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PROCUREMENT DEVELOPMENTS IN
THE UNITED KINGDOM: 2019, BREXIT AND INTO THE TWENTIES

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I. INTRODUCTION

As a consequence of the election of a new majority government on 12 December 2019, the United Kingdom will have left the EU by the time of Government Contracts Year in Review 2020. This event will lead to a series of changes to the content and impact of procurement law in the UK.

Exit day under the European Union (Withdrawal) Act 2018 is now defined as 31 January 2020. The relevant legislation has been the subject of a number of amendments arising from primary and secondary legislation and will be the subject of further substantial amendment by legislation currently working through Parliament.

Detailed reports on some of the likely consequences of Brexit are set out in the reports prepared for Year in Review conferences in February 2017, 2018 & 2019. The detail of those reports is not repeated here, but much of their content remains highly pertinent to the emerging situation. At the time of writing it is clear that the new government will look to take a radical approach to the extraction of the UK from the EU. Members of the government have expressed similarly radical views about procurement law on an unofficial basis. It is not yet clear how these views will be reflected in eventual changes to UK procurement law, albeit that many of the constraints reported on in previous reports remain applicable.

An updated version of the position regarding likely developments in procurement law and policy following Brexit is provided in the most recently updated report in House of Commons Library Briefings: “Brexit: public procurement”, Briefing Paper 8390, 5 November 2019, <http://researchbriefings.files.parliament.uk/documents/CBP-8390/CBP-8390.pdf>. This updates the position summarised in previous such reports. As is made clear in that paper, the United Kingdom’s search for future international trade agreements with other nations (such as the United States) may play an important role in shaping minimum requirements for competition and openness in UK public procurement.

Much of the debate continues to be concerned about the performance of public contracts. The failure or fragile state of some suppliers of key services to government continues to cause concern and the continued difficulties with tendering contracts for operation of the railways causes ongoing concern. Government’s sensitivity about procurement law issues has been heightened by the ridicule heaped on it over the Brexit ferries cases (see <https://www.cips.org/en-GB/supply-management/news/2019/july/rushed-and-risky-brexit-ferry-procurement-cost-85m/>) These have all now been settled. The key development by Government would be the publication and first

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steps in application of a new guide to public sector contracting – the Outsourcing Playbook with its 12 guidance notes. (<https://www.gov.uk/government/publications/the-outsourcing-playbook>)

II. LOOKING FOR POLICY UNDERLYING PROCUREMENT LAW

Although the content of procurement law has been the subject of vigorous discussion in the rather specialist world of UK procurement academia for many years, there has been very little public discussion about UK procurement law. As noted in previous reports, procurement law has been seen as a product of the EU to be reviewed and improved at the EU level. Specific concerns around, for instance, defence procurement or procurement of public-private finance projects have tended to be dealt with on a rather narrow, finance-focused basis without much reflection on broader procurement law issues.

This has started to change. The introduction of the Public Services (Social Value) Act 2012 started a vigorous debate in local government about how best to use public procurement to further local social goals leading to a government consultation in early 2019 as to how to push ahead in this area (<https://socialvalueportal.com>). Although the consultation report is interesting as a summary of the position (<https://www.gov.uk/government/consultations/social-value-in-government-procurement>) and the consultation closed in June, that consultation seems to have been lost in the turmoil that consumed politics in the second half of the year. It continues to be a priority area for government so presumably this or some similar debate will be reignited as the new government beds in. Debate around environmental issues and other issues such as the impact of modern slavery on public procurement have also been considered in some detail.

The debate has also broadened to a more general consideration of issues raised by public procurement. This is at least in part due to the fact that on various occasions over the last few years it has been asserted that one benefit or goal of Brexit would be the abolition of public procurement law.

