circumstances ineffectiveness would lead to disproportionate consequences.

(4) Economic interests directly linked to the contract are not overriding reasons relating to a general interest.

(5) In paragraph (4), "economic interests directly linked to the contract" include (but are not limited to)—

(a) the costs resulting from the delay in the execution of the contract,

(b) the costs resulting from the launching of a new procurement procedure,

(c) the costs resulting from the change of the economic operator performing the contract, and

(d) the costs of legal obligations resulting from the ineffectiveness.

(6) Paragraph (1)(a) does not apply where—

(a) the contracting authority considered that the award of a contract without prior publication of a contract notice in the Official Journal was permitted by Regulation 32 of the PAC Regulations,

(b) the contracting authority published, in the Official Journal, a notice complying with paragraph (9) stating that it intended to conclude the contract, and

(c) the contract was not concluded before the end of the period of 14 days beginning at the beginning of the day following the day of publication of that notice.

(7) Paragraph (1)(c) does not apply where—

(a) the contracting authority considered that the award of the contract was in accordance with Regulation 35, or paragraphs (9) to (12) of Regulation 36, of the PAC Regulations,

(b) the contracting authority sent a notice of the contract award decision, together with a summary of reasons complying with regulation 7(5)(c), to the tenderers concerned, and

(c) the contract was not concluded before the end of a period of—

(i) 14 days beginning at the beginning of the day following the day on which notice of the contract award decision is sent to the tenderers concerned if fax or electronic means are used, or

(ii) 16 days beginning at the beginning of the day following the day on which notice of the contract award decision is sent to the tenderers concerned if another means of communication is used.

(8) In the case of an Article 1(5) infringement, an Article 2(3) infringement or an Article 2a(2) infringement (being, in each case, an infringement not covered by paragraph (1)(b)), the court may, after having assessed all relevant aspects, declare the relevant contract ineffective.

(9) A notice referred to in paragraph (6)(b)—

(a) shall be in the format most recently adopted by the Commission under Article 3a of the Revised Remedies Directive before the commencement of this Regulation,

(b) shall include—

(i) the name and contact details of the contracting authority,

(ii) a description of the object of the contract,

(iii) a justification of the decision of the contracting authority to award the contract without prior publication of a contract notice in the Official Journal of the European Union, and

(iv) the name and contact details of the economic operator in favour of whom a contract award decision has been taken, and

(c) may include any other information that the contracting authority considers useful.

(10) The court may make any order necessary in the interests of justice to ensure that proper payment is made for any work done, or goods or services provided, in good faith in reliance on a contract that has been declared ineffective.

Effect of declaration that a contract is ineffective.

18.—(1) If the court declares a contract ineffective—

(a) any contractual obligations already performed are retroactively cancelled,

(b) any contractual obligations not already performed are cancelled,

(c) goods provided under the contract shall be returned (or in a case where goods provided under the contract have been consumed, an equivalent quantity of similar goods shall be returned to the party that provided the consumed goods), and

(d) all money paid shall be refunded.

(2) However, nothing in these Regulations prevents action taken in good faith in reliance on an ineffective contract having legal consequences.

Alternative penalties.

19.—(1) The court shall impose an alternative penalty if—

(a) under Regulation 17(2), it declines to declare a contract ineffective, or

(b) in the case of an alleged infringement referred to in Regulation 17(8), it finds that the infringement occurred but declines to declare the contract ineffective.

(2) The alternative penalty shall be either or both of the following:

(a) the imposition on the contracting authority of a fine of up to the lesser of 20% of the value of the contract or €1,000,000;

(b) the termination, or shortening of the duration, of the contract.

(3) The court may take into account all the relevant factors, including the seriousness of the infringement, the behaviour of the contracting authority and any extent to which the contract remains in force.

(4) The award of damages is not an appropriate alternative penalty for the purposes of this Regulation.

Non-exclusion of other remedies.

20. Nothing in these Regulations affects any power of the court to grant any other remedy in relation to a contract.

Revocation.

21. The European Communities (Review Procedures for the Award of Public Supply, Public Works and Public Services Contracts) (No. 2) Regulations 1994 (S. I. No. 309 of 1994) are revoked.

We hold this Conference at a time when the role of the market and the regulation of it are very much in the news. The current economic crisis has reopened a debate about the role of government and the role of the market and the relationship between them. I am following with interest, for example Professor Michael Sandel's interesting and provocative Reith Lecture Series which he is currently delivering on "A New Citizenship". The EU through the instrument of the EU treaties and EU law is a prime player in all of this, in particular because EU law strikes a balance between free markets in the area of the EU and regulation. It is based upon a free market and open Competition Model, but it also regulates markets – with the consent of the Member States.

I come to this Conference with a view from a small jurisdiction within a member state. In Northern Ireland we have been endeavouring in our own setting and in an EU law context to press out the space left by the "principle of subsidiarity " and to make the most of the will of its people through its hard won local democratic institutions. Inevitably here we are working within layers of constraints which include the requirements of EU law, national law and the limitations of devolved powers. For those of us who are working in areas of policy generation or with the experience of executing those policies which gives us an interest in policy generation, the EU law setting presents us with opportunities and challenges in which the lawyers have a very real role.

Before I focus on some concrete experiences and examples in Northern Ireland I would like first to bring the focus out and look at some broader issues of the setting for those examples:

Firstly, a devolved jurisdiction like that in Northern Ireland sits as I have mentioned at the end of a long chain of constraints global, European, national and local. Without taking away from the unprecedented benefits that the EU brings, it also comes with costs to national jurisdictions in that there are therefore many limitations on what government can achieve while it strives to operate effectively on behalf of its citizens. During my time as a lawyer for the devolved administration in Northern Ireland over the last few decades, it has become increasingly clear to me that understanding the

3RD BI-ANNUAL JOINT EUROPEAN LAW CONFERENCE

CURRENT ISSUES IN EU PUBLIC PROCUREMENT AND STATE AID

TALK FOR THE IRISH SOCIETY FOR EUROPEAN LAW AND THE UNITED KINGDOM ASSOCIATION FOR EUROPEAN LAW

STATE ENGAGEMENT OF THE MARKET THROUGH PROCUREMENT: THE NORTHERN IRELAND EXPERIENCE

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changing roles of the State, the market and of economic operators is central to the challenges and opportunities that I have referred to. Procurement and PFIs, the commissioning and running by private sector of provision for the elderly or disabled and the handling of policing and justice functions by those other than central government raise interesting questions about the distinction between public and private law caused by the blurring of the roles of the state and the corporate world and the application of EU law in that context. Does the Human Rights Act apply to private operators; how free are we to regulate the market separately in a local setting?

Then there is the question of competence of our administration: Procurement is an area of law which is devolved to Stormont. But international relations are not, and so our competence cannot be fully stretched out without mediation.

So, for example in testing our views with the EU Commission, we are duty bound to do this through with London colleagues – for it is at Westminster where that competence lies. As to our competence in European Law terms where single market rules pertain, although the procurement directives are implemented by Westminster for both jurisdictions, they are implemented with our consent and on our behalf. In other words – in national law terms we were entitled to implement separately in Northern Ireland. The very recent Advocate General's opinion in the Horvath case, points to there being much scope for differences of approach to implementation in the different devolved administrations in the UK.

The second introductory theme that I would like to mention is the now firmly established concept of corporate social responsibility. With apologies to you for the brevity of the account that follows I think it is appropriate that I provide some form of definition for this concept and how it is relevant to the subject matter of the talk.

The definition of "Corporate Social Responsibility", is contested one but for our purposes I want to draw from two sources: Firstly, from Professor Christopher McCrudden's text, "Buying Social Justice" where he quotes with approval the following definition (from Jeremy Moon of the ICCSR - International Centre for Corporate Responsibility):

“In essence CSR refers to business responsiveness to social agendas in its behaviour, and to the performance of those responsibilities”

- nothing earth shattering there. This definition easily slots into a government “command and control” model, that is the proper role of government and the limits on the market dressed up in new clothes.

The second source is a report on public sector roles in strengthening corporate social responsibility which was prepared for the World Bank and identified how public sector bodies (including government) can encourage CSR by using any one or a combination of various tools:

- Mandatory: that is government at different levels finding minimum standards for business performance embedded in legal framework (eg Health and Safety or accounting standards for companies);

- Facilitating: public sector agendas enables/indentifies companies to engage with the CSR agenda or to drive social and environmental improvements (eg innovative uses of procurement, government owned or tasked (SGEIs) companies);

- Partnering; public sector bodies may act as participants, convenors or facilitators (again procurements, use of golden shares or use of grant giving powers);

- Endorsing; taking “various forms” including the demonstration effect of public sector management practices.

