European Public Services Briefings 4

European Union Public Procurement Law, the public sector and Public Service Provision

Andy Morton

European Services Strategy Unit
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In the mid-1980s, prompted by the passing of Single European Act, the European Union embarked upon an ambitious programme of liberalisation to complete the Single Market. This included the opening up of many national industries to pan-European competition. EU public procurement law has been a crucial pillar to this agenda as EU institutions have sought to encourage cross-border, pan-European purchasing of public contracts. The impact of this has been difficult to gauge, including in the already very open procurement market in the UK. The experience of extensive procurement within the UK public sector has produced some serious questions in terms of impact upon service quality, value-for-money, industrial relations and investment outcomes. Despite this, the EU identified the UK as a good model in its attempts to create a Single European Market in procurement. Below, these issues are surveyed in relation to EU public procurement law and the UK experience with procurement practices

1. Introduction to Public Procurement in UK and Europe

Processes whereby government institutions and bodies purchase services, supplies and works from the private sector has constituted a significant and growing part of the European economy in the last 30 years. In 2009 public procurement contracts covered by EU law represented 3.6% of the EU's total GDP[1] and the total value of all procurement to the EU economy stands at more than ten times this and is worth over a trillion Euros[2].

The shape and scope of public procurement within European Union (EU) member states has changed radically in this period. Many countries, like Britain, have developed large-scale procurement frameworks affecting both the financing and function of swathes of its public sector. For example, Britain boasts over 700 Private Finance Initiative (PFI) infrastructure projects and large long-term, multi-service contracts. The EU in recent times has increasingly viewed the British example as a model for its desired single European procurement market. Since the 1980s the EU has sought to reach this goal through liberalisation policies spearheaded by state aid[3] and free movement law[4]. By opening up publicly owned sectors, so they more closely resemble the contracting and purchasing practices seen in the private sector, the belief is that opportunities will be forged for greater cross-border bidding of contracts.

EU public procurement law (thereafter EUPP), in targeting those 'public markets' within public, municipal and utilities sectors, overlaps with each of these areas of EU law above are fundamental to the Single Market programme. Given the considerable problems presented by the various forms of procurement in public service terms – such as poor value-for-money, service quality, poor industrial relations and investment shortfalls[5] – an examination of how EUPP law can affect this reality is

[1] European Commission Staff Working Document – Executive Summary of the Impact Assessment. *The*
[2] C.H. Bovis (2004). EU Public Procurement Law. Elgar Publishers.
[3] One of the two fundamental pillars to EU Competition policy (Anti-trust being the other) provided within articles 101-109 in the current Treaty.
[4] Characterised by the four economic freedoms providing for the free movement of Goods, Services, Capital and Person.
[5] See the ESSU's http://www.european-services-strategy.org.uk/outsourcing-library/

necessary; especially as EUPP law represents the law of the land in this area and throughout the rest of the EU.

There is always going to be some need for the public sector to purchase certain services from the private sector it cannot perform itself. If a hospital needs building or renovating the NHS needs to procure the services from those parties who can build it. In the UK however the direction of public policy has not regulated these adequately and worse has pushed the contracting and procurement method into areas it perhaps should not. This expansive use of procurement into areas of the public sector, where services would be better provided in-house, has created many of the problems highlighted above. Therefore, in light of the EU's powerful regulatory role, and its long-standing intention to play an active role procurement regulation, key questions need to put concerning the its role:

How does EUPP affect the use of procurement and contracting procedures in the UK?

- *Has EUPP law had an affect upon the extended and expansive use of contracting/tendering procedures in utilities, municipal and social service sectors in the UK?*
- *How does UK and EU law interact in providing the law of land in procurement?*
- *How are PPP and PFI schemes influenced by EUPP law and what scope is there for EU law to be used to regulate these?*

What broader role does or can EU law have enforcing social policy and public service goals in procurement contracts?

- *Can the Services of General Interest (SGI) frameworks – including Services of General Economic Interest and Social Services of General Interest – offer tools to enforce social policy considerations so important to public service provision?*
- *How does EU state aid and EU Competition law affect the application EUPP rules?*
- *Can EU labour and social law be used to frame procurement contracts and how EUPP law is implemented here?*

2. EU Public Procurement law

Since the 1985 Single European Act the European Commission has sought to promote a competition policy agenda that demands the removal of national barriers to cross-border competition. Public procurement has provided a crucial means for EU institutions to advance an agenda to create common purchasing patterns across Europe. This has been only partially successful and repeated attempts to create a Single Market in procurement have produced four different generations of EUPP law since the 1970s. These have constituted dozens of different directives and the thousands of pages of duties and regulations.

