

**PROCUREMENT OBLIGATIONS WHERE NONE
EXISTED BEFORE – THE CREEPING REGULATION OF UNREGULATED PROCUREMENT**

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**PROCUREMENT OBLIGATIONS WHERE NONE EXISTED BEFORE – THE
CREEPING REGULATION OF UNREGULATED PROCUREMENT**

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Who and which types of Contracts are excluded from the Regulations?

Firstly, let's look at who is excluded:-

The Public Contracts Regulations 2006 apply to procurement by “contracting authorities”. A list of these is to be found in Regulation 3 and include, for example, government departments and local authorities.

So what if you are not on the list? Have you escaped the regulations?

No, if you are what the Public Sector Directive calls a “body governed by public law”, i.e.

“a corporation established, or a group of individuals appointed to act together, for the specific purpose of meeting needs in the general interest, not having an industrial or commercial character, and –

- financed wholly or mainly by another contracting authority,
- subject to management supervision by another contracting authority, or
- more than half of the board of directors or members of which, or in the case of a group of individuals, more than half of those individuals, are appointed by another contracting authority” (regulation 3(1)(w)).

If a body meets any of the criteria, it will be covered. It is not necessary for it to meet all three.

So, for example, housing authorities fall to be caught by the “public law” requirements.

But if you do not fall into any of the above, that is one hurdle overcome!

So moving on to the type of contracts that are excluded.

The Regulations do not apply to the award of a public Contract, framework agreement or DPS (DPS is a Dynamic Purchasing System that is “a completely electronic system of limited duration” which meets any of the following:-

- established by a contracting authority to purchase commonly used goods, work, works or services, and

- open throughout its duration for the admission of economic operators which –
- satisfy the selection criteria specified by the contracting authority, and
- submit an indicative tender to the contracting authority or person operating the system on its behalf which complies with the specification required by that contracting authority or person)

There are general exemptions under 6(2) which are:-

- Services concession contracts which are services concession contracts awarded by a contracting authority (subject to Regulation 46, on public service bodies)
- Exclusive rights, under which services are to be provided by a contracting authority, or by a person which is a contracting authority in another relevant State for the purposes of the Public Sector Directive, because that contracting authority or person has an exclusive right –
 - to provide the services, or
 - which is necessary for the provision of the service

in accordance with any published law, regulation or administrative provision, which is compatible with the EC Treaty

- Land transactions (for the acquisition of land, including existing buildings and other structures, land covered with water and any estate, interest, easement, servitude or right in or over land;
- Employment Contracts (for employment and other contracts of service);
- R & D (for research and development services unless:
 - the benefits are to accrue exclusively to the contracting authority for its use in the conduct of its own affairs, and
 - the services are to be wholly paid for by the contracting authority);

You need to look at Recital 23 of the Public Sector Directive to find the reasons for excluding research and development activity of the specified kind –

The recital states:

“Pursuant to Article 163 of the Treaty, the encouragement of research and technological development is a means of strengthening the scientific and technological basis of Community industry, and the opening up of public service contracts contributes to this end. This Directive should not cover the co-financing of research and development programmes; research and development contracts other than those where the benefits accrue exclusively to the contracting authority for its use in the conduct of its own affairs, on condition that the service provided is wholly remunerated by the contracting authority, are not therefore covered by this Directive”.

- Telecommunications (where the principal purpose of the contract is to permit the contracting authority to provide or exploit public telecommunications networks or to provide to the public one or more telecommunications services) and moreover “Contracts whose purpose is to enable a contracting authority or utility to provide telecommunications services to the public are excluded because the market has been liberalised throughout the EU –

“In view of the situation of effective market competition in the telecommunications sector following the implementation of the Community rules aimed at liberalising that sector, public contracts in that area should be excluded from the scope of this Directive in so far as they are intended primarily to allow the contracting authorities to exercise certain activities in the telecommunications sector” (Recital 21).

In the Regulations “telecommunications services” are defined as “services the provision of which consists wholly or partly in the transmission and routing of signals on the public telecommunications network by means of telecommunications processes, with the exception of broadcasting and television “(Reg. 2(1)).