And so, with the terrain defined I would like to tell you about various experiences on the ground with respect to procurement. In doing so I should acknowledge these are just from my own area of experiences- it is certainly not a comprehensive review of what is possible.

Before I move to deal with actual examples of our approach to procurement I should note that procurement is only one of the devices by which administration can engage or orchestrate the operation of the market. Other examples are the use of public companies, the use of 'Golden Shares' and the use of taxation (see Annex).

But to turn to Procurement:

What Happens where the Market is not Interested/Able: (Market failure).

This is where the state wants to procure something that the market is either not interested to deliver, or not deliver as the government wants. Here I want to refer to 2 Northern Ireland cases, one on total, one on partial market failure:

The Foyleside Shopping Centre case:

The first case concerned the construction of a large shopping centre in the heart of Derry at a time when the troubles were at their height. Government had decided that to try and spark economic development in a particularly rundown part of the City that a large shopping centre development should be built on land it had assembled. The idea being that this would become a magnet to attract other business to the area. The Department had parameters with respect to scale and so forth that it wished to see. It went to the market to procure its objectives but the market did not respond initially to the opportunity to buy the land together with an obligation to build to the Departments specification. In order to "make the development happen" the Department then offered funding on the following basis:

On analysis of the market failure the Government's valuers estimated that to sell the package of land with the contractual obligations to build to the Department's specification meant the land should be valued at around minus £8 million. It would therefore provide the £8 million in the context of a sale with those contractual conditions,allowing for a reasonable developers profit, but the agreement with the purchasing entity would allow several assessments over a period of years to determine whether in fact the enterprise was successful, and to the degree that it was to claw back the government funding with interest.

Again government went to the market to procures its objective and with this offering a consortium was found to advance the project and the shopping centre was completed. However a rival shopping centre under the corporate banner of Peninsula Securities challenged the mechanism as an unnotified state aid and the government defended this in the High Court in Belfast. The High Court found in essence that for the purposes of the application of state aid rules there was no market to be distorted and that given the mechanism for claw back that government was rather, creating market capacity where there was none. On this basis it found no state aid existed and the case was not appealed. Government therefore felt that in circumstances of abject market failure it could intervene without reference to state aid rules to create business where the social circumstances were such that for political and social reasons it considered there was a priority to spark the market into operation: or so we thought.

Subsequently in England the European Commission commenced proceedings against English Partnerships, an organ of government which used the same device- but where there was clearly a market to be distorted (car construction for example), and it concluded that in these circumstances state aid did exist and that applications to clearance by the European Commission were necessary to render them permissible under European law. As a result to this day all parts of the United Kingdom have effectively accepted the jurisdiction of the Commission in respect of this technique, whether there is abject market failure or not, and whether the provision is in respect of industrial development or the creation of a social infrastructural project, such as a shopping centre.

In effect, by this technique the Government facilitated the creation of economic activity with very particular social aims in mind in an era in Northern Ireland when jobs were particularly scarce and employment difficult to generate. Whilst the decision of the Commission is undoubtedly sound where the device is abused to distort competition in otherwise robust economies, I do wonder whether the Commission's view that it has such an extensive jurisdiction is sound or necessary where there is abject market failure.

Universal Broadband Provision in Northern Ireland:

Another and much more up to date example of the government both mandating and facilitating its social agenda, and creating and up to a point controlling the market to deliver that has occurred with a Northern Ireland project intended to provide universal broadband provision across Northern Ireland at uniform price levels. This was against a background that left to its own devices the market would be likely to disadvantage those in more remote locations either by not providing the broadband coverage or by charging excessively for it. The technique used in this case was to approach the market to procure universal coverage at designated prices effectively asking the market how little do we need to pay you to provide this provision.

This project took place just as European jurisprudence had produced the decision in the Altmark case (c-280/00). The Altmark case was all about a public transport bus service in the rural district of Stendal in Germany- a service of economic interest. In essence a small district council had awarded the Altmark company a transport franchise and provided subsidies designed to offset the costs related to its public service mission. A competing firm lodged an appeal maintaining that the subsidies paid had not been notified to the Commission and contravened the Community rules on state aids. In that case the European Court of Justice ruled that such compensation does not confer an advantage on an undertaking concerned and does not constitute state aid therefore where 4 conditions were satisfied:

- first the beneficiary has effectively been entrusted with clearly defined public service obligations;
- second the parameters for calculating the compensation must be established in advance in an objective and transparent manner;
- third the compensation does not exceed what is necessary to cover all or part of the costs incurred in discharging the public service obligations (there being an allowance for a reasonable profit of course for discharging those obligations); and finally
- fourth – either the undertaking selected has been done so pursuant to a public procurement procedure or failing this that the level of compensation is

determined on the basis of an analysis of what a typical whether an undertaking would need by way of costs and profit to run such an operation.

Since that judgement a number of such universal broadband provision projects have taken place in the UK, some notified to the Commission, and some not. As it transpired the Northern Ireland scheme was not.

However it is clear that there is considerable complexity behind these four conditions laid down in the judgement and both the Commission and the UK have provided guidance for broadband and indeed other projects in this sphere.

For example it is necessary to consider whether state aid may exist not only for the service provider but also perhaps to end users.

Another area of potential difficulty is who owns assets which may have been generated in the course of the provision at the end of the contractual arrangements – do assets remain in public ownership (where they are less likely to rise state aid suspicions) or do they remain in private ownership.

So in fact the four Altmark tests are designed to be searching and need to be adhered to closely. In my view, this device, as the Court found, free from prior approval from the Commission is sensible and measured and a reflection of the respect EU law accords to whether economic functions at national level are carried out by democratic mandate by public or private sector (art. 295 TEU), whilst orchestrating competition rules to maintain reasonable competitive balance.

<u>Procurement Policy Development in Achieving the Equality Agenda in Northern Ireland</u>:

In this sphere there is an interesting story to be told in respect of Northern Ireland's policy development. Firstly I would like to say that the bulk of this story is much more roundly and satisfactorily related by Professor Christopher McCrudden in his text "Buying Social Justice" than I can ever provide in the short time available here.

Secondly it is important to point out that procurement rules have their roots in the "single market" project of the EU. Absolutely fundamental to the operation of the Union has been the opening of markets one to another and ensuring fair competition between companies in that context. On the face of it this seems unexceptionable in terms of the objectives of the EU. It is fundamental to the treaties and was always attractive to the United Kingdom and indeed to Ireland.

But it is not as simple as that. With open markets come the harmonisation of market conditions in many ways – thus the beloved jokes of the press on standardised banana sizes and suchlike – and a sense that local or national individualism is under stress from these rules.

In the context of procurement it is interesting to note that specific rules on procurement didn't exist until the early 1990s and any problems of procurement in the application of the single market rules were determined by the applications of general principles of EU law – in particular, transparency and non discrimination. Indeed one notable early case from Ireland was the Dundalk pipes case which is a good example of the application of those principles. In that case it transpired that the local authority in Dundalk had advertised for pipes but only specified the pipes' diameter in imperial, not metric measure– this of course offended against single market rules and the procurement was condemned by the European Court on that ground.

The other consideration to bear in mind is corporate social responsibility and the European Commission's attitude to it. Suffice for our purposes to say that whilst the UK has been engaged in a journey of exploration on how to deliver corporate social responsibility through procurement, the attitude of the EU Commission has been, at best, ambivalent. I think it is fair to say that the Commission's attitude has been that it should be voluntarily entered into by companies – not in the sense of philanthropy but in the sense that it should not be legally required of companies. It is clear from the 2002 Commission Communication on Corporate Social Responsibility. It considered that the adverse affects in terms of cost, loss of transparency, more bureaucracy and reduced competition essentially outweighed the benefits.

As a result at the end of the Commission's round table on Fostering Social Responsibility by SMEs there is a recorded disagreement between the Commission business and NGOs. The Commission and business essentially not being in favour and the NGOs very much in favour. In the end the final Commission communication on social responsibility in 2002 entirely omitted the mention of procurement.

Nevertheless it remains a potent force for regulation and driving social change and has been explored and used in various ways here in Northern Ireland.

