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Public procurement after the European Union referendum

This Briefing Paper summarises key elements of the European-derived public procurement rules as they apply in Northern Ireland. It also briefly presents what is currently known about future procurement regulation following the European Union (EU) referendum.

This information is provided to MLAs in support of their Assembly duties and is not intended to address the specific circumstances of any particular individual. It should not be relied upon as professional legal advice or as a substitute for it.

Key points

- Public procurement throughout the United Kingdom (UK) is largely defined by European Union law and the current rules will continue to apply until the UK has left the EU;
- The weight of opinion suggests that procurement law is unlikely to change significantly at UK level, although there may be some scope for reforming and 'tidying up' the rules; and,
- The Organisation for Economic Cooperation and Development (OECD) has made some recommendations on procurement reform, which the Committee for Finance (CfF) may wish to consider.

Introduction

This Briefing Paper summarises key elements of the European-derived public procurement rules as they apply in Northern Ireland. It also briefly presents what is currently known about future procurement regulation following the European Union (EU) referendum.

The Paper is set out as follows:

- Section 1 provides a brief background to the Single Market and EU public procurement rules;
- Section 2 outlines the relevant legislation in Northern Ireland; and,
- Section 3 briefly discusses what may be said about the future of public procurement regulation in the UK following the outcome of the EU referendum.

1. The Single Market and EU public procurement rules

The Single Market (in fact called the “internal market” in the EU Treaties) is defined in Article 26(2) of the *Treaty on the Functioning of the European Union* (TFEU):

*The internal market shall comprise an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of the Treaties.*¹

The UK Government’s *Gov.uk* website states that the Single Market is “*key to Europe’s place in the global economy*”.² Trade with the Single Market will remain an important consideration following the UK withdrawal from the EU because it can drive growth and jobs. On 28 June 2016, the UK Business Secretary said that keeping the UK’s access to the Single Market will be a priority during negotiations with the EU.³

Key elements of access to the Single Market are the requirements to comply with EU State Aid and public procurement rules. UK Government guidance defines State Aid as:

*...any advantage granted by public authorities through state resources on a selective basis to any organisations that could potentially distort competition and trade in the European Union (EU).*⁴

State Aid is therefore incompatible with the European Treaties, except in restricted circumstances.

The European Commission is responsible for controlling State Aid in the Single Market in all economic sectors. State Aid is controlled to prevent Member States from granting

¹TFEU available online <http://eur-lex.europa.eu/legal-content/EN/TEXT/HTML/?uri=CELEX:12012E/TXT&from=EN>

²<https://www.gov.uk/government/policies/european-single-market>

³BBC online (28 June 2016) [Business secretary says EU trade ties are top priority](#)

⁴<https://www.gov.uk/guidance/state-aid>

selective advantages to certain companies to the detriment of others. This allows companies from all Member States to compete evenly and without anti-competitive barriers.

The purpose of EU procurement rules therefore, is to 'open up' the public procurement market and to ensure the free movement of supplies, services and works within the Single Market.⁵ In other words, to ensure Member States remove restrictive practices.

The EU's procurement rules therefore prevent Northern Ireland's contracting authorities from selectively placing contracts with local firms. Contracting authorities must undertake rigorous and fair procurement process which prevent discrimination against providers from other Member States. This may arguably be a source of frustration to those wishing to promote local economic development, and to support local companies. But on the other hand, the rules also provide full and equitable opportunities for Northern Ireland businesses to bid for public contracts in other Member States.