- Broadcasting (for the acquisition, development, production or co-production of programme material intended for broadcasting by broadcasters or for the purchase of broadcasting time);
- Arbitration and Conciliation (for arbitration or conciliation services);

- Financial Instruments (for financial services in connection with the issue, purchase, sale or transfer of securities or other financial instruments in particular transactions by the contracting authorities to raise money or capital);
- Central Banking (for central bank services).

“Services Concession Contract” as defined above have to be further considered following the **Telaustria case (Case C-324/98, [2000] ECR 1-10745)**, as based on the general principles of European law there is a requirement for “a degree of advertising sufficient to enable the services market to be opened up to competition and the impartiality of the procedures to be reviewed” (para.62). I will discuss the case in further detail later on.

In relation to utilities, there are specific exemptions, namely:-

- (a) Contracts awarded by contracting authorities that are utilities, (i.e. the Contract is for the carrying out of an activity listed in any Part of Sch.1 to the Utilities Contracts Regulations 2006 where the utility is specified in that Part. In this case, the Utilities Contracts Regulations 2006 apply instead).
- (b) Bus services in a liberalised market, (i.e. the contract is for the provision of bus services to the public where other entities are free to provide those services, either in general or in a particular geographical area, under the same conditions as the utility)
- (c) Goods, works or services for resale (i.e. the contract is for the purpose of acquiring goods, work, works or services in order to sell, hire or provide

them to another person unless the utility has a special or exclusive right to sell, hire or provide them or other persons are not free to sell, hire or provide them under the same conditions)

- (d) Water purchased by a utility (i.e. the contract is for the purchase of water, where the utility is engaged in the provision or operation of fixed networks intended to provide a service to the public in connection with the production, transportation or distribution of drinking water or the supply of drinking water to such networks).
- (e) Energy purchased by a utility, (i.e. the Contract is for the supply of energy or of fuels for the production of energy, where the utility is engaged in –
- the provision or operation of fixed networks intended to provide a service to the public in connection with the production, transport or distribution of gas or heat or the supply of gas or heat to such networks, or
 - the provision or operation of fixed networks intended to provide a service to the public in connection with the production, transport or distribution of electricity or the supply of electricity to such networks, or
 - Exploring for or extracting oil, gas, coal or other solid fuels)
- (f) Excluded activities (i.e, the utility is engaged in an activity that is excluded from the Utilities Contracts Regulations 2006 by virtue of Reg. 9).

There is a further exclusion in relation to secrecy, national security and defence
Reg. 6(2)

- (i) Secrecy or national security (where the public Contract, framework or dynamic purchasing system is classified as secret or where the performance of the Contract must be accompanied by special security measures in accordance with the laws, regulations or administrative provisions of any part of the UK or when the protection of the essential interests of the security of the UK require it).
- (ii) Defence Equipment (where Art.296 of the EC Treaty applies to that public Contract, framework agreement or dynamic purchasing system).
- (iii) International Agreements (where different procedures govern the procedures leading to the award of the Contract and it is to be entered into in accordance with
 - an international agreement concluded in conformity with the EC Treaty to which the UK and a State which is not a relevant State are parties and it relates to goods or the carrying out of a work or works or the provision of services intended for the joint implementation or exploitation of a project related to that agreement, or
 - an international agreement relating to the stationing of troops and concerning the undertakings of a relevant State or a state which is not a relevant State, or

- the Contract award procedures of an organisation of which only States are members (an “international organisation”) or of which only States or international organisations are members.

Contracts must also be “a Contract in writing, for consideration (whatever the nature of the consideration)”. The Directive refers to it as being “pecuniary interest”.

Part B services are listed as

- Hotel and Restaurant Services
- Transport by Rail
- Transport by water
- Supporting and auxiliary transport services
- Legal service
- Regional placement and services
- Investigation and security services, other than armoured car services
- Educational and vocational education services
- Health and social services
- Recreational, cultural and sporting services

- Other services

Only the following rules apply to Part B:

- Technical specifications
- Contract award notices
- Statistical and other reports
- Provision of reports
- Publication of notices
- Enforcement of obligations

Where there are mixed services, but the Part B services form the greater part of the services, the Part B rules apply .