From a more progressive standpoint the think tank *Reform* has produced reports entitled “*Please Procure Responsibly, The state of public service commissioning*” (March 2019) (<https://reform.uk/sites/default/files/2019-04/Public%20Service%20Procurement%20web%20version.pdf>) and “*The Price of Poor Procurement, The argument for an independent regulator*” (October 2019) (<http://reformspending.uk/wp-content/uploads/2019/10/The-Price-of-Poor-Procurement.pdf>). The Smith Institute (another centre left entity, not to be confused with the Adam Smith Institute) has produced “*Out of Contract: Time to move on from the ‘love in’ with outsourcing and the PFI*” (January 2018) (<http://www.smith-institute.org.uk/book/contract-time-move-love-outsourcing-pfi/>) and “*Spending fairly, Spending well: time for a radical overhaul of value for money and public audit*” (February 2019) (<http://www.smith-institute.org.uk/wp-content/uploads/2019/02/Spending-wisely-spending-well.pdf>). The rather more middle of the road institution, the Institute for Government has produced “*Government procurement: the scale and nature of contracting in the UK*” (December 2018) (https://www.instituteforgovernment.org.uk/sites/default/files/publications/IfG_procurement_WE_B_4.pdf) and “*Government outsourcing: What has worked and what needs reform?*” (September 2019) (<https://www.instituteforgovernment.org.uk/sites/default/files/publications/government-outsourcing-reform-WEB.pdf>). There is a lot of content in these documents and it is not clear how far this will be borrowed by the more radical government now in place. The commentary on the first of the Reform papers in Butler, *Responsible public procurement: towards a public service contract regulator?* (2019) 5 PPLR NA 198 makes a number of important observations, in particular that the policy debate often seems to be detached from the requirements of law and

practice. There seems to be a rather general sense that a post-Brexit reform of procurement law will be relatively unconstrained. This theme is explored a little further below.

A number of more formal and specific public discussions are also relevant. The separate institution responsible for the audit of local government bodies (the “Audit Commission”) was abolished in 2014 and the independent review of the impact of the removal of this body has now closed its consultation phase. The Audit Commission had often been indirectly involved in procurement regulation as it was concerned with the lawfulness of items of expenditure by local government and its abolition may well have had an adverse impact on the culture of probity in local government. The final report of this review will be significant for consideration of the propriety of financial arrangements involving local government (see press release, 17 September 2019).

The probity of procurement by local government entities will also come under scrutiny in the ongoing judicial inquiry into the Grenfell Tower fire. That inquiry has now reported on events on the night of the fire. The inquiry now turns to the events that made the fire possible such as the process leading to the installation of cladding that substantially increased the fire risk associated with the tower. This aspect of the inquiry will inevitably start to dig into common practice in procurement, or the events and errors in the procurement leading to this event. There seems to be no conclusive evidence yet in the public domain implicating the relevant contracting authority (Royal Borough of Kensington & Chelsea) directly in corruption. There is however a great deal of ongoing speculation as to how corruption or poor procurement might have affected events (“*Corruption and Grenfell Tower*” <https://www.transparency.org.uk/corruption-and-grenfell-tower>).

It is not proposed to summarise all that is debated in these reports and associated papers. All point towards the need for a more active management of public procurement with a view to addressing concerns that some procurement decisions may have been motivated by improper considerations, or undermined by anti-competitive activity.

The most immediately relevant remarks are probably those to be found in the two recent reports by Policy Exchange. These are perhaps more instructive as to the government’s thinking as this body is a conservative think tank with some links to individuals in government. Two recent reports have made comment on public procurement.

In “*Modernising the United Kingdom*” it was noted (page 57) that

“At present, United Kingdom is bound by a series of EU Directives which outline a series of prescriptive rules applying to how Member States administer the process of public procurement, both at the local and national level. They are intended to create a single EU market for public procurement, where firms from one Member State are able to submit bids in any other Member State and be treated on the same basis as if they were a domestic supplier.

..[T]he EU procurement regime allows for very little discretion and flexibility which becomes an obstacle to concluding an otherwise successful project..

Nevertheless, the process should preserve the objective of minimising corruption and securing greatest value for money – there should still be an oversight mechanism designed to prevent corruption and situations where overly close ties between local or national domestic businesses and government lead to uncompetitive and uneconomic bids winning, causing needless expense for the

taxpayer. But it should be flexible, possibly operating on a ‘comply or explain’ basis or on the basis of adherence to principle rather than black-letter rules.’