2. Public procurement legislation

The EU *Public Contracts Directive 2014* (the 2014 Directive) sets out the legal framework for public procurement by contracting authorities. The 2014 Directive was transposed in England, Wales and Northern Ireland by the *Public Contracts Regulations 2015*⁶ (the 2015 Regulations). The Scottish Government transposed the 2014 Directive through separate regulations.⁷

It should also be noted that Part 4 of the 2015 Regulations does not apply in Northern Ireland or Wales. Part 4 deals with access to public sector contracts by smaller businesses. The Explanatory Note to the 2015 Regulations explains:

*Part 4 [...] does not apply to public bodies in Wales or Northern Ireland whose functions are wholly or mainly devolved functions in those jurisdictions. This recognises the fact that these Devolved Administrations already have their own arrangements in place for ensuring smaller businesses have better access to public sector contracts which reflect the particular circumstances of devolved procurement matters in those areas.*⁸

There are separate rules for utilities contracts, which were transposed in England, Northern Ireland and Wales by *The Utilities Contracts Regulations 2016*.⁹ There are also exemptions for Defence and Security contracts.

⁵CCS (2015) [A Brief Guide To The EU Public Contracts Directive \(2014\)](#) (see page 2)

⁶<http://www.legislation.gov.uk/ukSI/2015/102/contents/made>

⁷See <http://www.gov.scot/Topics/Government/Procurement/PCSandPCS-tChanges>

⁸http://www.legislation.gov.uk/ukSI/2015/102/pdfs/ukSIem_20150102_en.pdf (page 6)

⁹<http://www.legislation.gov.uk/ukSI/2016/274/contents/made>

2.1. Application of the EU procurement rules

This sub-section explains the application of the rules in relation to the location and size of the contract in question.

2.1.1. Geographical application

The EU procurement rules apply to all EU Member States, to the three states of the European Economic Area (Iceland, Liechtenstein and Norway), and to a number of other countries where the EU has entered into an agreement. The main such agreement is the World Trade Organisation (WTO) *Government Procurement Agreement* (GPA).

According to the UK Government's Crown Commercial Service (CCS), compliance with EU procurement rules ensures compliance with the GPA. **It is therefore important to note that suppliers from GPA countries have the same rights as EU suppliers.**¹⁰

2.1.2. Application to a contract

The EU rules apply when a tender is above a certain threshold. Thresholds vary and there are some exemptions depending on the subject of the contract, as shown in Figure 1:

¹⁰ CCS (2015) [A Brief Guide To The EU Public Contracts Directive \(2014\)](#) (see page 6)

Figure 1: EU procurement thresholds¹¹**EU Procurement Thresholds**

The European public contracts directive (2014/24/EU) applies to public authorities including, amongst others, government departments, local authorities and NHS Authorities and Trusts. Note: This directive will not be transposed into Scottish legislation until March 2016. With the exception of social and other specific services the following thresholds will apply to procurement carried out under the existing procurement directives in Scotland.

The directives set out detailed procedures for the award of contracts whose value equals or exceeds specific thresholds. Details of the thresholds, applying from 1st January 2016 are given below. Thresholds are net of VAT.

THE EUROPEAN PUBLIC CONTRACTS DIRECTIVE (2014/24/EU)

	Supply, Services ¹ and Design Contracts	Works Contracts ²	Social and other specific services ³
Central Government ⁴	£106,047 €135,000	£4,104,394 €5,225,000	£589,148 €750,000
Other contracting authorities	£164,176 €209,000	£4,104,394 €5,225,000	£589,148 €750,000
Small Lots	£62,842 €84,000	£785,530 €1,000,000	n/a

¹With the exception of the following services which have different thresholds or are exempt:
 – Social and other specific services (subject to the light touch regime) Article 74.
 – Subsidised services contracts specified under Article 15.
 – Research and development services under Article 14 (specified CPV codes are exempt).

²With the exception of subsidised works contracts specified under Article 13.

³As per Article 74. Services are listed in Annex XIV. Applying in Scotland from March 2016.

⁴Schedule 1 of the Public Contracts Regulations lists the Central Government Bodies subject to the WTO GPA. These thresholds will also apply to any successor bodies.

THE EUROPEAN UTILITY CONTRACTS DIRECTIVE (2014/25/EU)

The European utility contracts directive (2014/25/EU) applies to certain utility companies operating in the Energy, Water, and Transport sectors and will be transposed into UK legislation, including Scotland, in April 2016. With the exception of social and other specific services the following thresholds will apply to procurement carried out under the existing Utilities procurement directives from 1st January 2016.