If, under Reg. 8(1) the estimated value is less than the relevant threshold, there is an exemption.

The thresholds as at today's date are:-

Thresholds are net of VAT

	Goods	Services	Works
Entities listed	£90,319 ¹	£90,319 ²	£3,497,313

in Schedule	(€133,000)	(€133,000)	(€5,150,000)
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¹ (Schedule 1 of the Public Contracts Regulations 2006 lists central government bodies subject to the WTO GPA. These threshold will also apply to any successor bodies)

²(With the exception of the following services, which have a threshold of £139,893 (€206,000).

- **Part B (residual) services**
- **Research & Development Services (Category 8)**
- **The following Telecommunications services in Category 5**
 - **CPD7524-Television and Radio Broadcast service**
 - **CPC7525-Interconnection services**
 - **CPC7526-Integrated telecommunications services**
- **Subsidised services contracts under regulation 34.**

Other public sector contracting authorities	£139,893 (€206,000)	£139,893 (€206,000)	£3,497,313 (€5,150,000)
Indicative Notices	£509,317	£509,317	£3,497,313

	(€750,000)	(€750,000)	(€5,150,000)
Small lots	£54,327	£54,327	£679,090
	(€80,000)	(€80,000)	(€1,000,000)

	Supplies	Services	Works
All Sectors	£279,785	£279,785	£3,497,313
	(€412,000)	(€412,000)	(€5,150,000)
Indicative Notices	£509,317	£509,317	£3,497,313
	(€750,000)	(€750,000)	(€5,150,000)
Small lots	£54,327	£54,327	£679,090
	(€80,000)	(€80,000)	(€1,100,000)

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So, is that the end of the story? Obviously not. Treaty principles may still apply.

In particular today I would like to look at the following:-

Article 43 EC - Freedom of Establishment

This Article guarantees the right of community nationals and firms to set up business in other member states. This allows for companies which are set up under the law of one of the member states and which have their registered office, central administration or principal place of business in the Community to have a right to set up business in a different member state. Also, individuals who are self-employed in business or the professions may set up operations in other parts of the Community and companies may establish subsidiary or branches in other states. It outlaws Government measures that hinder these individuals and companies from establishing or setting up in other states or which hinder their activity once they are established. A good example of this would be any attempt to prevent a party from bidding on a public Contract, e.g. a Government Contract that might require a foreign firm, without a local base, to establish one.

Article 49EC – Freedom to provide services

Similarly, this seeks to open up markets for persons established in one member state who want to provide services in another on a temporary basis without setting up a permanent office or branch, for example a building firm based in Germany that wishes to act as a Consultant on a specific project in Paris. Similar to **Article 43** this can be invoked by individuals who are community nationals or community companies. This Article would apply, for example, where a Government bans

foreign firms from providing services in the state, or making access subject to payment of a fee that does not apply to domestic firms.

There are derogations under **Articles 46 and 55** on the grounds of public policy, public health or public morality. In addition, **Article 45** adds a further derogation to the extent that **Articles 43 and 49** do not apply to activities that “are connected, even occasionally, with the exercise of official authority”.

There is, however, a very narrow interpretation being given to this by the ECJ (European Court of Justice). Moreover, **Articles 43 and 49** do not apply to purely internal situations, i.e. they do not apply “to activities whose relevant elements are confined within a single member state”.

The next Article I would like to look at is **Article 12EC – Non-discrimination** which provides that any discrimination on the grounds of nationality is prohibited. This covers off both direct and indirect discrimination.

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Treaty principles and Telaustria

Let us look at the facts in the **Case C-324/98 Telaustria Verlags GmbH and Telefonadress GmbH v. Telekom Austria (2000)**. This case arose from a procurement dispute in Austria. In 1997 the state-owned telecom operator, Telekom Austria, published a call for tenders for a concession Contract for the production and supply of telephone directories. There were complaints from two Austrian companies, namely Telefonadress and Telaustria claiming that the

Contract should have been awarded in accordance with Community and National Procurement law.