In another report by Policy Exchange, “*Whitehall Reimagined*” it was noted (page 28) that

“...The state has a theoretically unlimited amount of money, overseen by staff who frequently do not have a commercial background and are not driven by the pressures of the bottom line. On the other side of the table are private, well-resourced commercial actors. This mismatch is recognised and therefore tightly regulated by an inflexible, rules-based process, which is also designed to prevent corruption. However, it only makes things worse – it creates a lucrative cottage industry of procurement lawyers, lobbyists and consultants who specialise in navigating the process to their client’s advantage....

After Brexit, there is opportunity to fundamentally reform how the United Kingdom conducts public procurement and manages complex projects, free of the bureaucratic and anti-commercial requirements of the Official Journal of the European Union. Much of the law in this area is derived from European Union, which pursuant to creating a single European market, mandates burdensome anti-discrimination tender procedures for both the bidder and the tendering body. These create a situation where, firstly, only large suppliers have the resources necessary to even submit a bid, and secondly, the tendering body does not have the operating flexibility required to prepare, tender and manage complex contracts, leading to a small number of large suppliers profiting excessively from poorly delivered projects, while procurement specialists in government focus on adhering to very specific, tick-box procedures instead of managing the project. The ease with which well-resourced suppliers can judicially challenge a tender decision leads to delays, legal costs, prolonged uncertainty and a tendering process where full and strict adherence to procedure takes up too much time.

The Policy Exchange report suggests a number of actions to simplify UK procurement law post Brexit, with more flexible rules, few bid challenges and increased direct contracting.

Key actions:

- ...
- *Rules governing the tendering process must be made more flexible and outcomes-based rather than process-based, to allow the tendering body the flexibility needed to manage the contract..*
- *Grounds on which tender selection can be legally challenged should be scaled back*
- *Tender evaluation criteria should be made more sensitive to the realities of commerce and the impact public procurement can have on local economies, to allow government to use the impact on the creation of British jobs as one criteria for evaluation, provided the supplier is capable of delivering cost effectively*
- *For smaller contracts, if a local supplier is capable of delivering on the project or contract, engaging them directly should be made possible, with appropriate safeguards against corruption and capability checks.*

Space does not permit a detailed critique of these texts.

In summary these two reports appear to reflect a few sensible ideas embedded in a rather simplistic or erroneous understanding of the regime and the broader legal context in which it sits. It is relevant to note that Policy Exchange is also closely linked to an initiative called the Judicial Power Project which is dedicated to rolling back the development of public law in the UK over the last 100 years. This project has some links to activities promoted by the Federalist Society. The ambition to deliberately roll back long established norms is plainly part of the ambition of those promoting these views.

There are a number of other processes going in different parts of the UK government considering the future shape of UK procurement law. None has emerged from the shadows to produce any concluded position. Perhaps the most significant such group is a body that appears to be run from Cabinet Office at the behest of the Prime Minister. It seems to comprise mostly businessmen and a small number of academics and practitioners. It is not clear how it will proceed or how far the thoughts from Policy Exchange will inform their reflections.

It seems that any future progress for reform will involve resolution of a key tension between those in government and advising government who take the rather radical view hinted at above that the government may need protection from business, and the interests of the Conservative party's traditional supporters in business. Anecdotal evidence, supported by some material in the Institute for Government reports referenced above, would suggest that some of those businesses on which government has become rather dependent for the delivery of services are rather concerned about the approach taken by government in recent tender processes and its failure to follow clear and certain tender procedures. This may have discouraged some from participating in particular processes. It is hard to be sure how far this is a problem, but certainly one can expect that business will be increasingly concerned about engaging with major projects if the rules for management of the relevant competitive processes are not clear and stable. This does not seem to have been clearly thought through.

III. INTEGRITY IN UK PUBLIC PROCUREMENT

In trying to understand how the law might progress it is useful to get some sense of how those in a position to effect change see the challenges for integrity in UK public procurement as being a real issue for the future.