	Supply, Services and Design Contracts	Works Contracts	Social and other specific services ¹
Utility authorities	£328,352 €418,000	£4,104,394 €5,225,000	£785,530 €1,000,000

¹Applying from April 2016.

THE DEFENCE & SECURITY DIRECTIVE (2009/81/EC)

The Defence & Security Directive (2009/81/EC) applies to entities operating in the fields of defence and security.

The directives set out detailed procedures for the award of contracts whose value equals or exceeds specific thresholds. Details of the thresholds, applying from 1st January 2016 are given below. Thresholds are net of VAT.

	Supply, Services and Design Contracts	Works Contracts	Social and other specific services
Defence and Security authorities	£328,352 €418,000	£4,104,394 €5,225,000	n/a

Even when a tender process is below threshold however, EU Treaty-based principles of non-discrimination, equal treatment, transparency and so on continue to apply.¹²

¹¹ <http://www.ojec.com/thresholds.aspx>

¹² CCS (2015) [A Brief Guide To The EU Public Contracts Directive \(2014\)](#) (see page 6)

It should also be noted that there is a separate threshold for social and health services, under a so-called 'light-touch' regime, which is set at € 750,000.¹³

2.2. Provisions of the 2014 Directive

The 2014 Directive contains provisions that relate to many different elements of public procurement. The key elements are:¹⁴

- **Facilitating involvement by Small and Medium Sized Enterprises.** Contracting authorities are encouraged to break contracts into lots to allow smaller companies to participate. The level of supplier turnover requirements is capped at twice the value of the contract;
- **Selection of suppliers.** Poor performance on previous contracts is explicitly permitted as grounds for exclusion;
- **E-procurement.** Electronic versions of all documentation must be available;
- **Contract award.** Sustainable Development Requirements, such as social and environmental aspects, can be taken into account in the award of contracts.
- **Reservation of contracts.** Certain contracts may be 'reserved' specifically to be awarded to public service mutual and sheltered workshops for disadvantaged and disabled workers.
- **Frameworks.** Contracting authorities may use framework contracts to 'call off' pre-qualified suppliers where transparency requirements are met;
- **Advertising.** Contracts covered by the regulations must be advertised in the Official Journal of the EU (OJEU);
- **Procurement procedure.** There are five award procedures which may be used in different circumstances, but with the proviso that contracting authorities should seek to ensure genuine competition:
 - Open. i.e. all interested parties may respond to the OJEU notice;
 - Restricted. i.e. a selection of those who respond to the notice is invited to submit a tender;
 - Competitive dialogue procedure. i.e. the contracting authority enters into dialogue with potential bidders to develop one or more suitable solutions for its needs and on which chosen bidders will be asked to tender;
 - Competitive procedure with negotiation. i.e. a selection of those responding to the notice is asked to tender and then the contracting authority may seek to negotiate improved offers; or,
 - Innovation partnership procedure. i.e. a selection of those responding to the notice is asked, *via* negotiation, to submit ideas to develop innovative works,

¹³ CCS (2015) [A Brief Guide To The EU Public Contracts Directive \(2014\)](#) (see page 4)

¹⁴ CCS (2015) [A Brief Guide To The EU Public Contracts Directive \(2014\)](#) (see pages 3-12)

supplies or services aimed at meeting a need for which no existing 'product' exists.