The review body in Austria referred a series of questions to the ECJ for ruling.

The ECJ ruled, in December 2000, that the Contract fell outside the scope of the Procurement Directives because it constituted a public service concession such that the provider obtained the right to exploit its service for payment.

Notwithstanding, the Court went on to state that the fundamental rules of the Treaty still applied and, in particular, the principle of non-discrimination on the grounds of nationality.

It went on to state that the principle of non-discrimination implied an obligation of transparency.

It went on to state that “that obligation of transparency consists in ensuring, for the benefit of any potential tenderer, a degree of advertising sufficient to enable the services market to be opened up to competition and the impartiality of procurement procedures to be reviewed”.

So, back to the Austrian National Court to decide whether the obligation had been met. Advocate General Fenelly added more detail in his Opinion. The view he expressed was that award of concessions had to reflect a minimum degree of publicity and transparency. In the *Telaustria* case, the offer was published in the Austrian Official Journal, in certain international newspapers and in local Austrian

newspapers and in the Advocate General's view, this satisfied the requirement of transparency.

So the outcome, through the ECJ, is that, in order to comply with the transparency obligation, public authorities must advertise public contracts, even if such contracts are outwith the scope of the Procurement Directives, so as to allow competition from potential bidders across the EU.

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What are the principles?

They are:

- transparency
- equal treatment
- non-discrimination

these apply

- even if a public Contract falls outside the Directives and, as I have stated in the **Telaustria** case
- there requires to be "a degree of advertising sufficient to enable the services Contract to be opened up to competition".

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These principles have been gradually extended by the ECJ. Let us go on to the CoNaMe case. This case is more formally known as **Consorzio Aziende Matano (CoNaMe) v. Comune di Cinglia de Botti** which was a judgment in July 2005. The facts in this case were that an Italian Local Authority had entered into a Contract to distribute gas with a company called Padania. The Authority held 0.97% of the shares in Padania. Padania was jointly owned by a large number of Local Authorities in the province. The previous gas distributor had been a consortium called CoNaMe and it brought proceedings locally through its regional court when the Contract was not publicly tendered. That court, in turn, asked the ECJ for its view on whether an invitation to tender should have been required. It was assumed that the Contract was a concession Contract and therefore fell outwith the scope of the Directives.

The Court decided that the direct award of the concession without transparency amounted to indirect discrimination on grounds of nationality as it precluded other member states from having any opportunity to express an interest in taking over the concession.

The only exclusion would be if there were objective circumstances that would override the impact of Articles 43 and 49 EC that we have discussed previously.

The mere fact that the Local Authority had a very modest economic interest at stake did not amount to special circumstances in the case and they went on to state that an awarding authority must “ensure that an undertaking located in the territory of a different member state can have access to appropriate information regarding that concession before it is awarded so that if that undertaking had so wished it would have been in a position to express its interest in obtaining that concession.”

The Advocate General Stix-Hackl, in her Opinion, went on to state that “certain positive obligations were imposed on member states”.

She considered the principle of proportionality and seemed to be of the view that there should not be a “one size fits all” regime but, rather, a sliding scale effect.

Indeed, she went on to say that where, for example, there was extreme urgency, certain public contracts falling under the Treaty could be exempt from the obligation to publish a Notice and, indeed, looking back at the *Telaustria* case, her first question was whether it was necessary to publish at all.

She went on to say that it would be excessive to require that all potential tenderers be contacted. In considering the method of publication and what required to go in that publication, certain key elements such as complexity and value would all have to be considered.

Finally, in conclusion, she stated “Articles 43EC and 49EC are to be interpreted as establishing in principle an obligation of transparency.

However, Articles 43EC and 49EC do not in all circumstances preclude the direct award of contracts, that is to say, contracts awarded without publication of a Contract Notice or a call for competition.

In assessing whether a direct award is permissible, the National Court must, in the manner of a market analysis, identify the economic operators to whom the proposed Contract is of interest, bearing in mind the potential competition, the value and object of the Contract playing a decisive role in that respect”.