On the one hand many have argued that the problem of corruption in the UK public sector economy is greater than often thought. The 2011 report by Transparency International UK "*Corruption in the UK, Overview and Policy Recommendations*" noted that the corruption health check for the UK gave the diagnosis of "growing threat, inadequate response." Corruption in key national institutions including political parties and parliament gave rise to real concerns. There is also a renewed academic interest in investigating the impact of corruption and anti-competitive activity in public procurement (see Fazekas & Kocsis, *Uncovering High-Level Corruption: Cross-National Objective Corruption Risk Indicators Using Public Procurement Data* (2017) B.J.Pol.S 1; Bauhr, Czibik, Fazekas, *Licht Lights on the Shadows of Public Procurement, Transparency in government contracting as an antidote to corruption?*; Fazekas & David-Barrett, *Corruption Risks in UK Public Procurement and New Anti-Corruption Tools* (2015); and see Anderson, Jones & Kovacic, *Preventing Corruption, Supplier Collusion and the Corrosion of Civic Trust: A procompetitive program to improve the effectiveness and legitimacy of public procurement (to be published)* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3289170)

There has been some increased realism as to the likely incidence of corruption in the system. For instance, there has been an ongoing concern that fraud in the public sector may be very significantly underreported in the UK (<https://www.nao.org.uk/wp-content/uploads/2016/02/Fraud-landscape-review.pdf>) As fraud and corruption are likely to be connected there must be some basis for supposing that corruption is also substantially underreported. This is reflected in part of the United Kingdom Anti-Corruption Strategy 2017-2022 dealing with public procurement as reflected in Review 4 of the Government's Year 1 Update at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/769403/6.5128_Anti-Corruption_Strategy_Year1_Update_v7_WEB.PDF.

The promised review of procurement risks in local government has not yet, however, been forthcoming.

An interesting perspective on these issues is afforded by a report of a body described as the Fraud Advisory Panel. It comprises various individuals active in white collar and public sector crime. The report is entitled "*Hidden in plain sight: domestic corruption, fraud and the integrity deficit*", (<https://www.fraudadvisorypanel.org/wp-content/uploads/2019/07/Hidden-in-plain-sight-Jul19-WEB.pdf>). The panel noted that "*the heavy emphasis placed on overseas corruption in recent years has taken our eye off the ball at home. The data are sketchy, the infrastructure non-existent, and no-one is in charge*". It is noted that "*If corporations are willing to engage in corruption and unethical behaviour overseas, which factors would inhibit them from doing so 'at home'?*" The Fraud Advisory Panel has managed to uncover some patchy data, but infers that the problem of corruption affecting public sector procurement is significant. As they note, the Chartered Institute of Building (a construction industry educational body) has typically found that about half of the construction professionals it surveys regularly believe that corruption is common in the UK construction industry and that neither the industry nor government is doing enough about this. In identifying the causes of corruption the construction professionals surveyed by the Chartered Institute of Building focussed most often on cultural confusion about what is corruption and economic difficulties as lying at the heart of corruption. A few specific aspects of public procurement are identified as representing particularly high risk areas for corruption.

On the other hand there remains real complacency in many quarters. This is reflected in an extract from a note already cited above.

"...There is a long-standing complacency that corruption happens overseas and not here, and many of our national responses are built on that foundation. However, there is a chink of light. In the justified outrage that many people feel about the tragedy, we should also remember that levels of corruption in the UK are nowhere near those of some other countries..."

(“*Corruption and Grenfell Tower*” <https://www.transparency.org.uk/corruption-and-grenfell-tower>).

Many of those now in and advising the new government deploy a rotating menu of inconsistent views about the relevance of law to public procurement and situations that potentially raise the risk of corruption in public procurement. For instance:

- British exceptionalism: we're British, we don't do corruption.
- Good government is conducted by supreme intellects who should operate outside bureaucratic or legalistic constraints.
- I'm not corrupt: this is my usual entitlement.

- Procurement law needs to be flexible so we can do what we need to do.
- All this environmental and social content in procurement law is just virtue signalling.