In 2011 the European Commission unveiled a plan to for a fifth generation of EUPP law. The 2004 incarnation of EUPP law is directed by the principles of *transparency* and *non-discrimination, proportionality* and *mutual recognition*. The principles of transparency and non-discrimination take primacy in directing EUPP law as they provide the means as well as ends to EU free movement goals: it will push national contracting authorities down the liberalisation route and, crucially, will enable commercial parties from other EU countries to bid and win contracts. This is done principally by

mandating procedures be used for the advertising and award of certain contracts once a contract value threshold is reached.

The 2004 EUPP Directives also overlap with other secondary European law including the Acquired Rights Directive, the Services Directive, the Posted Workers Directive and works in conjuncture with the Remedies Directive. Despite the intention for the two 2004 EUPP Directives – regulating Public Works[6] (Public Sector) and Utilities[7] procurement – to streamline and simplify EUPP law, its entangling with other areas of EU law, and the different, complex forms of procurement, have created a very complex regulatory regime.

The new reforms of EUPP will take place in the same year as the reform of other totemic areas of internal market law. This includes posted workers, acquired rights and state aid law. The apparently streamlined EUPP law includes the directive for Utilities covering water, transport, post and energy sectors, and the Public Works Directive; applying to works, supplies and services contracts. The latter applies directly to public sector contracting authorities including central government bodies and local government.

Both of these directives provide the rules of practice for various kinds of contracts. '*De minimis'* rules dictate what procurement rules apply to particular sorts of contract based on monetary size. In general, these *de minimis* thresholds – formed in conjuncture with state aid *de minimis* rules – are set quite low, thus increasing the possibility that EUPP applies. This has been identified as a key area for reform alongside that of (Competitive Dialogue procedures. EUPP also applies to those public service contracts whose monetary value is made up from 50% or more of public subsidy. In utilities terms this has been famously applied to the 'lifeline' island ferry network in Scotland as well in unpopular form in postal and other transport sectors.

The dialogue procedures mandated by EUPP law have created procedural demands for all contracting authorities. These procedures include the *open, restricted, negotiated* and *competitive* options for inviting bidders. The competitive procedure was a new inclusion in the 2004 Directives and was introduced for particularly complex contracts. Concerns over freedom to use a particular procedure are complicated principally by the advice received by, for example, local public bodies from central government.

Public authorities in particular may seek greater control over the bidding process so that certain parties do not bid (widely practiced by the private sector). 'Restricted' and 'Negotiated' procedures offer more control over the process for public bodies but a clear preference toward the 'Competitive' (used for PFI) and 'Open' procedures remains among EU and UK policy-makers. The combined 'competitive-negotiated' procedure offers a bridge between these different routes. Complaints from national stakeholders concerning these centre upon on the administrative-procedural burdens.

Given the much harder line 'most economically advantageous tender (MEAT)' criteria, that weighs down the new 2011 EUPP reform proposals[8], the issue of choice in other areas of the process will be increasingly important. The details of proposed EUPP reform provisions are not as important as to how the European Commission and ECJ interpret and enforce them. In regards to the award procedures, the ECJ might aid national public bodies greatly by taking the relaxed approach it has

[6] Directive 2004/18 (Public Service contracts)
[7] Directive 2004/17 (Utilities)
[8] The 2011 reform proposals do also introduce a new 'Innovation partnership procedure' for the use in Research and Development projects. Infrastructure and public works contracts of very large size might become relevant with these.

done in areas such as local council 'shared services'; but may not if an *Altmark*-type judgement is delivered instead. However, the Commission's approach may be very different and in this same area – dealt with briefly below – has demonstrated a hard line against perceived misuse of procedures mandated in the EUPP directives.

If certain procedures required by EUPP law are not observed – with any inconsistency on the part of EU institutions not withstanding – their public financing will become subject to attention by the European Commission as a state aid issue. The problems this mangled EU state aid-EUPP law nexus presents itself in the example presented by Scotland's lifeline ferry network outlined below.

3. 'Public markets' vs. 'Public services': Public procurement, public and social services as 'Service of general Interest'

Today, the role of public procurement goes to the very heart of both public service provision – and the European Social Model – and the economic goals of market-making so central to the Single European Market. The potential for conflict between these competing ethics - solidarity and liberalisation respectively – that underpin these is high.

This doesn't mean that Europe-wide rules demanding liberalisation through public procurement cannot be shaped by applying other areas of EU law, especially in regards to EU social law to enforce social standards. Unfortunately, as outlined above, this interface between law governing public procurement and the provision of public services produces a complex regulatory regime in the context of EU law. This pits the commercial-liberalisation ethos of EUPP & EU state aid law against the social policy and public service goals represented by those considerable chunks of the EU Treaty dedicated to social policy concerns.