A further development of that case is the Parking Brixen case, more fully known as **Parking Brixen GmbH v. Gemeinde Brixen, Stadtwerke Brixen AG (October 2005)**. This again related to a public service concession.

In 2002 the Italian Municipality of Brixen awarded to its wholly owned subsidiary a 9 year Agreement for management of a car park.

There was no prior advertisement to allow competition.

A complaint swiftly followed and the case came before an Italian Court. They, in turn, referred the matter to the ECJ.

The ECJ decided that that particular Contract amounted to a public service concession that took it outside the Procurement Directives.

Following on from Telaustria there were still principles that had to be applied namely non-discrimination and equal treatment.

They looked again at the implications of Articles 43 and 49 and stated that the freedom of establishment and free movement of services and the principle of equal treatment still applied and the Court referred back to Telaustria and the principles requiring transparency and a degree of advertising and stated that the complete lack of any call for competition meant that it was non-compliant with the requirements of Articles 43 and 49 as well as equal treatment, non-discrimination and transparency.

The counter-argument was that this was an in-house arrangement and therefore would not attract outside interest.

In its conclusion the Court acknowledged that the principles of equal treatment and non-discrimination apply only where a Public Authority entrusts the supply of an economic activity to a third party and therefore it is not appropriate, by reverse application of that theory, to apply the rules on public procurement or public service concessions where the Public Authority performs tasks in the public interest for which it is responsible itself without the use of third party input.

However, it was able to make a distinction in this case, on the basis that there was broad independence from its parent municipality and the investment and the contract capital would soon be opened to private investors.

Therefore they were able to come to the conclusion that the award was contrary to Articles 43 and 49 as well as the principles of equal treatment, non-discrimination and transparency.

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How Wide is the Concept of Concession?

Simplistically, it is a contract where the consideration is a right to exploit the service by charging end users, ie., the private sector party takes the economic risk. Examples of this are as per Telaustria and Parking Brixen above, ie., the rights to supply telephone directories or operate car parks or a further example would be the right to operate public transport.

Case C-26004 Commission v Italy poses a little unanswered question however.

If betting shop licences in principle are caught, then why not extend this to licences for pubs, hotels or sports clubs?

Is this a forthcoming attraction for the ECJ?

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What Considerations Have To Be Borne in Mind If The Contract Value Is Below The Threshold?

The first case I want to look at is **Bent Mousten Vestergaard v Spottrup Boligselskab**, (case in December 2001). This followed one year after **Telaustria** and confirmed that the treaty principles also apply to contracts that fall outside the directives because they are worth less than the relevant financial threshold.

This particular case concerned the housing contract. There was a stipulation in the contract that the outside doors and windows had to be supplied by a named Danish company.

This naturally resulted in a complaint and the Danish court asked the ECJ to rule on the fairness of this.

Following Telaustria, they went on to hold that: “The mere fact that the community legislature considered that the strict special procedures laid down in those directives are not appropriate in the case of public contracts of low value does not mean that the contracts are excluded from the scope of community law.

Authorities which conclude them are nevertheless bound to comply with the fundamental rules of the Treaty”.

The second case I want to discuss in relation to contracts that are below the threshold is the case of **SECAP SpA v Comune di Torino 2008**.

It repeated the position that strict special procedures apply only to contracts whose values exceed the threshold laid down in the directives, but they are not excluded from the scope of community law, ie., as said previously, the principle of non-discrimination on the ground of nationality applies.

It did go on though, to say that this would arise only in relation to contracts that were likely to be of cross-border interest and stated that it was for the national court to determine whether the contracts in question give rise to a cross-border interest that engages the fundamental principles and rules of community law.

I would like to explore with you now the impact on Part B services following well known decisions of the ECJ.

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The first one is **Commission v Finland**. This revolved around the procurement of catering equipment by The Finish Contracting Authority. A Notice was published in the OJEU in March 1998 for an upgrade in works to a regional building. This was stage 1. One lot was for the supply of catering equipment. There was a dispute as to whether anyone had actually tendered for the catering equipment, but it was clear that no tender was accepted.