The Evaluation Report of the United Kingdom in the Fifth Evaluation Round of GRECO (the Group of States against Corruption) (<https://rm.coe.int/fifth-evaluation-round-preventing-corruption-and-promoting-integrity-i/168088ea4c>) reflects this rather confused scenario. In a number of key areas there is clearly room for very substantial improvement and very real risk of corruption affecting key decisions regarding public procurement.

IV. DEVELOPMENT OF UK PROCUREMENT LAW AND THE CONSTRAINTS ON THAT DEVELOPMENT

It is too early to be clear as to what government seeks to achieve, but the materials referenced above, some leaks and anecdotal evidence suggest that it will be looking to substantially reduce the scope and complexity of procurement law, and probably either eliminate or reduce the scope for review of procurement decisions in court.

As already noted, government's aspirations are not necessarily framed by reference to the legal and practical constraints that remain applicable. For instance, however far the UK government may wish to liberalise procurement law, any change will be constrained by requirements flowing from the various trade arrangements that are or will be applicable to the United Kingdom.

The short term changes to procurement law in the United Kingdom are very much more limited. The body of regulations implementing EU law (of which the Public Contracts Regulations 2015 is the core measure) will remain largely unchanged in the immediate future. From 1 February 2020 until the end of 2020 (at least) the United Kingdom will be in an "implementation phase". It will have left the EU but remain subject to a transitional EU law regime. The only changes to UK procurement law will be those necessary to make sense of the law after exit.

In very short summary, the European Union (Withdrawal) Act 2018 as amended would provide for the continued effect of EU law after exit as a corpus of law now treated as English law but interpreted by UK courts only in accordance with EU law principles as at exit day. This is to be referred to as "retained EU law". Sections 8 and 9 provide statutory authority for the making of secondary legislation to implement any withdrawal agreement, or to remedy or mitigate failures in effective operation of or deficiencies in the continuing, retained EU law. There will be minimal changes to the effective procurement regulations.

Most obviously the requirement to publish procurement notices and so forth in an EU website is replaced by an obligation for publicity in an equivalent UK publication service. Functions undertaken by the EU Commission are transferred to UK entities. Importantly no change is foreseen to the scope of the bodies to be covered by the legislation. It might have been hoped by many that the very broad coverage of UK agencies made under the previous EU offering at the WTO would have been narrowed, but GPA partners plainly did not agree to that.

The Withdrawal Act looks likely to be amended to provide that the implementation period cannot be extended beyond the end of 2020. Given the time needed for negotiation of any new arrangement, and the need for ratification of an arrangement within the EU's institutions and, in the case of a more extensive arrangement, by the institutions of all Member States, this time limit risks there being no agreement or limits its ambition.

If the UK government sticks with its time limit of the end of 2020 on the agreement of the terms of the forthcoming arrangements it seems likely that the agreement will provide a rather low level trade arrangement covering and will not get as far as issues of procurement. The EU may be content with such an agreement given that its deficit with the UK is in areas which are likely not to be covered. The future course of these discussions is hard to predict given that this is a rather unusual situation in which one of the parties to a trade agreement negotiation is positively looking to reduce the depth of the existing trade arrangement in at least some areas. Accordingly, it is hard to read what the procurement law content will be of any EU-UK agreement applicable from 2021.

Whatever the outcome, the eventual shape of UK procurement law is also likely to be constrained by the procurement law arrangements that are agreed as part of whatever trade arrangements that the UK concludes with other states.

Three specific constraints are considered a little further below.

A. Government Procurement Agreement (GPA)

The United Kingdom will accede to the GPA on its own account on or before 27 February 2020. (Presumably this will have happened sometime in January 2020) (https://www.wto.org/english/news_e/news19_e/gpro_27jun19_e.htm) Broadly speaking this is being done on the basis the UK will take on coverage schedules that reflect existing coverage for UK institutions under its current EU derived arrangements.

As noted in last year's report this opens up various possible changes that might be made to procurement law if the GPA is the only relevant constraint. The scope of UK procurement regulation can still be narrowed from its current broad coverage to the rather narrower scope required under the GPA as the current EU legislation is considerably broader in scope than the GPA coverage.