- **Stages in the process.** There are anti-discrimination procedures built into a number of stages to ensure equal treatment:
 - Specification stage. Requirements must be described in a way that does not favour or eliminate certain suppliers – e.g. using specific brand names or national standards. Instead the use of performance specifications is encouraged;
 - Selection stage. There are specified grounds for exclusion of suppliers – e.g. for criminal convictions or previous poor contract performance;
 - Financial assessment. Suppliers that do not have a proportionate level of financial soundness may be excluded;
 - Technical assessment. Suppliers may be excluded if they cannot demonstrate they are adequately equipped for the job and have a satisfactory track record; and,
 - Award stage. The award must be on the basis of Most Economically Advantageous Tender (MEAT). This can include price/quality ratios, and can also include social and environmental requirements, provided they relate to the contract.
- **Abnormally low tenders.** The contracting authority must investigate abnormally low tenders and discount any which are based on breaches of environmental or social laws;
- **Standstill period.** To allow suppliers time to review contracting authorities' decisions, there must be a 'standstill period' between decision of award, and the signature of a contract;
- **Changes to awarded contracts.** There are limits to the extent to which a contract may be changed without the need to re-advertise in the OJEU.
- **Termination.** Contracts must allow for termination where there has been a breach of procurement law; and,
- **Enforcement.** Member States must allow for action by suppliers against contracting authorities in the High Court. Action may also be taken by the European Commission against a Member State in the European Court of Justice.

3. The future of public procurement regulation following the outcome of the EU referendum.

This section introduces some key considerations about the future of procurement regulation following the EU referendum result.

3.1. The future shape of regulation cannot yet precisely be determined

How the legal framework may change following Brexit has been addressed by the Chartered Institute of Purchasing and Supply:

How the UK government seeks to unpick and separate the UK legal system from that of the EU remains to be seen. Much will depend on the way in which the exit is carried out, including maintaining our relationship with the EU through the EEA (the Norway model) or through the EFTA (the Switzerland model).

Whatever model is adopted, we can certainly expect changes across a range of legal topics which impact procurement contracts, possibly intellectual property, data protection, competition, tax, and employment law – especially where derived from EU law such as working time, agency workers and TUPE.¹⁵

The UK Government's Crown Commercial Service (CCS) has stated that it is too early to say what the longer-term implications of Britain's decision to leave the EU will be on procurement rules.¹⁶

In relation to charities and the so-called 'third sector', the Charity Finance Group (a charity that champions best practice in finance management in the voluntary sector) has stated that:

...charities who are engaged with public procurement contracts have limited interaction with other EU member states, both within the UK and the rest of the EU. Therefore, it is unlikely that a Brexit would significantly affect bidding landscape for charities.¹⁷

¹⁵ <file:///S:/Team%20Folders/Public%20Finance%20&%20Scrutiny%20Unit/CFP/Procurement%202016/Brexit%20%20the%20leagal%20implications%20for%20procurement%20-%20Supply%20Management.htm>

¹⁶ <https://www.civilserviceworld.com/articles/news/crown-commercial-service-too-early-say-what-brexit-will-mean-procurement>

¹⁷ CFG (2016) '[Potential impact of Brexit on UK charities](#)' (see page 8)

3.2. The current public procurement rules continue for now

The CCS stressed that the current rules will continue to apply until the UK has left the EU.¹⁸

This position is supported by other sources. For example, specialists in state aid, public procurement and competition law, Ramsay and Cairns of the law firm Pinsent Masons have argued that:

...because EU public procurement laws are already implemented in UK legislation those rules would continue to apply until such time as they are repealed or amended. As such public bodies should be aware that "disgruntled bidders" for their contracts could rely on those rules to challenge any procurement process that deviates from that set out in the current laws.¹⁹

3.3. 'Access to' versus 'membership of' the Single Market

Ramsay and Cairns further argued that:

Whatever trade deal the UK agrees with the EU, a form of procurement regulation will continue to apply. The UK would be required to abide by the EU procurement rules if it adopted the European Free Trade Agreement, or Norwegian model of relationship with the EU [...] The WTO's Government Procurement Agreement, which would apply if the UK exits the single market entirely, still requires open and fair competition for public contracts too.²⁰

Totis Kotsonis of law firm Eversheds LLP queried the extent to which the UK would retain access to the Single Market. All other things being equal, full *membership* of the Single Market (i.e. rather than partial *access* to a particular sector, such as agriculture, or financial services) is likely to entail continued full application of EU procurement legislation.²¹

If partial access to the Single Market were an option considered by the UK, it remains doubtful that public procurement would be significantly deregulated. For example, the EEA Agreement does not cover the EU's Single Market for agricultural products, nor the EU's Common Agricultural Policy.²² But within the EEA, as previously noted in sub-section 2.1.1, public procurement rules would continue to apply.