About two years afterwards, the Contracting Authority wrote to four companies asking them to bid for the supply and installation of catering equipment (Stage 2).

In the meantime, a lease was put in place for the private sector tenant, who was to operate as a restaurant and for whom the equipment was required and the tenant would buy the equipment for the Contracting Authority at a cost that was below the relevant threshold. In February 2000, the bidders were all told that the cost was too high and they were invited to approach the tenant with new offers (Stage 3).

As a result of that process, the tenant entered into a contract with one of the suppliers. A complaint swiftly followed and the matter came before the ECJ.

The opinion was given by Advocate General Sharpston who stated that the Commission had not demonstrated that the terms of the contract had changed sufficiently over time to break the link between the three stages and she concluded that substantially the same contract had been awarded as was originally advertised.

She went on to consider whether the Contracting Authority would be allowed to award a supply contract through the negotiated procedure without publishing a tender notice when no appropriate tender was received. She came to the conclusion that the general principles from the Treaty could not over-ride the express derogation and that this applied below the thresholds such that if a tender procedure was unsuccessful, it is permissible to award a contract without re-advertising in the same way as is allowed for contracts above the threshold.

In her opinion, the Advocate General sets out a few points of key note.

Firstly, she moves away from the principle of advertising requirement in Telaustria and refers instead to publicity "that is required". The differential is not discussed in any detail in this case.

She looks at assessing the situation with reference to the potential market for the contract and tries to draw a distinction between a range of contracts which are excluded from the scope of the directives for various reasons (eg., service concession contracts) and on the other hand low value contracts (the service concession contracts potentially being of significant economic value).

By looking at the value and nature of the contract in question, as well as the location of the Contracting Authority and suppliers, the emphasis is a very significant one if we are to go ahead on the basis of the Community Laws and rules of transparency requirements apply only where there is a potential effect on interstate trade.

By bringing an element of reality to the process, considering not only the value and nature of the contract, but also the location where the work is to be carried out and the services supply is provided, this may lead to different conclusions even within the same members states as to whether any transparency requirements exists.

Following on was the **Commission v Ireland Post Offices case, An Post**. The facts in this case were that in 1992, the Irish Minister for Social Welfare awarded a

contract to the Irish Post Office An Post whereby social welfare claimants were able to collect their payments from An Post branches.

No competitive tender procedure was followed.

The Contract was renewed in 1997 until the end of 1999.

A complaint then followed and the Commission contacted Ireland regarding the contract.

The contract was not formally renewed at the end of 1999 but An Post were allowed to continue to provide the services on an ad hoc basis so as to ensure continuity of social welfare payments. The Commission brought the case in respect of this continuation of the contract on the basis that there was lack of advertising that in turn breached the EC Treaty.

It was agreed between Ireland and the Commission that the services were non-priority.

However, just because they were non-priority did not mean that the Contracting Authority could proceed on a basis which might result in treatment detrimental to the undertakings which might be interested in that contract but which were located in other member states, ie., the Court is unequivocally of the view that unless justified by objective circumstances, such an award would constitute indirect discrimination on the grounds of nationality.

Ultimately, it was the Commission's responsibility to weigh up the evidence providing an infringement and it could not rely on any presumption that a Part B contract is or is to of cross-border interest.

The Commission, in this case, had not provided the required evidence and the action was dismissed.

This case recognised the **Commission v Finland** case and whether or not a contract in respect of an award of which an infringement is alleged is actually a cross-border interest.

In respect of part B services, the case of **Federal Security Services Ltd v Chief Constable for the Police Service of Northern Ireland [2009]** N1Ch 3 has shown that procurement obligations in respect of part B services can go beyond simply the requirement to advertise for services. The Northern Ireland High Court has set aside a contract award for Part B services and granted an injunction to restrain its implementation, even though such contracts are exempt from the standstill period obligation. The judge held that a standstill period is required for some Part B services contracts in exceptional circumstances under the general principles of EC law.