As already noted, the thinking about public procurement reform outside the legal world seems often to disregard the crucial impact of GPA membership upon the scope for law reform. The audience at Year in Review conferences does not need to be coached in the consequences of GPA membership. Even the non-discrimination provisions in Article IV seem sometimes to be ignored. It also seems that the implications of the requirement for a domestic review procedure in Article XVIII are not fully understood. In particular it seems to be assumed that changes could be made to the measures by which the United Kingdom achieves compliance with the GPA without other GPA signatories having any ability to constrain that change under the terms of the agreement.

B. Ireland & Scotland

Ongoing issues for the territorial integrity of the United Kingdom may also be relevant. It is not clear that the government is particularly committed to maintenance of the United Kingdom.

Northern Ireland applies the same basic procurement regulations as England and Wales (but not Scotland). These regulations are applied, though, in the context of a separate legal system and separate governmental structure applying distinct procurement policies (although the lack of any sitting government in Northern Ireland since January 2017 due to a political impasse there significantly limits the effective independence on matters of policy). Inevitably government

procurement has increasingly functioned without regard to the border between Northern Ireland and the Republic of Ireland; growth in cross-border commercial links may have stalled immediately following 2008 but in most sectors one would expect cross border activity in government tenders. This is also particularly true in the gas and electricity sectors where the markets function as All-Island markets. Procurement is therefore an area in which the practical nature of the border is of great significance and the simplistic focus on physical barriers wholly misses the real economic and social issues involved.

The UK government's failure to engage with or understand the existence or nature of issues in Northern Ireland and its border with the Republic of Ireland have had and will continue to have an immense impact on the process. Given that in many respects the island of Ireland currently operates as a single market, or at least two markets deeply integrated in various very specific respects, the impact of any Brexit outcome may affect procurement law in Northern Ireland in various respects. As noted in previous years' reports, it is hard to see how previous commitments to maintaining alignment between Ireland and Northern Ireland can be respected while causing NI procurement law to diverge markedly from the model in the Republic of Ireland.

As predicted last year, the government has finally had to push through an arrangement in which Northern Ireland and Ireland remain in single market-type arrangement unless some replacement trade arrangement can be reached. This involves keeping Northern Ireland in a curious quasi-EU arrangement even after the rest of UK has fully left the EU. (A simplified explanation of this situation is to be found at <https://www.instituteforgovernment.org.uk/explainers/brexit-deal-northern-ireland-protocol>. The relevant protocol itself was not drafted in a way that reveals its full meaning without copious coffees and some background knowledge of EU customs and internal market law.) The end point of this separate all island process is unclear and is dependent upon complex political, commercial and other issues. It must be a possibility that this independent direction leads to some novel status for Northern Ireland both in and out of the EU, or perhaps rather more likely it will lead to continuing steps towards unification of Ireland. The operation of the "consent mechanism" for release of Northern Ireland is likely to become a matter of great importance going forward (see <https://www.instituteforgovernment.org.uk/explainers/northern-ireland-protocol-consent-mechanism>)

As noted last year, it seems very likely that Brexit will lead to the well known fact that the unification of Ireland will have occurred in 2024 – as noted by Data in Star Trek TNG, Series 3, 'The High Ground'. If and insofar as the Westminster government chooses to slow down that process, it may be that it will decide to slow the process of detaching the law in the rest of the UK from that in Ireland. This may affect the way in which UK law detaches itself from the EU in this as in other areas.

Scotland operates its own separate procurement law system within its own distinct legal system. The end point for that system is also uncertain given the current constitutional uncertainty around Scotland.

C. Sector Specific Issues: for example, Health

The development of procurement law and policy will be driven by complex issues in both domestic politics and international trade relations and in particular in trade conflicts between the UK and US. This will be seen in a number of areas such as defence, cybersecurity, data

management and the like. The most immediate area for conflict between the UK and US will arise in health.