But it was not always so. With the passing of the Northern Ireland Act 1998, effectively the constitution of the devolved government came section 75, which imposes a duty on all public authorities to have due regard to the need to promote equality of opportunity between persons of different religious belief, political opinion, racial group, age, marital status or sexual orientation as well as between men and women, people with disability or those without and those with dependants and those without. The Equality Commission's guidance on carrying out the duty was clear and unequivocal that public authorities procurement policies were an integral part of how they carried out their functions, and their procurement policies should therefore give effect to the section 75 duties. The Northern Ireland Select Committee in the House of Commons thought likewise.

"We do not consider the award of public contracts as simply an economic activity by the Administration, in which the Administration can consider itself as equivalent to a private sector organisation."

However the then direct rule administration's response was uncompromising:

"The government's longstanding position is that public procurement of goods and services is to be based on value for money… and should not be used to pursue other aims",

and in respect of s.75, “Policy on procurement by Departments and public bodies is determined centrally. In due course the central policy will be subject to an equality impact assessment in line with the s.75 obligation”.

However a dramatic shift occurred with the institution of a devolved administration in ____. Procurement policy was a devolved area, and in its first programme of Government the administration picked key areas for particular review: the review of public administration, the review of rating policy, and the review of public procurement among them. The team that took forward this stream of work had several constraints to work within:

- EU law, and the duty in s24 of the NI Act, together with the power in s14(5)(b) of the Act on the part of the UK government to intervene to revoke legislation which had an adverse effect on the single market for goods and services within the UK;
- the political constraint that 4 parties with diverse political opinions would have to sign up to the results;
- the NI Treasury Officer of Accounts, and indeed Treasury and OGC’s overarching policy drive to obtain “value for money”.

In the event, after intensive discussions to overcome these challenges, the team’s report used as its starting point the need to obtain best value for money, which it defined as,” the optimum combination of whole life costs and quality (or fitness for purpose) to meet the client’s requirements” But in a critical comment it added, “this ..allows for the inclusion as appropriate of social, economic and environmental goals within the procurement process”, linking this to the s75 duty.

A pilot project to assist the unemployed was recommended. This was especially significant as this are had particular equality implications in Northern Ireland given that for many years, Catholics were twice as likely to be unemployed as Protestants. Addressing unemployment therefore came to be regarded as a part of the fair employment agenda. There had been earlier small scale attempts drawing on the precedent of the Beentjes case (where an ECJ decision had considered and not found wanting a contract clause in a public procurement contract had provided for the contractor to employ 15% long term unemployed)- a “Making Belfast Work”

project in West Belfast had already used such a device, but the biggest related to the Victoria Square Development, where the NI Executive insisted that the developers briefs must describe how they would add value to the local economy, by tackling unemployment, enhancing employability and maximising training opportunities, and would consider how their plans would help fulfill the s75 duties.

The pilot involved a special condition being put into 20 selected procurement contracts in Northern Ireland. This would require suppliers to implement a plan they have provided to the contracting authority which was acceptable and which provided a clear specific and concise utilisation plan for employing unemployed people (the employment being provided either by contractors or sub-contractors). No maximum or minimum number was defined. The definition of unemployment was carefully considered by the Equality Commission so as not to discriminate against women. Further, the unemployed could be from anywhere in the EU (or from outside if the bidder was also from outside the EU). Under the tender documentation the proposed plan should be submitted as part of a bid and failure to comply with it would be subject to an appropriate penalty. The feasibility and quality of the plan could only be taken into account at the award stage where otherwise equivalent tenderers who submitted a plan were in competition. This was to comply with the Nord Pas De Calais decision – and indeed with the European Commission's restrictive interpretation of it. (See Guidance on Social Considerations in Procurement)

I would like to make some comments on this approach:-

1. The approach was modest. Academic and other debate about the meaning and significance of Beentjes and the Nord Pas de Calais decisions meant that to obtain legal certainty, this was the chosen course;

2. In some ways modest though the initiative was, it gained the approval of the then Executive and created a distinctly different policy approach to that in the UK Departments, and the arguments for parity of approach were therefore defeated – after all if procurement was a devolved matter it was within the discretion of the local administration to take a different approach;

3. Given the presence of section 75 and the particular problems of Northern Ireland it was not unnatural that such a different approach be taken.

In due course an evaluation report of the project was submitted to the Procurement Board of Northern Ireland in September 2005 and it showed that the costs of job creation were modest compared to other schemes. It was considered that clarity between value for money and social objectives were achieved by the two stage selection process – firstly price and quality, and secondly assessing the scheme only in the event of a tie between bidders.

The gains were, however, modest within the region of 50 workers from the target group retained in employed afterwards. Ultimately this is attributable to the modesty of the scheme because of the EU law constraints and the lack of clarity on what was possible;

Nevertheless the scheme pointed the way to a broader use of this kind of orchestration or regulation of into the operation of private sector entities. Other examples where such an approach could be taken to promote social objectives, environmental objectives, health and safety objectives and so on.

As a result of the successful pilot Northern Ireland Government together with NGOs together under the new devolved administration have adopted comprehensive guidance, “Equality of Opportunity and Sustainable Development in Public Sector Procurement in May 2008. The document provides guidance on everything from strategic and project development through specification and selection to the performance management of contracts. Now First Minister Peter Robinson in the foreword to the Guidance acknowledges that:
“the leverage of public procurement to contribute to delivering greater equality and social inclusion as well as sustainability goals within the current legislative framework should not be underestimated. In Northern Ireland public procurement accounts for approximately 1.9 billion of supplies, services and construction works and over the next 10 years this will be added to by a further 20 billion under the Investment Strategy for Northern Ireland.”

The document is an interesting reflection of both the policy priorities, and the legal constraints (mainly of a European law nature) to this area of policy development.

Partnership Procurement:

There is one final though unfinished chapter to relate. It raises further issues of the interface with EU law and public procurement where again government is striving to improve, in conjunction with industry, its approach to procurement.

Sir Michael Latham in 1994, Sir Peter Levine in 1998 and Sir John Egan again in 1990 all contributed to this process by their reports to government on government procurement.

Their reports identified many of the key failings of the traditional approach to procuring and managing contracts such as: the emphasis on lowest price rather than value for money; an adversarial culture throughout the supply chain; and a lack of client focus. In turn they made detailed recommendations including: the need to bring client, design consultants, contractors and sub-contractors together as an integrated team; a partnership approach to working with an emphasis on team work, openness and continuous improvement; and a move away from awarding tenders solely on the basis of lowest price. They emphasised the role of the client in bringing about the necessary changes within the industry and recommended that government commit to becoming a best practice client. Therefore it is estimated that substantial savings perhaps up to 30% of construction costs over 5 years, and better quality products could result from the implementation of these recommendations.

UK government have responded to these calls in recent times by among other things adopting what is called a partnership procurement technique. For example, here in Northern Ireland an £800 million schools renovation programme has recently been carried forward by a procurement with particular features to encourage and benefit from this partnership approach:

Key features of the approach in the procurement were:

- to award according to most economically advantageous tender, and not lowest price;
- to use a framework arrangement;
- to use one simple economic parameter ie fee percentage;
- fee percentage;
- and to invite competition in secondary competitions against indicative prices put forward by the contracting authorities, turning the competition on the quality of the tenders received.

However under this technique at the time of award the final price is not known, but becomes a controlled matter thereafter with a contracting authority appointed which fixes prices for materials in market rates and through an open book approach between the contracting authority and the contractor. The aim is to remove the all too common contractual disputes around what has become known as an "low bid/high claim culture". This mechanism delivers the final price and produces a dialogue between contracting authority and construction which is intended to drive up the quality of the final product of the schools and greater learning on the part of both the contracting authority and the contractors in the process.

Unfortunately this technique as it has been exercised has currently been suspended following a High Court challenge by a leading Northern Ireland contractor – Henry Brothers. In his judgment Mr Justice Coghlin has criticised the technique. He has taken the view that the European Court of Justice case law including the Irish SIAC Construction case judgment from Ireland does not support a proposition that some criterion on price or cost could be omitted. He also found that at secondary stage award a fee percentage had to be accompanied by a competitive establishment of specific prices or costs at the conclusion of the secondary competition. There was no finding of discrimination on grounds of nationality.

I will not say more about the judgment at present. But for our purposes suffice to say that on the basis of this judgment again EU internal market rules have interacted with an approach by N.I. government to drive up the quality of the results of procurements

whilst keeping prices firmly under control by this partnership approach. The Judgment is the subject of an appeal.