The facts concerned the award of a contract for security, guarding, driving and associated services for the Northern Ireland Police Service, all Part B services under the Public Contracts Regulations. Federal Security Services held the existing contract and it was one of the two firms that were called for a clarification interview in the procurement for the new contract. However, the contract was

awarded to the other bidder, RGS, without any standstill period between the award decision and the contract being entered into.

FSS brought proceedings to set aside the contract, alleging that the award procedure breached a number of the provisions in the EC procurement rules, including the requirement for a standstill period.

Part B services contracts are exempt from the obligation under reg.32(3) of the Public Contracts Regulations, providing for a 10 day standstill period between notification of the contract award and the conclusion of the contract, to give a disappointed tenderer the opportunity to challenge the award. However, it should be noted, in line with the European Court of Justice's ruling in the Alcatel case (C-81/98), that in accordance with the general principles of European law contained in the EC Treaty unsuccessful tenderers must be given an opportunity to have decisions reviewed. The judge went on to note that in relation to Part B contracts, even though there was no express requirement in the Regulations for a standstill period, it was possible therefore that, in accordance with the Alcatel case, one could be required in certain circumstances. In this case the judge found that a standstill period should have been used.

The key factors included that:

the contract was high value;

it was of cross border interest;

the Chief Constable was already aware of controversy over the procedure; and

the Chief Constable's advisers had recommended a voluntary standstill period.

So, essentially the question of whether to use a standstill period in relation to a Part B contract (at least until the remedies directive comes into force can be resolved by determining whether it may be of interest to tenderers outside the UK.

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When Do The Principles Apply?

Firstly, when they are relevant to the internal market.

As discussed previously, treaty principles apply only if the contract is of a certain cross-border interest to suppliers in other new states, not if there is only an internal market for the works, services or supplies. As stated, the contract has to contain cross-border interest and I would refer you back to the **SECAP** case I have discussed earlier.

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Other relevant factors have to be considered and these include, in particular, the value. A cross-border interest may be excluded if a contract value is very modest, but not if it is for a significant amount.

Secondly, the Directives' thresholds serve only as a guideline.

Thirdly, in respect of price or performance, low value contracts may attract foreign interest where borders straddle active areas of interest.

Finally, the value and nature of services require to be considered.

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Is there now always an obligation to award contracts competitively under the EU treaty principles?

Four specific elements have to be considered here.

Firstly, contracts which would have benefitted from an exemption.

Secondly, contracts of a very modest value. These have already been considered.

Thirdly, contracts not limited to an internal market only. Again, this has been considered earlier.

Finally, the principle of proportionality requires to be considered.

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The Commission Interpretative Communication 2006

This lays down the non-binding guidelines.

It covers off best practices for the award of contracts which are not subject to the Public Procurement Directives but for which there is nevertheless an obligation to advertise either:-

- because it is outside the scope of EU procurement directives because the value is below the thresholds; or
- within the scope of the EU directives but concern services which are only subject to limited regulation and, as such, do not require competitive tendering in line with the full procedures in the EU Procurement Directives, ie., Part B.

They propose that the obligations of the treaty principles apply not only to public bodies but also private entities which are subject to procurement regulation under the Utilities Directive. This is obviously somewhat controversial.

They propose that the award of a contract which is below the relevant value thresholds but is only subject to limited regulation must be opened up to competition by means of a sufficiently “accessible advertisement” if such contract is likely to be of interest to parties in other member states.

The “adequate and commonly used” means of publication include:

- the Internet
- OJEU
- national and regional press
- specialist publications
- local means of publication (in special cases).

They go on to suggest that the adverts should include the following:

- a short description of the essential details of the contract and the award method; and
- an invitation to contact the contracting entity if relevant
- adequate information on the short listing methodology;

In respect of the means of award, they state that the process must be fair and impartial and that this aim may best be achieved by:-

1. Non-discriminatory description of the subject matter of the contract. For example, the description of the contract should generally not refer to any specific make or trademarks and thereby exclude an alternative which is equally suitable on an objective analysis.
2. Equal access for interested parties from all EU member states. The award of the contract should not be made subject to conditions which may cause direct or indirect discrimination against interested parties from other member states.
3. Neutral recognition of formal qualifications. If evidence of formal qualifications is required, documents from other member states offering an equivalent level of guarantee have to be accepted.