It is important for a US audience to note that while the new government travels under the Conservative label and many of its members were young Thatcherites, this UK conservatism does not map directly onto any US model of conservatism or US expectations of UK conservatives. Firstly, centrist conservatives have been purged from the party. Second the government gained power in an electoral switch that is an English (not British) version of Goldwater's southern strategy (in this case involving the flipping of numerous Parliamentary seats in Labour's Red Wall in the North and Midlands). This has meant that while the government will probably have to respect the attachment of its new voters to the institutions of the British welfare state, particularly the universal tax-funded health care system. The government may chip away at that system, but its ambition to be reelected in 4 or 5 years' time will require it to protect the system and that will make it very wary of anything that increases its costs. The agenda of the current US administration is on a collision course with that political agenda.

At present the procurement of most goods and services, including clinical services, by the National Health Service is covered by one of the applicable procurement systems. The procurement of most clinical systems is covered by tendering requirements as a consequence of the health service service reforms introduced by a Conservative Health Secretary in the last decade. Although they may not have focussed on this, both government and opposition are agreed that the scope of these requirements should be reduced and as (broadly) neither EU law nor the GPA requires the tendering of clinical services it seems likely that this will be the direction of travel. The NHS is gradually implementing a complex set of measures called the NHS Long Term Plan and this is likely to lead to integration of service delivery although outsourcing of a range of services will continue. The opening up of competitive tendering for clinical services has encouraged the emergence of a market for delivery of services by a range of suppliers, some of whom are from the US, Canada or the EU. It is not clear how far any of the relevant states will want to apply pressure to maintain market access for these entities going forward in the face of fairly consistent movement towards a narrowing of that market. To the extent that the scope of clinical services is opened up to outside competition, the government will be accused of "privatising the National Health Service". All the signs are that the government will be very sensitive to any such accusation as this could shatter the novel voting coalition that has brought it to power.

Procurement of goods, medical devices and pharmaceuticals will also be highly sensitive. The Office of the U.S Trade Representative (USTR) has placed "Procedural Fairness for Pharmaceuticals and Medical Devices" on its list of negotiating objectives for the initiation for US-UK negotiations. The goal is elaborated as requiring the USTR to "seek standards to ensure that government regulatory reimbursement regimes are transparent, provide procedural fairness, are nondiscriminatory, and provide full market access for US products". It has hard to see how the UK government can give much ground here. It is a core element of the NHS Long Term Plan that the budget should be protected by maximising the commercial benefits to be derived from centralised purchasing entities. US commercial entities often complain of the outcome of procedures dealing with the regulation and pricing of devices and pharmaceuticals. This is a complex area, but in simple terms NHS institutions in England can and do drive hard bargains on pricing and regulation. The market for the 56 million or so patients in England affords them considerable power and while this is a tempting market access is also controlled by demanding competitive and regulatory procedures. The rhetoric from the US administration is that very much higher US prices are subsidising the UK (and other systems). The UK's position would simply be

that it must get the best value it can, and while it is very sensitive to threats by suppliers that they might refuse to supply, that is rarely the real issue. As long as US suppliers are prepared to supply on the terms available in the UK, it is a matter for US purchasers whether they are prepared to pay more for the same product. It is not really clear what change the USTR agenda would require, but any significant unfolding of the structure of pricing of goods and devices would almost certainly be unaffordable. If pressed, the UK government will have to choose between its transatlanticism and its new "friends in the North" on whose votes it depends. It seems likely that the most it will be able to agree to will be a modest accommodation to the USTR's position even if that jeopardises the success of any negotiations.

As noted, the competitive tender procedures adopted by the NHS are often complex but their complexities are often a consequence of applying a single pricing and regulatory framework across an entire country. (For these purposes, England, Scotland, Wales and Northern Ireland operate as semi-separate entities). A court challenge to a particular pharmaceutical procurement in 2019 illustrates the point. It seems inevitable that the same core principles of equal treatment and transparency will continue to apply to procurement processes – indeed USTR will no doubt demand this. These principles enable a purchasing authority to exercise a bounded discretion in devising and applying its procurement process and bid evaluation methodology. Equal treatment requires that the authority treat the same situations in the same way, and different situations differently and there is broad discretion in deciding what is, or is not, "the same". *AbbVie v NHS England* [2019] EWHC 61 involved the procurement of a £1bn contract for Hepatitis C drugs in different sub-markets. Suppliers were obliged to submit a single bid for a share of the whole market. Where a supplier was unable to supply a part of the market, a "dummy price mechanism" attributed a price to it. In addition, the evaluation used an "unmetered access model" which calculated a fixed fee to be paid to each supplier, which was not based on the amount of drugs it in actual fact supplied. In a longish judgment the Court considered that although the process was complex the process could not be criticised as treating bidders inappropriately.