¹⁸ <https://www.civilserviceworld.com/articles/news/crown-commercial-service-too-early-say-what-brex-it-will-mean-procurement>

¹⁹ <http://www.out-law.com/en/articles/2016/june/brexit-organisations-warned-against-casting-aside-eu-state-aid-and-public-procurement-rules-in-light-of-vote/>

²⁰ <http://www.out-law.com/en/articles/2016/june/brexit-organisations-warned-against-casting-aside-eu-state-aid-and-public-procurement-rules-in-light-of-vote/>

²¹ <http://whoswholegal.com/news/features/article/33240/effect-brexit-uk-public-procurement-legislation-application-eu-state-aid-rules-uk/>

²² <https://www.regjeringen.no/en/topics/european-policy/areas-cooperation/agriculture/id686224/>

Other influential commentators – notably the Institute for Fiscal Studies (IFS) – have argued that ultimately the notion of ‘access to’ the Single Market is “*virtually meaningless*”, because of the GPA mentioned earlier.

The IFS report *The EU single market: the value of membership versus access to the UK* helpfully explains the distinction between ‘access to’ and ‘membership of’:

Full ‘membership’ of the EU Single Market substantially reduces the costs of trade within the EU. Whilst some costs such as transport costs and cultural barriers such as language remain, the Single Market eliminates tariffs (border taxes) and customs checks and, importantly, reduces non-tariff barriers, which are particularly important for services trade. Whilst any country has ‘access’ to the EU as an export destination, membership of the Single Market reduces ‘non-tariff’ barriers in a way that no existing trade deal, customs union or free trade area does.²³

3.4. There may be an opportunity to ‘tidy up’ procurement law

While it seems that procurement law is unlikely to change significantly, there may be an opportunity to rationalise it in a way that is not possible while remaining a Member State of the EU. Sue Arrowsmith, the Achilles Professor of Public Procurement Law at Nottingham University, has said that it may be possible to comply with EEA or GPA requirements, but without the complex EU-derived legislation:

What we could do is have a more sensibly designed, simple, rational procurement law that implements these procedures, not all the very, very detailed and unnecessary stuff that we’ve got from the EU.²⁴

But BiP Solutions, a provider of provider of procurement support and intelligence to public and private sectors, states:

The UK was instrumental in setting much of the EU procurement regulations currently in place and our procurement procedures are enshrined in UK laws such as the Public Contracts Regulations 2015. It is therefore highly unlikely that a UK government would favour fundamental change after Brexit.²⁵

Based on the evidence presented in the preceding sub-sections, it seems that, whichever route the UK takes in future *vis-à-vis* the Single Market, Northern Ireland is likely to have to maintain similar principles to those currently in place – i.e. a commitment to transparency, equal treatment, and fair and open competition.

²³ IFS (2016) ‘The EU single market: the value of membership versus access to the UK’ <https://www.ifs.org.uk/publications/8411>

²⁴ <http://www.publicfinance.co.uk/feature/2016/05/buying-power-evaluating-eu-procurement-rules>

²⁵ BiP Solutions (2016) ‘[Public procurement after Brexit, BIP Business Analysis](#)’ (see page 4)

But over-and-above those considerations, it is particularly interesting to note the above-cited passage which describes the UK as “instrumental” in developing the EU approach. On that basis, dramatic change at UK level seems unlikely in the short term.