On a more general plane, my own view on the procurement regime is that it is too tightly drawn. Quite apart from the merits or demerits of individual judicial decisions, in an area where the general principles of EU law say what needs to be said to safeguard the internal market, and where equally "doing the deal"- for that is what procurement is in the final analysis-, is an infinite variable not readily to be regulated in detail, and where the consequences of that regulation can be so restrictive on member states policy initiatives, and finally where the application of the general principles can be very effective, as, for example, the golden shares cases illustrate.

In conclusion, I would say:

- what I have related shows that, even in troubled times for the smooth operation of our government in Northern Ireland, that utilising the space allowed by the principle of subsidiarity in the internal market is alive and well in the area of procurement law, and indeed state aids and other areas of economic activity where Government wants to influence the market in pursuant of its democratically given remit. With a growing understanding of the limitations of the market, there will continue to be an insistence for the values which the people want to see facilitated – and procurement is a key area where this can be achieved.

- given the EU setting, a high level of ingenuity and expertise is needed to make the best of the space that is available action at local level; and finally,

- I have mixed views on the application of the single market rules; I fully accept the extraordinary and beneficial aspects of this fundamental aspect of the EU project, and the ECJ's articulation of it, but I would ask for careful consideration to be given too the necessity to be so prescriptive, especially by legislation, and the extent of the Commission's action as a proportionate response to the need to balance proper EU control with the principle of subsidiarity.

Thank you for the opportunity to share these experiences on procurement law from the Northern Ireland legal jurisdiction with you.

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June 2009.

ANNEX

One might jump to a conclusion that the type of procurement devices mentioned represent the latest in tools to manipulate what part the market does and how it does it and what influence broader public objectives can be brought to bear in the context. However, this is certainly not the case and one can find that although the challenges of European law and its application in this context are new the type of devices that government can use to add broader social or other objectives into the corporate world are of longstanding.

Public Companies

For example, in Northern Ireland we would still have a considerable number of what would be regarded as public companies founded not in memorandum and articles of associated created under a Companies Act but whose constitutions are in fact founded in legislation. Examples of this would be what are called the "trust ports", that is ports entrusted with public property and public functions but nevertheless operating as corporate entities albeit with publicly set objectives. Examples in Northern Ireland would be the Port of Belfast or the Port of Warrenpoint, and one can readily see how the parameters of the Altmark case are relevant when considering the maintenance and operation of such entities: -the Victorians have been here before us!

Golden Shares - the Port of Belfast:

Another area of cross-fertilisation between the corporate world and government can be seen in an interesting run of cases in the 1990s where the concept of the "golden share" as it had been operated in various member states was tested repeatedly in the European Court and in most of the cases the member states use of the device was found wanting. A golden share in a company is a share invested with particular powers in respect of the operation of the company so that, unlike the institution of the public company the constitution of which is set in its entirety by government, in the case of golden shares using a device which is equally available to private or public sector it is possible to give key powers over the operation of the company to the

holder. Traditionally, these shares had been used as a device on the privatisation of companies to ensure a continuing measure of government control which was very often operated to ensure that the continuing ownership of the company within the member state which held the golden share. The Commission took the view that even where the device was not stated to be for the purpose of exercising such control, unless the member state could demonstrate clearly that the share was held for transparent purposes, and in particular that it could not be used in a way which offended against the free movement of capital or the freedom of establishment rules of the EU such a device would not be legitimate.

In the case of the United Kingdom the golden share held by government in BAA was one of those that fell to be scrutinised by the European Court and although the UK in its defence indicated the share could and would not be used in a way which was incompatible with the UK's European obligations, and that it did not see why a member state should not equally be able to avail of the device as private companies could. The court held against the UK and various other member states.

As the litigation was developing in Northern Ireland the previous devolved administration was considering the privatisation of Belfast Port and the use of a golden share in that context. However, given the risks created by the European litigation very careful thought was given to what use might be made of such a share, and in that context a share was designed with specific and limited purposes related to maintaining the essential character of the Port as a Port and no more. We constructed a model, on the basis of art 86TEU. As it transpired in its various decisions the European Court decided that the use of a golden share in such a way (as it had been deployed in Belgium in case c- 503/99 regarding the maintainance of the security of its means to maintain and deliver gas supplies to its citizens) was sufficiently well defined that it could only operate in a way that was compatible with EU law and so what had been proposed in Northern Ireland for Belfast Port was legitimate and fit for purpose. However, as it transpired it was decided not to privatise the Port in the event – a case of the operation was a success but the patient died as far as the lawyers were concerned but one which serves to illustrate again the ability of government by this means to influence corporate structures and the way corporations operate.

Again, these decisions leave space for the democratic expression of what art 295TEU provides for.

Taxation in Northern Ireland:

Another instrument from a government perspective which can be a driver to impose responsibilities on corporate entities whether social or otherwise and that is taxation. This is relevant to the subject matter because tax can not only be a fundraiser for government it can be a powerful instrument to orchestrate and regulate by infusing it with social or other responsibilities through taxation. In Northern Ireland it is not always appreciated that the local government has in fact a broad power in respect of taxation. This power has not changed from the 1920 Constitution and has continued through the various iterations of our Constitution to this day. It is basically a power to create taxes. This has not been much in evidence in its operation but as the creation of new taxes is generally not a popular thing for an administration to undertake one can readily understand why this is so. However, in selected areas not already dealt with by London for example where objectives of a public nature can be served such as by taxing plastic bags interesting possibilities for such market controls exist. From an EU perspective the relatively recent court decisions in respect of Portugal concerning the Azores, Gibraltar and the Rioja region of Spain are highly relevant to Northern Ireland in that they have confirmed that the use of taxation by regional administrations provided the decisions are taken at that level, and the results of imposing the taxation are not compensated for by central government are legitimate and do not constitute state aid for the purposes of European law.

We in Northern Ireland asked the UK to intervene in the case of Commission v. Portugal (re the Azores). In that case the regional government of the Azores had created a corporate tax rate advantage for the Azores, to assist that region, but the European Commission claimed that this was in effect a state aid, favouring businesses in that region. It referred to the fact that the central Portuguese government had a duty of solidarity to assist the regions, and that it was entitled and indeed bound by that duty to assist the Azores, even where its difficulties were created as a result of the tax policy it had adopted. We wished to avoid the ECJ reaching any judgment which might curtail the freedom of taxation as it existed in the

devolved regions of the UK, or the potential to refresh devolution by granting further taxation powers.

We then argued before the ECJ that local taxation powers were legitimate in the case of the asymmetrical devolution in the UK provided that the power to tax was operated independently by the local parliament, and that there was no countervailing duty on the part of the member state to intervene. The ECJ agreed, and has consistently maintained that view, in the face of European Commission interventions in two following cases regarding Gibraltar and the Rioja region of Spain.

State Aid - Regeneration & Infrastructure

Bridgette Wilcox
Eversheds LLP
19 June 2009

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State Aid – Regeneration & Infrastructure

We will cover:-

- Planning your approach
- Proceeding where no State aid
- Approved Regeneration Schemes
- GBER/De minimis/approved temporary framework schemes
- Practical Application

EVERSHEDS

Planning your approach

- Is there State aid? 4 tests but focus on "is there a benefit"
- If no - project proceed
- If yes then:-
  - Is there an approved scheme?
  - Can GBER/De minimis/temporary framework schemes be applied?
  - Notify?

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State Aid - Regeneration & Infrastructure

Forms of State Aid

- Grant funding
- Investment
- Joint Venturing
- Guarantees
- Rent subsidies
- Sale of land
- Overcompensation for goods or services

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Proceeding where no State Aid

1. Infrastructure

- State aid issues generally will not arise if infrastructure is provided on the following basis:-
  - open access
  - available to all on non-discriminatory terms
- Terra Mitica & Great Yarmouth State aid decisions
- Beware of specific benefit rather than general (i.e. road to factory gate) and standard planning requirements

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Proceeding where no State Aid (Cont)

2. Transfer of Land

- Sale of Land Guidelines – General rule is if the sale is for less than open market value ("OMV") it will amount to State aid
- OMV established by way of open and unconditional tender procedure or as established by independent evaluation (on basis of methodology in guidelines)
- 3 year rule – assumption (if sale on basis of independent evaluation) that OMV is no less than purchase price if the public body is selling within 3 years from the date of purchase of land in question – BUT get out clauses in falling markets

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Proceeding where no State Aid (Cont)

3. Investment

- Market Economy Investment Principle ("MEIP") – if applies then no benefit and thus no aid
  - Pari passu investment with private sector
- Benefit needs to be looked at in respect of various levels i.e. not just the initial recipient.

