The consequences of Brexit for public procurement legal standards

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Outline

- Models
  - EU procurement regime
  - The EEA (“Norway”) option
  - The WTO option (Government Procurement Agreement – GPA)
    - Main focus
    - GPA is robust; plurilateral only; and used as basis for EU agreements
    - Others: Switzerland, CETA, DCFTAs with Ukraine etc
- Transition issues
- Pending measures
Key elements of procurement trade regimes

- Prohibition on discrimination
- Transparent award procedures to support this and foster competition
- Remedies for undertakings (before national courts etc)
EU

Major contracts (main legislation only)

- Classic Sector Directive 2014/24
- Utilities Directive 2014/25
- Concessions Directive 2014/23 (classic and utilities fields)
- Defence and Security Directive 2009/81
- Remedies Directive 89/665
- Utilities Remedies Directive 92/13

Lower value contracts of cross border interest

- TFEU (all 3 key elements, including simplified transparency requirements)
EEA

- Applies EU rules for all three key elements (major and lower-value contracts)
  - Important related legislation also applies e.g. on standardisation (Reg. 1025/2012)

- Same system for notices
  - *Official Journal of the EU* for advertising, award notices etc
  - Standard forms, including European Single Procurement Document
  - Use of Common Procurement Vocabulary (CPV)
WTO Government Procurement Agreement (GPA)

- Plurilateral agreement
- Does the UK have to apply to be Party to the GPA?
  - Yes?
GPA: coverage

- Negotiated “bilaterally” – so EU/UK negotiation needed, and no MFN
  - EU/UK agreement need not be extended to others
- EU: covers (most) procurement covered by the directives, and seeks reciprocity
GPA: coverage

- EU-UK could maintain current GPA coverage
  - UK White Paper envisages “replicating” current WTO commitments
GPA: EU coverage compared with directives

1. GPA covers only major procurement (above directives’ thresholds)
   - However, UK legislation would outlaw local preference?
GPA: EU coverage compared with directives

2. GPA does *not* cover private utilities

3. GPA does not cover some utility sectors (postal services, gas and heat, oil and gas extraction, solid fuels extraction/exploration)

Many UK utilities excluded by “competitive markets” exemption
- Not e.g. water
GPA: EU coverage compared with directives

4. GPA does not cover hard defence (tanks etc)
   - Other fora?
     e.g. European Defence Agency

5. GPA does not cover some services (directives’ old “Part B” services - now more regulated in EU)
   - E.g. health and social services; legal services
GPA: EU coverage compared with directives

6. Does not cover most concessions?
   • Needs clarification

7. GPA Art. III.2 allows measures relating to goods or services of persons with disabilities, philanthropic institutions, prison labour
GPA: award procedures

- Similar structure to (old) Utilities Directive
- Single set of procedures for all covered contracts
  - Much preferable to EU approach
GPA: award procedures compared with Classic Sector Directive (selected key points)

1. GPA has no single system for notices
   - UK ContractsFinder; but could UK use OJ?
2. GPA does not require electronic procurement
3. GPA does not require acceptance of self-declarations
4. GPA allows use of negotiation in any competitive procedure when stated in advance
   - EU limits for standard procurement
GPA: award procedures compared with Classic Sector Directive (selected key points)

5. GPA allows greater use of (advertised) qualification systems
   • Similar to (although a bit narrower than) Utilities Directive

6. Directive has detail on:
   • “recurrent” procurement (framework agreements and dynamic purchasing systems) - important
   • electronic auctions

7. Certain GPA rules on drafting specifications apply only “where appropriate”
GPA: remedies

- Remedies for suppliers (GPA Art.XXVIII):
  - Except where State failure to implement

= higher standard than for many WTO rules
GPA: remedies compared with EU directives

- Similar to Remedies Directives, with exceptions:
  - Independence etc of review body
    - Not important as UK already “over-judicialised”
  - Damages can be limited to costs
    - Not important in UK
  - EU 2007 measures do not apply: standstill; ineffectiveness; automatic suspension
    - More important
GPA v EU regime: summary of impact on MS27

- Coverage (assuming UK coverage remains as now)
  - Slightly? more limited market access
  - *But* could go beyond current GPA coverage
- Award procedures
  - Less strict in some ways
    - Not significant, apart from framework agreements?
- Remedies
  - Less strict – but UK review body more of a problem
- More divergence within the UK
  - Still much more simple and standard than many of MS27?
Other (non-accession) trade agreements

- Mostly modelled on GPA
  - Applies to EU agreements with non-GPA Parties as well as GPA parties
  - Latter largely concerned with broadening coverage within GPA framework, if possible
    - e.g. TTIP negotiations on US States’ procurement
Other (non-accession) trade agreements

- Some aim at wider coverage and/or deeper standards than GPA, inspired by directives
  - Coverage
    - Switzerland: private utilities ("sub-GPA" standard of award procedures)
  - Award procedures etc e.g.
    - DCFTAs with Ukraine etc: gradual assimilation to *acquis*
    - TTIP negotiations

- Some provisions are "sub-GPA" standards (not of interest for UK)
  - Some entities under CETA
Transition issues (withdrawal agreement)

- Ongoing award procedures
- Arrangements etc already concluded under EU rules:
  - Modifications
  - Call-offs under framework agreements and dynamic purchasing systems; qualification systems
  - Remedies relating to procedures where contract concluded
    - Including ineffectiveness remedy
  - E-invoicing
- Retaining OJEU access for UK?
Pending measures

- Proposed Regulation on access for third country goods and services
  - Could be applied to UK where coverage less than the directives
- Accessibility Act (COM/2015/0615 final)
  - Accessibility obligations in public procurement specifications