This presents a 'conflict of laws' scenario. In attempting to reconcile this EU's institutions have in recent times placed an increasingly heavy bias on the liberalisation principles embodied in the Treaty. The definitions of SGI, Services of Social General Interest (SSGI) Services of General Economic Interest (SGEI) found in the Treaty should, in principle, present opportunities to frame processes of liberalisation, such as procurement, in the name of social goals concerning quality of service, Value for Money (VfM) and worker protection. Reality presents something different, therefore a question must be posed: can these principles of SSGI and SGEI be used to shape or shield public service provision from excessive and ill-fitting or ill-advised procurement and contracting procedures?

Definitional problems with concepts like SGEI do not offer good prospects. EU Institutions have been keen not to nail down precise definitions, but certainly SGEI is seen has having far-wider scope in terms of those sectoral activities it covers than SSGI. This can result in an organisation or industry whose function is for social or public general interest, being defined as 'economic' and therefore subject to the economic, market-making rules of the Treaty. This applies to sectors such as postal and transport services that often have dual economic and social character and it has become clear through advances in EU Competition and free movement law that more clearly defined social service sectors such as health could be wrapped up in economic rather than social service definitions. These definitional boundary issues are being seen in the new commissioning reforms of the NHS–reforms that further raise the spectre of EU state aid and public procurement law in UK healthcare.

To muddy the waters further, the Commission has produced statements and communiqués glorifying the solidarity role of SSGI and the social services that embody them[9]. Its actions however sit in stark contrast to this as it has advanced EU liberalisation in pointed and detailed form whilst leaving this ambiguous SGEI principle without sufficiently definition. This rather duplicitous position is mirrored elsewhere.

There are specific areas in which this applies where we can find other possible avenues to shape these processes. EU institutions have sought to define most areas of what we consider to be 'public services' to also be 'public markets', therefore specifically subject to EU liberalisation rules. So is there recourse in EU law to shape the liberalisation process demanded by EUPP and other EU law? the legal tools that public authorities of member states can deploy do have some merit as well as pitfalls. The better examples include the use Public Service Obligations (PSOs) in contracts. PSOs are built into contracts and tenders and are used to define public service goals and how they are to be provided and funded. It is common practice on the continent to endow public service provision with formal and chartered social service objectives; whether they are contracted out to external, non state parties or not. In public works contracts this would include respecting pre-existing collective agreements[10] and environmental considerations.

PSOs do offer a means to lace public service goals, functions and means of financing, but their use is heavily circumscribed. Not only is EUPP supported by a powerful set of EU state aid rules, which heavily regulates public subsidy to public sector bodies, but essentially these bodies of law have a level of importance placed upon them that trump the social objectives that frame SGI and PSO principles also found in EU law. An example of how PSOs are used by national bodies in the UK and how they're viewed by the European Commission is spelt out in the example below.

4. The British experience with procurement and EUPP

4.1. The Altmark[11] Criteria: PSOs and Utilities sectors: transport

Scotland's 'lifeline' ferry network connects the dozens of Scottish island communities to the Scottish mainland[12]. Tendering policies were pushed into these in the late 1990s, state aid law was applied aggressively in combination with EUPP law as demanded by the European Commission and new directives. These services, taken as routes bunched together and run by single companies like Caledonian MacBrayne, are not profitable and require two-thirds of its operational budget to be provided by public subsidy. There are however some profitable routes, with only one on the western side of Scotland[13].

Why is it desirable to force a liberalisation procedure upon a service that is not even close to being profitable, especially given the essential 'lifeline' nature of these services? The only rationale one can

[9] Commission Staff Working Document. Biennial Report on Social Services of General Interest. 2/7/2008. The European Commission.
[10] Please note: that the theoretical application of Transfer of Undertakings (TUPE) law is complex and particularly so given recent European Court of Justice Decisions concerning the legal standing of collective agreements when posted workers are at issue in public works contracts.
[11] *Altmark case c-280/00*
[12] http://www.european-services-strategy.org.uk/publications/essu-reports-briefings/european-public-services-briefing-2-the-impact/eu-public-transport-policy.pdf
[13] This Gourock to Dunoon route had a public service ferry and a private operator plying the route. The other profitable western route was made defunct by the building of the Skye Bridge, and the ferry services to Orkney and Shetland have for-profit companies plying routes as well as public service operators.

offer is to create opportunities for private parties to cherry pick the profitable routes. Thus reducing the scope of public service operation to the unprofitable remainder. In a deal done between European and Scottish authorities, a new tendering procedure was ordered and a state-owned company was awarded the tender. This company was a newly formed subsidiary of state-owned Caledonian MacBrayne that previously plied the route to the annoyance of private parties and the European Commission.