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Proceeding where no State Aid (Cont)

4. Loans

- Commercial loan complying with the applicable reference rate, as calculated in accordance with the Commission Communication on the revised method for setting the reference and discount rates (OJ C 14, 19.1.2008, p. 6-9)
- Interest rate depending on credit rating and collateral

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Approved Regeneration Schemes

- Approved Schemes
  - Partnership Support for Land remediation – runs until 2013 (funding for environmental protection measures – e.g. remediation of brownfield/derelict or polluted sites so fit for new use)
  - Housing gap funding scheme – runs until 2013 (gap funding for economically unavailable training developments)
  - Historic Regeneration schemes – run until 2013 (funding for additional costs of maintaining heritable building)

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State Aid - Regeneration & Infrastructure

Approved Regeneration Schemes (Cont)

- Partnership Support for Regeneration: Environmental Regeneration – unlimited in duration (funding towards sustainable and balanced economic growth across English Regions and to enhance and improve the physical environment) – no aid scheme
- Partnership Support for Regeneration: Community/Voluntary (neighbourhood) Regeneration – unlimited in duration (support to local communities by enabling them to participate in local regeneration by easing access to capital and funds) – no aid scheme
- **Note:** Block Exemption registered Scheme - Regional Investment Aid Scheme for Speculative and Bespoke Developments – runs until 2013 (gap funding for speculative and bespoke projects in Assisted Areas)

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GBER

- Regional aid
  - Transparency
  - Tangible/Intangible investment
  - Retention of investment
  - Scheme based
  - Large projects separately notified

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GBER (Cont)

- SME
  - Investment
  - Consultancy
- Environmental Aid
  - Range of measures/schemes
  - Costs not calculated net of any operating benefits
  - Not waste management (Environmental aid Guidelines)

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State Aid - Regeneration & Infrastructure

GBER (Cont)

- R&D&I
  - Large/SME/small
  - Fundamental 100%
  - Industrial 50%
  - Experimental 25%
    and uplifts
  - Costs relate to R&D&I only (includes cost of R&D facilities)

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De minimis

- €200,000 over 3 year rolling period
- New €500,000 scheme
  - Temporary measure enabling limited amount of aid to be given as compatible State aid
  - Assist businesses as a consequence of the economic crisis
  - Scheme applies only to businesses which were not in difficulty on 1 July 2008
  - Aid must not exceed €500,000 per undertaking (cumulated with De Minimis)
  - Aid can be granted until 31 Dec 2010
  - First measure authorised for the UK under the new temporary framework for State aid
- Guarantee and loan schemes

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Notifying State Aid

- Article 87(3)
- Discretionary Compatibility
  - (a) economic development - abnormally low standard of living/serious unemployment
  - (c) development of certain economic activities/areas - not adversely affecting trade conditions contrary to the common interest
  - (d) culture/heritage conservation - not affecting trade and competition in the Community to an extent contrary to the common interest
- Procedural Regulations

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State Aid - Regeneration & Infrastructure

Practical application

- PPPs – JESSICA
- Regeneration schemes
- Regeneration in falling markets
- s.106
- CPs

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ISEL/UKAEL

Ryanair and its implications

London, 19 June 2009

Damian Collins

Time Lines

- Ryanair/Walloon Region/ BSCA arrangements: November 2001
- Commission Decision: 12 February 2004
- Ryanair's Application for Annulment: 25 May 2004
- *State Aid and Regional Airports Communication: 9 December 2005*
- Oral Hearing: 12 May 2008
- Judgment: 17 December 2008

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State aid: Two Questions

- Is the measure aid?
- Is the aid compatible (Article 87(2) or (3)) or can it be exempted (Article 86(2))?

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Article 87 (1) – Presence of Aid Four Conditions

- Intervention by the State or through State resources
- Intervention must be likely to affect trade between Member States
- Intervention must confer an ***advantage on the recipient*** by favouring certain undertakings or the production of certain goods
- Intervention must distort or threaten to distort competition

(Source *Ryanair*, para 36)

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The Measures in Question

- Discounts on landing charges (fixed by Walloon Region Decree, collected by Airport Manager)
- Indemnity as compensation for changes in legislation (Walloon Region)

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An advantage?

- Were the measures in favour of Ryanair an advantage?
- Did Ryanair receive an economic advantage which it could not have received under normal market conditions?
  (Market Economy Investor Principle -"MEIP")

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The Market Economy Investor Principle ("MEIP")

- No advantage if, in similar circumstances, a private investor, of a dimension comparable to that of the bodies managing the public sector, could have been prevailed upon to enter into similar transactions, having regard in particular to the information available and foreseeable developments at the date of the transactions *(Case C-328/99 and C-399/00, Seleco, para 39)*
- Complex economic appraisal

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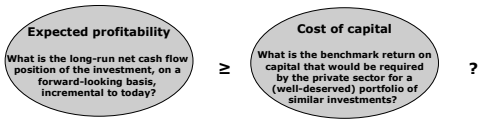
Applying the MEIP

- Market economy investor principle
  - In a financial deal struck by the state, would the required return be acceptable to a private investor
- In practice this means ensuring



- There are well established methods of assessing these
  - Expected profitability from NPV and IRR
  - Cost of capital from capital asset pricing model (CAPM)

Source: Oxera

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Expected profitability

- Net present value
  - A forward-looking, long-run incremental analysis
  - Determine future cash flows for each year, calculate the internal rate of return (IRR)
  - Use *ex ante* available information and expectations
- There are a number of challenges
  - *Ex Ante* analysis
    - *Ex ante* data may differ from actual events
    - *Ex post* data can be used as a check
    - What approach should be taken when *ex ante* and *ex post* evidence conflict strongly and consistently?
  - Incremental analysis
    - Are fixed costs relevant?

Source: Oxera

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Specific issues for application of MEIP

- Should the Walloon Region and Airport Manager (BSCA) have been treated as a single entity for the application of the MEIP?
- Was the Walloon Region acting as an economic operator or using its legislative and regulatory powers?

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Implications

- MEIP: *Ryanair* is about "when" not "how" MEIP should be applied
- MEIP: The "single entity" question
- MEIP: Exclusion of application where State operates as public authority
- Economic activity –v- public authority powers: where to draw the line?
- MEIP: "*Ex ante"* in an "*Ex post"* context

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ISEL/UKAEL

Ryanair and its implications

London, 19 June 2009

Damian Collins

The Commission's response to the banking crisis

Leo FLYNN*,
Legal Service, European Commission

All views expressed are personal to the author

Summary

1. Traditional approach to troubled banks
2. Response to the crisis
3. Banking Communication
4. Recapitalisation Communication
5. Impaired Asset Communication
6. Outlook

1. Traditional approach

Banks subject to same rules as other sectors:

- Rescue and Restructuring Guidelines (2004)
- Rescue aid for temporary survival
- Small exception for rescue aid in R&R Guidelines (point 25, fn 3)
- Restructuring aid to restore long-term viability
  - Restructuring plan
  - Own contribution (50%)
  - Compensatory measures

2. Response to crisis (1/7)

- Article 87(3)(b) EC:
  - "Remedy a serious disturbance of the economy"
  - Restrictive application, only twice applied in past (EL in 1980s)
  - **But** seriousness and scale of current crisis
    - Also affecting fundamentally sound banks
    - Threatening stability of financial system
    - Potential impact on whole economy

2. Response to crisis (2/7)

- Possible to allow measures which would not be allowed under normal rules
- Rules remain exceptional and limited in time
- 3 Guidance papers:
  - Banking Communication (13 October 2008)
  - Recapitalisation Communication (5 December 2008)
  - Impaired Asset Communication (27 February 2009)

2. Response to crisis (3/7)

- Practical arrangements
  - Reinforcement of resources (Economic Crisis Team)
  - Quick procedures and decisions
    - Simplified consultation procedure within DG COMP and quicker consultation of other services
    - Use of an urgent written procedure or a temporary empowerment of a Member of the Commission
    - Simplified linguistic requirements

2. Response to crisis (4/7)

- **Traditional**
- Sachsen LB (DE) – 4 June 2008
- IKB restructuring (DE) – 21 October 2008
- Northern Rock (UK) – opened 2 April 2008, extended 7 May 2009
- West LB (DE) – opened 1 October 2008, conditional decision after f.i.p. 12 May 2009