4. Appropriate time limits. These should be long enough to allow interested parties from other member states to make a meaningful assessment of the contract being awarded and prepare their offers.
5. Transparency and objectivity. All participants in the process should be made aware of the applicable rules in advance and have the certainty that these rules apply to all in the same way.
6. Number of bidders. If awarding authorities wish to limit the number of entities which are invited to submit an offer, this should be done in a transparent and non-discriminatory manner by applying, for example, objective criteria. However, the number of applicants shortlisted should take into account the need to ensure adequate competition.
7. Negotiation. If all contract award process involves negotiation, this should be conducted on a non-discriminatory basis so that all bidders in the competition have access to the same amount of information and unjustified advantages for a special bidder are excluded.
8. Contract award. The final award decision should comply with the procedural rules laid down at the outset of the process and the principles of non-discrimination and equal treatment should be fully respected.

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How Can The Transparency Requirement Be Met?

Firstly, the ECJ case law is very vague on what is required as has been discussed today. Secondly, a degree of advertising has to be sufficient to open the contract competition. See Telaustria and subsequent cases.

Foreign suppliers must have access to appropriate information before the contract is awarded.

Precise requirements are currently unclear. The authority has to assess the requirement to waive advertising in each individual case. The case C454/06 Presstextnachrichtenagentur GmbH v Austria shows there is still some confusion as to whether advertising has to be waived or not and each individual case has to be looked at separately.

Although not an exemption as such, changes to an existing contract will not necessarily attract the procurement regime. However, the ECJ has made clear that amending a price condition, in the absence of express authority to do so under the terms of the contract, “might well infringe the principles of transparency and equal treatment as between tenderers”.

In the case itself, the small price amendments were held not to constitute a new award of a contract. However, in making its preliminary ruling, the European Court of Justice (ECJ) gave some very helpful comments as to what changes do bring about a new contract. The ECJ commented that:

"in order to ensure transparency of procedures and equal treatment of tenderers, amendments to the provisions of a public contract during the currency of the contract constitute a new award ... when they are materially different in character from the original contract and, therefore, such as to demonstrate the intention of the parties to renegotiate the essential terms of that contract".

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Transparency and Advertising : The Options

The Interpretive Communication by the European Commissions I mentioned earlier give examples, as I have said, of adequate and commonly used means of publication.

It makes reference to "national or regional press", including "specialist publications" but does this go far enough if the contractors have cross-border interest?

This may be a subject of a challenge in due course.

Are international newspapers or journals (for example, the Financial Times European Edition) sufficient?

Is it sufficient to advertise in one language only? What about the Authority's own website? The Commission's Communication refers to it as flexible, cost effective and adequate but will it always be sufficient?

What about on-line portals?

Finally, to be “belt and braces”, should you consider a voluntary notice in the OJEU itself?

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The Domestic Courts

There is uncertainty as to the approach the domestic courts would use in looking at the matters I have raised today and there is certainly a need for legal certainty.

For example, under the Public Contracts (Scotland) Regulations 2006, it states that

“the Contracting Authority shall, if required by its general community obligations for the benefit of any potentially economic operator, ensure a degree of advertising which is sufficient to enable open competition and meet the requirements of the principles of equal treatment, non-discrimination and transparency”.

How would that be followed in other jurisdictions?

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So, does this take us any further? Well, clearly there has been progress and a degree of reality has been creeping into cases.

Has the secondary regime been created? Well, there is no doubt that there are principles that have been developed in the ongoing ECJ decisions, but it is vital obviously to manage the risk of challenge in this uncertainty.

No easy answer, I am afraid. As indicated, each case needs to be considered on its own merit and if in doubt, play safe

We can advise further on any of the issues raised above. Please contact Karyn Watt or Martin Whiteford for further information.

Anderson Strathern LLP and the authors assume no responsibility for any loss or damage arising from or related to parties relying on the information contained herein. This is written as a general guide and users are recommended to take independent legal advice where appropriate.