The result is not as bad as it could have been, with a private bidder being clearly inappropriate for the route. But a quagmire endured over a period of 10 years could have been avoided. Firstly, this presents an example of an extremely burdensome and unnecessary procurement process demanded by the European Commission and not from London, Edinburgh or any UK governmental interest. This included two state aid investigations and serious uncertainty about the future of these lifeline services as the purchase of new and necessary vessels, for example, was repeatedly put on hold. Although this makes the Commission look rather bad, there is plenty of blame to go around. Successive Scottish governments botched the process and didn't adequately draft PSOs into the tenders. Moreover, now that the publicly-owned company that had this route before has taken control of it once more (by proxy at least) nearby private interests like Western Ferries will not let this lie, and this is will not – despite the wasted time and money at both the national and European levels – be the end of the saga.

The ECJ has also been important in triggering events like this example concerning transport services. The Court's famous *Altmark* case represents a good case-in-point in conjuncture with the Scottish debacle above. In *Altmark* – the rules of which are applied to public tendering procedures to validate government subsidy – the Court of Justice laid down a rigorous, four-pronged criteria that public service contracts had to observe if they were to contain PSOs. The criteria, in short, entailed strict terms of definition of service and therefore terms of subsidy, and constitute a serious bureaucratic set of hoops for contracting authorities to jump through. This is to ensure that a) the use state subsidy (or aid in-kind) to fund certain services is verified and b) the use non-economic criteria concerning public service objectives is restricted.

Beyond the formal aspects of EU influences on these questions, such as case law, directive text etc., there is another crucial informal element concerning the role of the European Commission. The Commission has the powers to investigate alleged breaches of state aid, EUPP and EU free movement law more generally. In such cases the Commission takes a very liberal view of EU law – in contrast to the more balanced view it often displays in its Communications and other published working documents. It can hand out a 'positive' or a 'negative' decision with the offence of state aid breach presented by the latter. However, the political process before this happens is far more important. The Commission's power can be expressed through informal means including through back door tactics to ensure it gets the result it wants from national authorities. In the Scottish case above, an unofficial trade was made in exchange for a 'positive' decision; whereby Scottish authorities got the no-State-Aid-breach decision it wanted, but in exchange did have to sever the profitable Gourock to Dunoon route from the broader unprofitable rump held by Caledonian MacBrayne.

The SGI framework, through the use of PSOs, therefore does not offer a shield against the use of a procurement framework *per se*. The use of PSOs can validate the selection of a public sector party and public financing, but only if a procurement procedure is used. This will still be open to scrutiny if a private sector party feels aggrieved at the process and/or outcome and complains to the European Commission. This last point is presented again below concerning local councils.

4.2. Local councils and contracting-out of local services

The impact of procurement practices upon the provision of local government services presents another pertinent example of the conflict between the ethos underpinning social services and that of commercial gain. Municipal authorities In all EU countries are subject to a complex, dual set of complex European and national demands when deciding how and when to use contracting and procurement to provide services. Crucially, however, the impact of EUPP rules upon local government services must be viewed through the prism of national policy; principally because much of EUPP law only applies courtesy of national level policy endeavour and application, and not directly.

Much of municipal service provision would be classified below the EUPP *de minimis* rules, meaning EUPP law would not – in the abstract – immediately apply. In countries like the UK, however, where policy programmes have pushed various contracting practices deeper into the public realm, EUPP law becomes very relevant; as once a tendering/procurement process is selected, EUPP rules governing this process must be adopted. The principal issues arising from national pressures upon local government in this procurement context include financial, administrative and employment concerns. The issue of finance presents the further and fundamental issue of choice.

Pressures from successive UK governments for 30 years, either through the advice concerning best practice and financial (usually negative) incentives, have been the crucial factor in shaping the choices of UK local councils in how they provide local services. Contracting out became 'outsourcing', and has migrated to a term 'commissioning' and in all these guises has been mainstreamed through all UK public services. In theory, commissioning is a means of securing the best service making use of all resources and taking a neutral position on public, private and voluntary providers. In practice, the separation of client and contractor functions, the mainstreaming of procurement and a contract culture, and the creation of markets to drive competition between sectors, inevitably result in the commercialisation and decline of in-house provision. Commissioning Councils are emerging that have outsourcing as the default option.

The administrative burden has been the primary complaint of the Local Government Association (LGA). The new reforms' attempts at addressing these concerns do not appear to have impressed the LGA, offering only limited changes to the dialogue procedures and to the *de minimis* rules that would take a lot of key services out of EUPP law regime. In the fact, the LGA do not think the proposed *de minimis* rules changes (concerning social services) will affect councils at all. These proposed reforms do offer however the first European attempt to regulate PFI contracts and other 'service concession' contracts, although without offering anything concrete on reforming these types of contract.

More murky water is found on the issue of cross-council shared services arrangements. Due to division in the approaches taken between the ECJ and the Commission. The European Commission has been prepared to take legal action against municipal authorities so as to apply its very liberal interpretation of EU free movement, competition and EUPP law. Local councils in Britain have collaborated with each other to provide shared services, often establishing new companies or entities. The size of these new bodies' and the extent of their service operations often cross *de minimis* thresholds, subjecting them to EUPP rules. The European Commission has made clear its intent in applying the full force of EU competition law to these arrangements, favouring the position of other (usually commercial) parties to win such contracts and presenting with this opportunities for cross-border bidding for contracts.