- **Transitional**
- Roskilde (DK) – 31 July 2008, 5 November 2008
- Bradford and Bingley (UK) – 1 October 2008
- Hypo Real Estate (DE) – 2 October 2008

- **New rules**
- Denmark (guarantee) – 10 October 2008
- Ireland (guarantee) – 13 October 2008
- United Kingdom – 13 October 2008, 22 December 2008, 15 April 2009
- Germany (guarantee, recap, other) – 27 October 2008, 12 December 2008
- Portugal (guarantee) – 29 October 2008
- Sweden (guarantee) – 29 October 2008, 28 January 2009, 28 April 2009
- France (guarantee) – 30 October 2008, 12 May 2009
- Netherlands (guarantee) – 30 October 2008

2. Response to crisis (5/7)

- Spain (assets) – 4 November 2008, 8 April 2009
- Italy (guarantee) – 14 November 2008
- ING (NL) – 13 November 2008, opened 31 March 2009
- Finland (guarantee) – 14 November 2008, 5 February 2009, 30 April 2009
- Dexia (BE, FR, LUX) – 19 November 2008, 13 March 2009
- Greece (guarantee, recap, other) – 19 November 2008
- Fortis (BE, LUX, NL) – 19 November 2008, 3 December 2008
- Parex Banka (LV) – 24 November 2008, 11 May 2009
- Aegon (NL) – 27 November 2008
- France (recap) – 8 December 2008, 28 January 2009, 23 March 2009
- Austria – 9 December 2008
- SNS Reaal (NL) – 10 December 2008
- Slovenia (guarantee) – 12 December 2008
- Carnegie (SV) – 15 December 2008
- KBC (BE) – 18 December 2008
- Bayern LB (DE) – 18 December 2008

2. Response to crisis (6/7)

- Nord LB (DE) – 22 December 2008
- Spain (guarantee) – 22 December 2008, 16 April 2009
- IKB guarantee (DE) – 22 December 2008
- Latvia (guarantee, other) – 22 December 2008
- Italy (recap) – 23 December 2008, 20 February 2009
- Anglo Irish Bank (IE) – 14 January 2009
- SdB (DE) – 22 January 2009
- Kaupthing Bank (FI) – 21 January 2009
- France (recap 2) – 28 January 2009
- Denmark (recap) – 3 February 2009
- Sweden (recap) – 11 February 2009
- Ethias (BE) – 12 February 2009
- Hungary (guarantee, recap) – 12 February 2009
- Banco Privado Portugues (PT) – 13 March 2009
- Dexia (BE) – opened 13 March 2009
- Bank of Ireland (IE) – 26 March 2009
- Fortis Nederland (NL) – opened 8 April 2009
- UK (homeowner mortgages) – 20 April 2009
- UK (asset-backed securities) – 21 April 2009

2. Response to crisis (6/7)

- Commerzbank (DE) – 7 May 2009
- Caisse d'Epargne et Banque Populaire (FR) – 8 May 2009
- Fortis Bank (BE/LU) – 12 May 2009
- AIB (IE) – 12 May 2009
- Bayern LB/Hypo Group Alpe Adria (DE/ÖS) – opened 12 May 2009
- Fionia Bank (DK) – 20 May 2009
- Portugal (recap) – 20 May 2009
- HSH Nordbank (DE) – 29 May 2009

Common benchmarks developed by early decisional practice:

- Eligibility: subsidiaries of foreign banks, systemic branches
- 6 months as normal duration of schemes with review clauses
- Limitations on the issuance windows for guarantees, limitations in the maturity of the debts (3 years)
- Minimum remuneration of capital…

3. Banking Communication (1/4)

- General principles:
  - Distinction fundamentally sound and not fundamentally sound/distressed banks
  - Need for review after six months
  - R&R Guidelines apply *mutatis mutandis*
    - Aid limited to the minimum
    - Contribution from beneficiaries
    - Behavioral commitments
    - Structural adjustments
  - Measures covered:
    - Guarantees
    - Recapitalisaton
    - Winding–up
    - Liquidity assistance

3. Banking Communication (2/4)

- Guarantees:
  - Broad range of funding can be covered, but no subordinated debt
  - Normally only new debt
  - Maturities up to 3 years, up to one third of measures up to 5 years
  - Remuneration in practice according to ECB guidance
  - If payment under guarantees, then restructuring plan
  - Behavioural constraints (e.g. no advertising with guarantee; no measures irreconcilable with aid; limitations on expansion)

3. Banking Communication (3/4)

- Recapitalisation:
  - More precise guidance in Recapitalisation Communication

3. Banking Communication (4/4)

- Winding-up:
  - Combined with guarantee or other measure
  - Minimise moral hazard
  - No new activities
- Liquidity assistance:
  - Normal measures of central banks no aid
  - But certain measures are aid

Competition
4. Recapitalisation Communication (1/5)

- Why new paper?
- Objectives of recapitalisations:
  - Restore confidence
  - Ensure lending to real economy
  - Rescue of banks to avoid systemic effects

4. Recapitalisation Communication (2/5)

- Competition concerns:
  - Competition between banks of different MS
  - Competition between banks using public funds and those not using them
  - Competition between distressed and sound banks if public funds made available at same terms

4. Recapitalisation Communication (3/5)

- Need to balance concerns against objectives:
  - Sufficient remuneration
  - Differentiate remuneration/terms according to risk profile (sound, non-sound)
  - Exit incentives

4. Recapitalisation Communication (4/5)

- Remuneration for sound banks:
  - If 30% private participation, rate is accepted
  - For sound banks from 7% (preferential shares) to 9.3% (ordinary shares)
  - Based on ECB guidance
  - The lower the entry price the more step-ups and exit incentives are necessary

4. Recapitalisation Communication (5/5)

- Remuneration for distressed banks:
  - Higher remuneration, reflecting risk profile
  - Restructuring or liquidation plan within 6 months
  - Behavioural safeguards (e.g. dividend ban)
- Reporting and possible prolongation after 6 months

5. Impaired Asset Communication (1/8)

- Why new paper?
- Key issues:
  - Transparency
  - Burden sharing
  - Eligibility of assets
  - Valuation of assets
- Valid for guarantee and purchase models

5. Impaired Asset Communication (2/8)

- Transparency and disclosure:
  - Full disclosure of impairments
  - Valuation, certified by independent expert, validated by supervisory authority
  - Full viability review in parallel (capital adequacy, prospects for viability)

5. Impaired Asset Communication (3/8)

- Burden sharing:
  - Banks should bear losses to the maximum
  - Correct valuation and remuneration
  - If identified loss leads to technical solvency, then winding-up or (for financial stability) restructuring
  - If no full *ex ante* burden sharing, then contribution later (claw-back clauses, first loss, residual loss sharing)
  - The lower up-front contribution, the higher later contribution from shareholders necessary

5. Impaired Asset Communication (4/8)

- Eligibility of assets:
  - Toxic assets (in particular sub-prime) are core
  - Other categories possible if systemic threat (specific problems of MS)
  - Baskets of assets defined in Communication
  - Additional flexibility up to 20% of assets
  - The broader the eligibility, the deeper the necessary restructuring

5. Impaired Asset Communication (5/8)

- Valuation of assets:
  - In principle, assets should be valued at market value
  - Transfer price above market value is aid
  - If transfer price equals real economic value, aid level compatible
  - But adequate remuneration necessary
  - If transfer value above real economic value, far-reaching restructuring necessary and claw-back clauses
  - Commission will consult panel of experts on valuations put forward by MS

5. Impaired Asset Communication (6/8)

- Incentives to participate:
  - Enrolment window up to 6 months
  - Mechanisms to help take-up
  - Behavioural safeguards
- Management of assets:
  - Clear functional and organisational separation

5. Impaired Asset Communication (7/8)

- Follow-up:
  - Asset relief is necessary but not sufficient for return to viability
  - Restructuring: viability, compensatory measures, own contribution
  - Extent of restructuring depends on: size of State support, soundness of bank, transfer price, size of assets concerned, problems of bank, business model
  - In-depth restructuring in particular if total State support above 2% of RWA

5. Impaired Asset Communication (8/8)

- State aid procedure:
  - Commission approval for 6 months
  - Within 3 months viability review or restructuring plan
  - Final approval within assessment of restructuring

6. Outlook

- Monitoring and review of schemes
- Impaired asset transactions forthcoming
- From rescue to restructuring phase

- Real Economy – Temporary Framework

CURRENT ISSUES IN EU PUBLIC PROCUREMENT AND STATE AID

3rd bi-annual joint European conference
Goodenough College, Bloomsbury, London
Friday 19 June 2009

Altmark in the light of the CFI Irish BUPA case

Philippa Watson Essex Court Chambers

Introduction

My participation in this conference is designed to seek to determine what is the impact of the **BUPA** judgment[1], handed down by the CFI on 12 February 2008, on the law relating to services of general economic importance (SGEI). In particular, I will consider how the principles in the **Altmark** case[2] need to be read in the light of their application to the factual and economic circumstances of the **BUPA** case.