Another area that has involved some concerns involves the way in which the system determines which drugs will be paid for by the system and for what purposes. A number of bodies are involved and they can control whether a particular pharmaceutical or device can be used, or can be reimbursed. An expensive treatment may not be authorised if its therapeutic value seems to be limited. Products can sometimes also be permitted to be used for novel purposes thereby undermining the position of a market leading specific drug. It is obviously a disappointment when a major pharma company finds that its new multi-million dollar drug is being replaced by an aspirin because the aspirin is achieving comparable therapeutic outcomes, but the UK approach would not be inclined to protect the position of the more expensive drug.

There certainly will be cases in which the processes are incorrectly designed or incorrectly applied but it is not clear what change will be required to enable US entities to increase market access as that access would already be largely unfettered even absent reform.

At its heart this issue is a core cultural clash between UK and US understanding of the commercial operation of a health system and between different strands of the Conservative party. The UK position will focus on the health outcome of a particular choice, and the overall cost to the system of that choice. While some old style conservatives might have been sympathetic to the interests of business, that strand in the party will probably have reduced influence.

V. CASE LAW

There have been no very dramatic developments in case law in the United Kingdom in 2019. Case law such as *Circle Nottingham v NHS Rushcliffe Clinical Commissioning Group* [2019] EWHC 1315 concerned a challenge to the award of a contract for operation of a large public hospital facility by a commercial entity. The private entity had lost the competition and the operation of the facility was being taken over by the public sector. Even though questions were raised as to how quickly the public hospital would be able to take over operation of the facility, the court did not stop the contract from being entered into and the case now continues solely as a claim for damages by the private entity for the profit that it says it would have earned from the contract. This is a good example of the current approach in the courts under which it will be genuinely hard to persuade a court to apply any remedy against an unlawful contract award decision other than the award of damages. While in theory a challenge made before a contract is signed can lead to the Court ordering an early trial and preventing the contract from being entered into, that will only occur in the most exceptional of cases. Usually challenging parties will be confined to a remedy in damages which may cover, for instance, full compensation for lost profit on a contract. Those damages can however be very substantial.

This approach has a resonance with the view sometimes expressed by judges hearing these cases that procurement litigation has become a battleground for major corporates in their ongoing battles for greater market share world-wide. This sense has given fuel to the notion already referred to that the procurement system is tilted against the public sector.

VI. SINGLE SOURCE PROCUREMENT

A review into the operation of the Single Source Procurement system is underway. Industry has until the end of February 2020 to respond to the consultation. See <https://www.gov.uk/government/consultations/review-of-the-single-source-regulatory-framework-2020-consultation>

The consultation is being conducted by the Single Source Regulations Office and is focussing on reporting requirements and contract profit rates under the system. These matters will obviously be of great concern to current single source defence contractors. It is not entirely clear, though, how if at all this review fits with the concerns expressed by those now in government about Defence procurement. These concerns seem to go rather beyond the more technical matters under review. (see the Policy Exchange reports noted above, for example) and to look at broader, but very well known issues about the recurring costs and failures of defence procurement and concerns whether procurement goals are driven by strategy and planning, or the other way around. As F-35s start to fly off new aircraft carriers there are some who question whether the money involved was well spent and what lessons should be learned for the future.

VII. CONCLUSION

The UK procurement scene is certainly exciting. While procurement lawyers may be in the cross-hairs of this government, its own plans are unclear and in development. Those interested in supplying to any part of the UK public sector will have to keep up to date with the rules and procedures within which they have to work.

Perhaps the best guess is that the system will end up being rewritten as a rather looser more general set of procedures still bound by the same principles. The real battle is likely to focus on

attempts to constrain the scope or intensity of review of public procurement decisions. This will be connected to the broader pressure on judicial review.