In 2010 a UK case involving questions of such shared services reached the ECJ at the initiative of the European Commission. In pursuing legal action against Brent Council, the Commission took issue with the award of a contract to the company LAML, created for insurance purposes by some West London councils. The award was made despite the presence of a private bidder and the fact that LAML did not initially bid for the contract in question. The ECJ, in applying the principles of its previous *Teckal* and *Strohal*[14] cases, decided against the Commission, despite a fairly clear misuse of procurement procedures outlined in EU law on behalf of Brent Council.

The *Teckal* test – based upon principles of control and function – might have become important in shaping EUPP law concerning in-house service provision. Cases such as *ANAV* and *Brent vs. RMP* above also support the benign, pro-local discretion principles of *Teckal,* i.e. that the ultra-liberal interpretation, consistently favoured by the Commission, must not be upheld in all instances. What is more, the ECJ, on the same day as it handed down its LAML decision – and overturning a ruling of Britain's own Court of Appeal in the process – made a similar judgement concerning these shared services between German municipalities. Once again, the Commission, took issue with how shared service arrangements we being conducted that the City of Hamburg had made with its neighbours, but was left disappointed with the ECJ ruling.

Two notes of caution must be appended to the above: The first concerns the tactics the European Commission uses to eventually get its way. The spectre of state aid law is a serious one concerning questions of local government services. As the *Altmark* case demonstrates above, the ECJ won't always be forthcoming in awarding contracting authorities freedoms to provide and fund services how it pleases. Moreover, the looming state aid Modernisation agenda of the Commission (at the time writing) may address these issues further and may not make pleasant reading for those in local government who favour the hands-off EU approach the ECJ favoured in *Teckal* and *LAML*. These fears will be stoked in light of the Commission's stated intention to provide greater congruence between EUPP and state aid law, something that might stoke further conflict between the Court and Commission approaches.

The second note of caution is presented by ECJ inconsistency. The *ANAV* and *Altmark* cases, to name only two, do not share a common judicial approach, nor does the *LAML* case with *Altmark.* This problem of ECJ-made uncertainty presents itself again on questions of EU free movement law and the acquired rights (TUPE) addressed below.

4.3. 'New' procurement: the Private Finance Initiative and Public Private Partnerships

Those large-scale procurement processes found in utilities and transport sectors are not the only venue where EUPP law becomes relevant to the British experience. Large and most small-scale[15] services provided through local councils are also covered by EUPP law, with French firm Veolia being among the more well known European providers of services such as waste management. Many of these contracts are carried out using the PFI or Public Private Partnership (PPP) model and go far beyond Veolia's troublesome relationship with numerous councils. A large number of highly expensive infrastructure projects, through the PFI/PPP model, have created some very controversial examples of newer forms of procurement.

[14] *Teckal Case c-107/98 (1999), Strohal (1998) case c-44/96.*
[15] Defined, again, by *de minimis* rules.

The NHS in England and Wales has many controversial high-profile PFI projects. It displays some of the most dangerous results of the incompatibility of liberalisation-driven procurement regimes and social goals wrapped up in public service provision. Many NHS Hospital Trusts are saddled with PFI-related debt and tied to a long-term contract. Such scenarios, notionally, would prompt a bail out by the Department of Health. This moral hazard scenario – with the enormous risk as well as debt the public sector bodies take on – appears to be a better outcome than a hospital closing down. But if this is the optimal outcome then the virtue of this financing model must be questioned. And given current fiscal problems of all layers of government a bail out is clearly far from a guarantee.

There is a further confusing state aid issue with PFI that complicates things further. The Commission has favoured the expanded use of the PFI model despite some clear examples of breaches of the state aid principle from numerous British examples. The potential for further complications is very real given a mixture of European and national reforms of healthcare systems through the procurement method and the reform of EU state aid law.

PFI is, in many cases, a form of concession contract. Up-front payment for services is not present, so payment is obtained either via instalments over the course of a long-term contract, or the firm can derive its profit in operating the service with user charges. Both options usually entail strategies to cut labour and service costs and is particularly dangerous in regards to many public and social services.

An important to note regarding the relationship between EUPP law and PFI/PPP is that concession contracts for *services* are not covered, unlike concession contracts for public works. There are two areas – works and services - therefore where the concession contract and PFI/PPP models really needs some regulatory re-think and hopefully removal from those highly social-care-sensitive areas of the public sector. Reform would be welcomed, and recent proposals of EUPP law do offer to bring service concession contracts under the regulatory guise of EU law for the first time.