Given that I only have 20 minutes – and those at the end of a long day of numerous papers and comments – in which to set out my views I have set out in this paper some background material to the discussion.

Relevant EC Treaty provisions

Services of general economic interest (SGEI) figure in two EC Treaty provisions: Article 86(2) and Article 16. Article 36 of the Charter of Fundamental Rights provides that SGEI must be recognized and respected. Reference was made to SGEIs in Article 111-6 of the

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Case T-289/03 BUPA , BUPA Insurance and BUPA Ireland v. Commission Judgment of 12 February 2008

2 Case C-280/00 Altmark [2003] ECR I-7747

Constitution of Europe. The Treaty of Lisbon revises Article 16 EC (which will become Article 14 EC) and introduces a specific Protocol in relation to SGEI).

Article 86(2) provides for the possibility derogation from the provisions of the EC Treaty of SGEI:

> "Undertakings entrusted with the operation of services of general economic interest... shall be subject to the rules contained in the Treaty, in particular to the rules on competition, in so far as the application of such rules do not obstruct the performance in law or in fact, of the particular tasks assigned to them. The development of trade must not be affected to such an extent as would be contrary to the interests of the Community."

Article 16 as it stands at present reads as follows:

> "Without prejudice to Article 73, 86 and 87, and given the place occupied by services of general economic interest in the shared values of the Union, as well as their role in promoting social and territorial cohesion, the Community and the Member States, each within their respective powers and within the scope of application of this Treaty, shall take care that such services operate on the basis of principles and conditions which enable them to fulfill their missions"

Following the entry into force of the Treaty of Lisbon Article 16 will become Article 14 and the following sentence will be added:

> " ...
>
> The European Parliament and the Council, acting by means of regulations in accordance with the ordinary legislative procedure, shall establish these principles and set these conditions without prejudice to the competence of Member States, in compliance with the Treaties, to provide, to commission and to fund such services."

The Treaty of Lisbon will also add a Protocol consisting of two articles:

> Article 1
>
> The shared values of the Union in respect of services of general economic interest within the meaning of Article 16 of the Treaty on the Functioning of the European Union include in particular:
>
> — the essential role and the wide discretion of national, regional and local authorities in providing, commissioning and organizing services of general economic interest as closely as possible to the needs of the users;
> — the diversity between various services of general economic interest and the differences in the needs and preferences of users that may result from different geographical, social or cultural situations;

— a high level of quality, safety and affordability, equal treatment and the promotion of universal access and of user rights.

Article 2

The provisions of the Treaties do not affect in any way the competence of Member States to provide, commission and organize non-economic services of general interest.

There is no attempt in the EC Treaty or the Charter to define SGEI. The provisions appear therefore to acknowledge the right of the Member States to define SGEI and are confined to ensuring that in doing so the provisions of the Treaty are respected as far is possible without prejudicing the attainment of the objections of those SGEI.

SGEI before Altmark

There were two approaches to State funding of SGEIs prior to **Altmark summed** up by Advocate General Jacobs in **Gemo**[3] as the 'State Aid approach' and the 'the compensation approach'

The 'State Aid approach' regarded funding granted to an undertaking for the performance of SGEIs as State aid within the meaning of Article 87 (1) EC which might however be justified under Article 86 (2) EC.

The 'compensation approach' viewed funding as potential compensation to a service provider for the cost of providing the SGEI. Such funding constituted State aid within the meaning of Article 87 (1) only if and to the extent that the funding in question exceeded the necessary level of remuneration for the service in question.

There was no more precise indication of where the dividing line between state aid and compensation for services lay. There was no clear indication of how compensation should be distinguished from State aid

The application of the two approaches by both the EC Commission and the ECJ was at times unclear and inconsistent. The practice of both institutions is summarized by at paras 92- 104 of the Advocate General's opinion.

The Altmark case

[3] Case C-126/01 [2003] ECR I-13769

Altmark concerned the grant by the Magdeburg Regional Government of licences for scheduled bus services in the Landreis of Stendal and the payment of subsidies for the operation of those services. Three questions were referred to the ECJ for a preliminary ruling the first of which concerned the applicability of Article 87 (1) EC to subsidies intended to compensate for the deficit in operating urban, suburban and regional transport services. Citing **ADBHU**[4] and **Ferring**[5] the ECJ held that a State measure must be regarded as compensation for the services provided by the recipient undertakings in order to discharge public service obligations if those undertakings do not enjoy a real financial advantage and the measure does not have the effect of putting them in a more favourable competitive position than their competitors. If this is the case that measure is not caught by Article 87 (1).EC.

The Court then proceeded to set out the circumstances in which subsidies/grants would be regarded as compensation and thus not falling within the ambit of Article 87 (1):

> "...public subsidies intended to enable the operation of urban, suburban or regional scheduled transport services are not caught by that provision where such subsidies are to be regarded as compensation for the services provided by the recipient undertakings in order to discharge public service obligations. For the purpose of applying that criterion, it is for the national court to ascertain that the following conditions are satisfied:
>
> - first, the recipient undertaking is actually required to discharge public service obligations and those obligations have been clearly defined;
>
> - second, the parameters on the basis of which the compensation is calculated have been established beforehand in an objective and transparent manner;
>
> - third, the compensation does not exceed what is necessary to cover all or part of the costs incurred in discharging the public service obligations, taking into account the relevant receipts and a reasonable profit for discharging those obligations;
>
> - fourth, where the undertaking which is to discharge public service obligations is not chosen in a public procurement procedure, the level of compensation needed has been determined on the basis of an analysis of the costs which a typical undertaking, well run and adequately provided with means of transport so as to be able to meet the necessary public service requirements, would have incurred in discharging those obligations, taking into account the relevant receipts and a reasonable profit for discharging the obligations.

These four conditions are cumulative.

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[4] Case 240/83 [1985] ECR 531
[5] Case C-53/00 [2001] ECR I-9067

SGEI after Altmark

Following the **Altmark** judgment The Commission published a number of communications on general issues relating SGEI

> White Paper on Services of General Interest COM (2004) 374 Final
>
> Services of General Interest including social services of general interest: a new European commitment COM (2007) 725

As to public service compensation, the Commission published a Notice and a Decision dealing with those cases where public service compensation does not meet the **Altmark** criteria.

> Community Framework for State aid in the form of public service compensation [2005] OJ C297/04
>
> Decision on State aid in the form of state public service compensation granted to certain undertakings entrusted with the operation of services of general economic interest [2005] OJ L312/67

The Commission applied the **Altmark** criteria in assessing the status of public funding under Article 87 (1)[6]. The Court did likewise in reviewing the legality of state aid decisions[7].

The BUPA case

This case was an application for the annulment of decision of the EC Commission of 13 May 2003 (some two months before the **Altmark** ruling was handed down by the European Court of Justice (ECJ)) finding that a risk equalization scheme in the Irish Health Insurance market was not a State aid within the meaning of Article 87 (1) EC.

Private medical insurance (PMI) was introduced in Ireland in 1957 with the establishment of the Voluntary health Insurance Board ('the VHI') which had the essential purpose of enabling persons not eligible under the public sickness insurance scheme (which was means tested) to get coverage for hospital expenses. Since 1991 the public health insurance scheme, which is essentially financed through general taxation, has provided cover for the entire Irish population irrespective of income. For many

[6] For example Pyrenees-Atlantique Decision C (2004) 4343 Final; DORSAL Decision C (2005) 1170 Final

[7] Joined Cases C-34 – 38/.01 Enirisorse SpA v. Ministero delle Finanze [2003] ECR I-14243; Case T-157/01 Danske Busvognmaend v. Commission [2004] ECR II-917;Case T-124/01 Valmont Nederland v. Commission [2004] ECR II-3145; Case C-451/03 Calafiori [2006] ECR I-2941

years the VHI was the only provider of PMI services in Ireland. That position changed in the mid 1990s with the liberalization of the PMI market following the adoption of the Health Insurance Act 1994. Under Part II of that Act the provision of PMI in Ireland was made subject to four public interest requirements:

Open enrolment: anyone aged less than sixty five years of age must be accepted as a member of a PMI scheme regardless of age, sex or health status;waiting periods could be applied.