At a more practical level, it has been noted on the National Housing Federation blog that any change to the procurement rules will require considerable resources, which the UK Government may not currently be able to spare:

It might be possible for the UK Government to carry out a forensic examination of the current procurement rules to identify what can be repealed and what needs to be kept. However, a government with much more urgent priorities is unlikely to be prepared to spend the considerable time and civil service resource needed for this. It is much more likely that the government will keep the rules that it has. Minor changes might be possible in specific areas, but we should not expect comprehensive repeal.²⁶

What is currently without doubt is that, for the short term at the very least, the current procurement laws in the UK are set to remain unchanged. With this in mind, the final section of this Paper briefly considers recommendations for procurement reform made recently by the OECD.

²⁶<http://www.housing.org.uk/blog/will-the-eu-procurement-rules-continue-to-apply-post-brexite/>

4. OECD procurement recommendations

In 2014, the Executive asked the OECD to provide an assessment of its public-sector reform agenda. One particular area studied by the OECD was procurement reform. In its recent Governance Review Report *Northern Ireland (United Kingdom): Implementing Joined-up Governance for a Common Purpose*,²⁷ the OECD made two recommendations for public procurement, as shown in Figures 2 and 3:

Figure 2: OECD Recommendation 25

Recommendation 25. Identify and empower owners of social policy objectives in public procurement

- Ensure on-going, high-level commitment to better integrate social objectives in the planning and commissioning phases of more procurement processes.
- Develop and make available expertise to commissioning and procurement officials as they undertake their work.
- Clarify the role and remit of procurement officials to ensure appropriate inclusion during the planning and commissioning process.
- Develop the necessary expertise, collect and share successful examples and best practices within the Northern Ireland, and cultivate additional relationships with neighbourhood, local and regional organisations that can assist in identifying proposals for social outcomes that are truly welcomed by and beneficial to the targeted communities.

Figure 3: OECD Recommendation 26

Recommendation 26. Strengthen Northern Ireland's governance in its procurement function

The case study on public procurement recommends that DFP should:

- evaluate, with relevant stakeholders, agenda-setting for the Procurement Board
- address perceived risk aversion to empower innovative decisions
- develop further the role of officials responsible for commissioning procurements
- leverage existing successes as pilots to cross silos
- clarify and harmonise the roles of relevant stakeholders in the commissioning and delivery of major infrastructure projects.

In relation to social clauses, the OECD found that there have been some positive outcomes. But it also found that these successes have not been consistent.²⁸

Scrutiny point: The CfF may wish to ask the Department of Finance to provide a briefing on how it believes the OECD recommendations could be implemented.

In addition, previous RaISe papers have identified that an accountability gap arising from the lack of the former Department of Finance and Personnel's power to compel departments to provide data in relation to the use of public contracts addressing

²⁷OECD (2016) [Northern Ireland \(United Kingdom\): Implementing Joined-up Governance for a Common Purpose](#)

²⁸OECD (2016) [Northern Ireland \(United Kingdom\): Implementing Joined-up Governance for a Common Purpose](#) (see page 46)

ancillary objectives of government when securing works, supplies or services.²⁹ Incompleteness in data makes it difficult for the Executive or other stakeholders to evaluate the effectiveness of the policy as a whole. It seems reasonable to assume that addressing the OECD recommendations might also require consideration of the central procurement function and the ability to require data returns.

5. Concluding remarks

This Paper has shown that public procurement throughout the UK is largely defined by European Union law and the current rules will continue to apply until the UK has left the EU.

After that, procurement law is unlikely to change significantly at UK level, although there may be some scope for reforming and ‘tidying up’ the rules.

In the meantime, the OECD has made some recommendations on procurement reform, which the CfF may wish to consider further.

Ultimately, public procurement policy is devolved to Northern Ireland. So it would be possible for Northern Ireland to deviate from the future path chosen by the UK Government. Whether such a decision would be welcomed by businesses is open to question.

²⁹RaISe (2015) NIAR 83-15 ‘A Comparative Perspective on Public Procurement Requirements’ (see page 23)