5. The European Commission's proposed reforms of EUPP

The European Commission's proposals for EUPP reform published in December 2011 do not propose anything specific or encouraging. Despite the streamlining of EUPP into the two 2004 directives above, many areas of concern remain. Plus, the Commission has been unhappy with the level of progress, prompting it to announce a consultation process to garner views to further reform[16]. Despite the Commission apparently heeding the common complaint that EUPP rules are in dire need of simplifying its proposals has been met with opposition from Member States, business groups[17] and unions[18] and local government.

It does seek to offer Europe-wide regulation on concessions contracts for services and proposes a harder line application of the low-cost 'most economically advantageous tender (MEAT)' criteria for awarding contracts. The second is coupled with a firmer line on how other criteria can be used in awards. This is perhaps the most concerning feature of the proposed reforms.

Minus those perceived problems of administrative burden for contractors those serious problems of excessive administrative and procedural burdens for local government appear to be have been

[16] This was coupled with a similar announcement for a review of EU state aid rules that, as an important part in EU competition law, has significant bearing on the shape of EU public procurement law.
[17] F. Guarascio (Dec 2011). EU Launches Public Procurement Overhaul. Public Service Europe. http://www.publicserviceeurope.com/article/1293/eu-launches-public-procurement-overhaul
[18] see reference 4 in sources list below

ignored. Moreover, proposals do not assuage serious concerns about an EU agenda intent on critically undermining employment rights in the procurement process.

5.1. Social criteria vs. low-cost 'MEAT' criteria

PSOs, or any other form of 'social criteria' will face further hurdles to forming part of public contracts under the new EUPP proposals. The proposals stipulate that such non-economic criteria that are not 'directly relevant' to the tender cannot be used and that in the event that they are relevant lowest cost criteria must take primacy.

The proposals do not explicitly address the role of PSOs in relation to the low-cost criterion. There are some indication of concern from the Commission for environmental factors, but these are presented in the creaton of powerless working groups and plenty of nicely written and presented communiqués. Its intentions in EUPP reform however provide no clarification of the role of either PSOs or environmental criteria when placed with the low cost, MEAT criteria. Despite the shroud there cannot be any question that its priority is placed on the latter.

In bringing the ECJ's role into these questions we find a familiar story of inconsistency. On the one hand, the Court in the *Beentjes*[19] case stated that social considerations can only be brought into contracting criteria if they did not obstruct an otherwise economically advantageous winning bid. On the other hand, the *Concordia*[20] case provided more scope for environmental criteria to form a substantive part of contracting criteria. Environmental policies have generally been given a greater role than social policy concerns in challenging the four economic freedoms of the Single Market. Even here however, a clear trend is not discernible in the ECJ's unreliable jurisprudence.

In the public works reform directive the role of social services is highlighted as possessing 'special character'. This is rather general in tone[21] but it does specifically state that the *de minimis* threshold for these types of services is to rise to €500000. Any apparent improvement here must be set against definitional issues around the term 'social services' mentioned above and the reality as to how certain services be defined.

The balancing act in EU law terms does simply rely on weighing the importance and virtues of economic and social principles in the Treaty. It also involves a crucial subsidiarity question whereby a normative choice is made, by EU authorities principally, whether to allow more national and local discretion and choice in applying EU law to their national and local needs.

5. 2. Employment issues in procurement I: Procurement, Posted Workers and Free Movement of Services

Besides those social standards pertaining to the provision of actual services, such as VfM and service quality mentioned earlier, there are some very serious questions that the Commission must answer on social standards in procurement contracts relating to collective agreements and employment protection. These issues more specifically – in the context EU law – concern EU services law, posted workers and acquired rights (TUPE in UK terms).

[19] *Beentjes case c- 31/87 (1988)*
[20] *Concordia case c-513/99 (2002)*
[21] Much of EU law is written in such a way as to offer some lofty lip-service to social goals and the European social dimension.

As with services of 'special character' above, the proposals for EUPP reform outline some general principles about enforcement against bidders who breach labour and social law. However well meaning the statement does not mirror the Commission's, or the ECJ's, own recent positions on labour rights in public procurement. In recent years both the ECJ and the Commission have applied EU free movement law in a new way that threatens to challenge key aspects of collective bargaining and labour law systems in several EU countries.

This presented itself through two very important posted workers cases in regards to procurement in two important cases - *Laval* and *Rüffert*[22] - decided by the ECJ[23] in 2007. Both of them concerned construction contracts and the latter captured under the public works EUPP Directive. In both cases posted workers were brought to work on the site in question. The contracted company in question sought to evade national norms, in different ways, concerning pre-existing collective agreements in the respective construction sectors.