Lifetime cover: contracts cannot be terminated by the insurer.

Community rating: the same rate of premium must be applied for a given service regardless of age sex or health status;

Minimum benefits policies: benefits must conform to a give prescribed level.

BUPA Ireland has been operating on the Irish market since 1997. It was the VHI's main competitor. At the time of the proceedings before the CFI, BUPA had a market share of 15% by members and 11% by receipts whilst the VHI had approximately 85% by members and 80% by members.

The Health Insurance Act 1994 authorized the establishment and operation by the Minister for Health of a 'Risk Equalisation Scheme' ('RES'). The RES is a mechanism which provides for payment of a charge to the Health Insurance Authority – a body charged with the task of advising the Minister on the commencement of payments under the RES and of administering those payments through a fund specially set up for that purpose – by PMI insurers whose risk profile is less healthy than the average market risk profile. Newcomers to the market were given a three year exemption from the RES.

PMI insurers are required to submit to the HIA returns covering six month periods. On the basis of these return the HIA evaluates the distribution of risks among PMI insurers, reports to the Minister and, if necessary makes a recommendation to commence RES payments.

On 23 January 2003 the Irish authorities formally notified the RES to the Commission pursuant to Article 88 (3) EC. By a decision of 13 May 2003 the Commission found that the RES was not a State aid because it involved "payments which are limited to the minimum necessary to compensation [PMI] insurers for SGEI obligations and therefore does not involve State aids in the sense of Article 87 (1) EC".

The judgment of the CFI dealt with a number of general matters pertaining to SGEIs before proceeding to apply the Altmark criteria of review to the RES.

> First the Court held that there was no definition in Community law of the concept of an SGEI and no established rule setting out the conditions which must be satisfied before a Member State could invoke the existence and protection of an SGEI mission. Member States have a wide discretion to define what they regard as SGEIs. However that discretion is not completely unfettered: Member States must ensure that every SGEI mission satisfies certain minimum criteria notably the presence of an act of a public authority entrusting the operators in question with an SGEI mission and that mission must be of a universal and compulsory nature. A failure on the part of a Member State to 0bserve these criteria may constitute a manifest error of assessment.
>
> Secondly, the burden of proving that the relevant criteria indicative of an SGEI have been observed and that the service in question should be characterized as an SGEI rather than an economic activity lies on the Member State.
>
> Thirdly, an operator entrusted with an SGEI mission need not necessarily be given an exclusive or special right to carry it out. The grant of a special or exclusive right is an instrument which may enable an SGEI mission to be performed but it is not a pre-requisite for such a mission. An SGEI mission may be entrusted to a large number or even all the operators active on a particular market.

Turning to the **Altmark** principles, against which the Court held the Commission Decision had to be reviewed in spite of the fact that it was adopted before the **Altmark** judgment and could not therefore have constituted the framework within the Commission examined the RES, the Court found that the RES satisfied the four cumulative conditions laid down in **Altmark**.

(i) The existence of public service obligation

> The RES was a public service obligation. There had been an act of entrustment in the sense that obligations as to the nature of PMI policies had been imposed (open enrolment; lifetime cover; community rating and minimum benefits). The granting of special or exclusive rights to a limited number of operators was not necessary nor was it necessary that that the service in question did not respond to the needs of the whole population or was not available throughout the entire national territory;

(ii) Structure of compensation

Although the criteria for the calculation of payments under the RES was complex they were not untransparent nor unclear. A mathematical formula for the calculation of compensation had been set out and the data to which that formula would be applied has been determined.

(iii) Necessity and Proportionality

The third **Altmark** condition requires that compensation should be necessary for the attainment of the objective of the SGEI and proportionate to that objective. BUPA had argued that that the RES was not aimed at compensating for the cost of supplying health services in accordance with the fourfold requirement laid down in the 1994 Act. Compensation was not based on receipts for medical services. It was not therefore possible to determine whether and to what extent such services were supplied at a loss to the insurer. The Court was not swayed by this argument. It stated that the quantification of costs according to risk profiles was "consistent with the purpose and spirit of the third **Altmark** condition in so far as compensation is calculated on the basis of elements which are specific, clearly identifiable and capable of being controlled." The scheme as a whole did not permit an examination of receipts as a standard for determining the cost of supplying services as the Community rating required premiums to be fixed in such as way as to cover the insured population as a whole – regardless of risk levels. Neither the purpose nor the spirit of **Altmark** required that receipts be taken into account in a system which operates independent of receipts.

(iv) Efficiency

The fourth **Altmark** test goes to efficiency. To satisfy this operator must have been entrusted with a SGEI mission following a public procurement procedure or if not, his costs must be compared to that of an efficient operator.

No procurement procedure had occurred in **BUPA** and since it was not possible in BUPA to identify in advance who would benefit from risk equalization payments the "efficient operator" test could not be applied. Moreover at the time when the Commission's Decision had been adopted the RES had not come into operation. Nevertheless the Court found that the system was inherently neutral with regard to inefficiencies – the average claim costs of all insurers were computed and this meant they could benefit from their own efficiencies if they did better than the national average.

Even thought the Court found that there was no state aid involved in the RES and thus the Commission's Decision's decision was valid it proceeded to consider the RES under Article 86 (2) EC.

As to the necessity of the scheme, the CFI held that the Member States' had a wide discretion in this regard. It was essentially up to them to decide what the fulfillment of the objectives of a given SGEI required subject only to review on the ground of 'manifest error'. There was no requirement to demonstrate indispensability. Due to the danger of risk selection by PMI operators, the Commission had not erred in finding that the RES was necessary to maintain stability in the market.

The Court found that the RES was proportional. It was influenced by the fact that new market entrants benefit from a three year exemption- this would go some way to alleviating any deterrent effect the RES might have on potential market entrants.

Conclusions

The **BUPA** judgment clarifies a number of issues. It confirms that Member States have a wide discretion in defining both the substance and modus operandi of SGEIs. Their decision is reviewable only on the ground of manifest error. The CFI in reviewing the Commission's decision in BUPA adopted a 'light' approach in the sense that it appeared reluctant to disturb in any way the decision of Ireland with respect to the operation and funding of PMI services or that of the EC Commission in their review of the RES under Article 87 (1)EC.

The Commission adopted the BUPA decision before the Altmark judgment had been handed down. It could not and was not aware of the criteria laid down in that judgment. The CFI reviewed the decision in the light of those criteria. It did not attempt to draw a distinction between the circumstances in front of the ECJ in the Altmark case and those of the BUPA case which were plainly different. It adopted a 'one size fits all' approach. The result lacks credibility. The reality is that the area of SGEIs and their funding is complex. Whilst in some case the Altmark criteria may suffice to determine whether public funding is compensatory in nature or is in fact a subsidy in the nature of state aid, in many others those criteria may not be applicable and another approach may be justified. This was the position in BUPA. The Altmark criteria – even had they been known to the Commission- were difficult to apply to the RES.

Perhaps the better approach might have been for the CFI to take the essence of the Altmark criteria- the principles underlying these criteria – and create a workable standard for review for cases such as RES.

Member States have discretion to determine what an SGEI is and discretion in how to fund SGEIs. This means that there will be many variables amongst funding mechanisms. It is perhaps naïve to assume that one set of review is applicable to all those mechanisms.

Whilst Altmark was greeted with enthusiasm as clarifying the dividing line between compensation and state aid and the criteria aid laid down therein have subsequently proved to be applicable by both the Commission and the ECJ in their respective approval/review procedures of state aid, we now see form BUPA that matters are not so simple. SGEIs are complex and highly sensitive area of law and policy. They do not easily lend themselves to a mechanistic system of review. The future will bring more cases like BUPA to the Commission and to the ECJ and Altmark may have to be re-visited if the letter and spirit of the Treaty are to be respected.

Finally and not without importance is the Treaty of Lisbon. What exactly does the amendment to the current Article 16 mean? What powers has the Community got with respect to SGEIs and their funding in the light of both Altmark and BUPA? And is the Protocol compatible with the wording of new Article 14?