The *Rüffert* case saw a blatant attempt by the contracting firm to avoid its legal commitments to a collective agreement it had already bound itself to. In *Laval,* the sub-contracted firm was not a signatory to a collective agreement, but still sought to ignore Swedish practice in regards to industrial relations that demanded it enter into negotiations with relevant trade unions in that sector. *Laval's* Swedish subsidiary refused and paid its Latvian workers 40% less than the agreed minimum for the Swedish construction sector.

In *Rüffert,* unlike in *Laval,* the company was bound to a collective agreement courtesy of public procurement contract, a contract to which the primary contractor had agreed to have the wage agreement attached. This subcontractor later breached this public contract by not observing the terms of this collective agreement and was fined. Despite this flagrant breach its contract of service, the ECJ found in its favour. A blunt question of 'how'? is perfectly appropriate. The ECJ, endorsed by the Commission, deemed such collective agreements, unless defined clearly in national law, to hinder the freedom to provide services and freedom of establishment rights as enshrined by EU free movement law. This position constituted a clear undermining of collectively agreed wage agreements and the freedom of unions to bargain with employers these.

The ECJ's role is troubling and its decisions in *Laval* and *Rüffert* presented a clear breach not only of its own previous line of case law, but of the EU Treaty itself. This distortion of EU law and national labour law and practice will take serious remedying. The Commission, despite making its view clear in representations in both the above cases and with the 2006 Services Directive, has not referred to the role of collective agreements in its EUPP reform proposals. This is serious omission. The Commission has also recently proposed a recast of the Posted Workers Directive, a proposal that has not been squared with its proposals for EUPP. This latter scenario on its will create further confusion as applying social standards to public contracts.

5.3. Employment issues in procurement II: Acquired rights (TUPE), public sector transformation and worker protection.

The series of overlaps between the economic aspects of EU law above also have an important but increasingly conflicting relationship with EU social law. This has been presented in very stark terms through the ECJ's *Laval* and *Ruffert* cases in regards to wage bargaining and posted workers above.

[22] *Laval case c-341/05 (2007) and Rüffert case c-346/06 (2008)*

[23] A British example of very similar issues is presented by the events at Lindsey in Lincolnshire where British workers at a refinery site took unofficial strike action in 2009.

Another area affecting public sector employees comes in the form of acquired rights (transfer of undertakings). This overlap between EUPP, free movement of services law above and EU acquired rights law creates a further demonstration of a mangled regulatory regime that attempts to reconcile an incongruous set of economic of social goals.

At least in the 1990s the Posted Workers Directive and the ECJ created a sound approach to these issues in balancing the economic and social goals in the Treaty. The Acquired Rights Directive (ARD) – since its introduction in 1977 – followed an even stronger employment protection approach; one, that many have claimed, is in conflict with free movement principles. Free movement law, as described above, has moved on since the 1980s and has taken on a strong liberalisation complexion at the expense of the social protection ethic that framed the first ARD (of 1979) and much of EU social law from the 1990s. This sort of liberalisation lean would place EU free movement law much closer to the policy preferences of the UK than in the past.

The core issue, in the context of this paper, concerns the use of contracting-out and tendering of public sector services within the context of EUPP law. The transfer of employees and their collectively agreed rights and working conditions has been a central issue to public sector-reform-through-contracting since the 1980s. This presented a sharp conflict between the UK Government's approach, spearheaded by Compulsory Competitive Tendering (CCT) reforms, to public sector restructuring and the EU's Acquired Rights Directive. This divergence centred upon the crux issue as to whether the ARD applied to semi-privatised, contracted-out and tendered services previously run by in-house public sector bodies. The ECJ ruled against the UK government's position in broadening the scope of the ARD to include this. However, this worker protection-lean of the ECJ does not provide a full representation of its position, either in the 1980s and certainly not in the current day.

As stated above inconsistency marks ECJ jurisprudence more than any legal doctrine, and certainly applies also to its approach to acquired rights. The cases of *Schmidt, Rask* and *Merkx*[24] followed a broader, worker-protection logic that applied the basic principles of the directive, even in the event of the transfer of a single employee (*Schimidt*). The *Rygaard* and *Spijkers*[25] cases however narrowed the scope in way not consistent with the ECJ's *Schmidt* reasoning. The more recent cases – although 12 years-plus old – of *Süzen* and *Henke* underlined this restrictive interpretation where it found the ARD to not apply.

There cannot be any doubt that the *Schmidt* logic is critically at odds with the Court's logic in its *Rüffert* decision. Given the aforementioned overlap of these different areas questions of congruence are clearly pertinent. Furthermore, the European Commission's desire to recast the previously well-balanced Posted Workers Directive into a more neo-liberal, pro-market form – as framed by the ECJ in cases like *Rüffert* – the signs for the shape of new European ARD look ominous from an employment rights perspective. The EUPP Directive recast doesn't offer to alter this view.

There are several key issues in regards to modern day public sector restructuring and employee rights that the EU has offered no guidance or ruling on. The use of framework agreements, issues concerning change of location of an undertaking and shared services are crucial factors in determining how the public sector and public sector employment will look in coming years. Framework agreements will be an important tool for unions in determining the use of contracting but serious questions

[24] *Schmidt case c-392/92 (1995). Rask case c-209/91 (1993). Merckx case c-172/94 (1996). Suzen case c-13/95 (1997)*
[25] *Rygaard case c-48/94, (1995)* and *Spijkers case c-24/85, (1986)*

concerning the potential involvement of foreign bidders for contracts will pose headaches for local councils and the NHS.

Shared services – of the type identified by the *Teckal* case – will become more common as Councils seek to collaborate in service provision in response squeezed budgets. EU law has been more helpful courtesy of the ECJ. The issue of location is an area where, if the decidedly liberal interpretation of *Laval-Rüffert* is followed – a dangerous set of scenarios is possible. EU law doesn't provide guidance of where the relocation of an undertaking post-transfer would constitute a forced redundancy in-kind. A legal argument premised around employee rights would point to a straight forward application of the 1990s approach to EU social and acquired rights law. The ECJ's recent and unreasoned - and to some outright illegal - application of four freedoms law must be a major point of concern. It will again be interesting to see what a Acquired Rights recast Directive produces on these issues given the silence afforded to them in the EUPP law reforms.

Conclusions

Squaring off the different experiences and examples provides a very mixed and complex picture of EUPP law. What is clear though from the UK perspective is that EU law offers only a little to the policy tool set available to shield public sector endeavour from commercial interference.

In most cases outlined above, a UK government has usually been the primary driver of privatisation, quasi-privatisation, tendering and contracting policies in the public sector. In some cases, such as the Scottish example cited above, Brussels has been the principal instigator of an ineffective and inappropriate liberalisation policy.

Despite this, there are some policy innovations from the European level that national public sector bodies should look to. PSOs, despite a heavily proscribed use, can offer a valuable means of affecting the bidding process when used properly, and have been used in the UK in some cases. These only assist in shaping what is already largely an inappropriate means of structuring public service provision; and greater choice on the part of national public bodies – especially those of the more locally-focused variety – is sorely needed. Fundamentally, a total review needs to take place at the national and European levels to critically assess the interface between the public and private sectors and the use of procurement frameworks and contracting within this.

EUPP law reform is one of the twelve 'levers' of the Single Market Act (2011), a programme drawn to direct the Single Market's future agenda. These EUPP reforms – with the other reforms of key areas of EU law highlighted already – must be used as an opportunity to do this, but it does appear that this will be an opportunity missed. The following would help seize it:

Definitions of SGI, SGEI and SSGI must be codified formally so that particular sorts of service are categorised as exempt from EU Competition law and free movement law. This will remove the uncertain situation whereby EU institutions can take advantage of definitional vagaries to push policies that spearhead EU liberalisation further into public service sectors. Any dual economic and social function can be ignored in favour of preserving the social service function of a service.

PSOs must be given a stronger positive legal role so that they can take as important a role as economic and low cost objectives that currently are seen as paramount to the EU's public procurement objectives.

Measures to regulate procurement supply chains must hold co-equal legal standing with economic 'MEAT' goals. Such social and environmental criteria must be able to be applied across supply chains so that where sub-contacting for ancillary services are present they adhere to codified standards as well as the principal contractor. In particular, the ILO's Core Labour Standards and conventions can form the basis of these, and would provide much to UK law in the area of procurement. This would also help prevent the unnecessary additional contracting out of services that allow rules of this sort to be averted and standards ratcheted downwards. A special note must be made on this point to collective agreements and what occurred in a public works contract in Lincolnshire in 2009 and in a similar way to the *Ruffert* case.

A subsidiarity clause must be embedded and enforced in EUPP law to provide protection to local level discretion in the use of procurement procedures. The ECJ has displayed an occasional willingness to honour such a principle, but this is only occasional; and the Court has also shown a willingness in other parts of its jurisprudence to take the opposite, very aggressive route to apply absolute EU-wide standardisation.

In regards to the latter-two offerings there is a crucial constitutional problem in the European sense. EU social law – concerning both employment and social service concerns – has already received ample attention in the Treaty. Subsidiarity too, has a very nicely worded provision in the EU's primary law document. Fundamentally, the application and enforcement of the Treaty's different provisions and principles has come down to the desires of EU Institutions and the more powerful member states.

AJB Morton

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Glossary

EU – European Union
ECJ – European Court of Justice
ILO – International Labour Organisation
EUPP - EU public procurement
VfM - Value-for-Money
PPP - Public Private Partnerships
PFI - Private Finance Initiative
SGI – Services of General Interest
SGEI – Services of General Economic interest
MEAT – Most economically advantageous tender
TUPE – Transfer of Undertakings and Protection of Employment

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