

## Procurement law update Ben Hooper

### Introduction

1. This paper reviews recent developments in procurement law under the following three headings:
  - (i) Recent case law on the new remedies regime;
  - (ii) The *Teckal* exception and the Supreme Court's judgment in *Brent*; and
  - (iii) Procurement and the Localism Bill.

### (i) Recent case law on the new remedies regime

1. The new remedies regime in Directive 2007/66/EC has been implemented by way of amendments to the Public Contracts Regulations 2006, SI 2006/5 (the 2006 Regulations)<sup>1</sup>. The amendments take effect for contract award procedures that began after 20 December 2009.

### **Automatic stays**

2. One of the more important changes introduced was the replacement of the former reg. 47 of the 2006 Regulations (on the enforcement of procurement law obligations) by the much more detailed provisions in a new reg. 47, together with regs 47A-47P.
3. Under the former regime, a tenderer needed to apply to the Court for an injunction if it wanted to prevent a contracting authority from entering into a contract following an allegedly flawed procurement. By reg. 47G(1) of the 2006 Regulations, the starting of proceedings ~~in~~ respect of [the] contracting authority's decision to award the contract now automatically imposes a requirement that prevents the contracting authority from entering into the contract at issue (assuming it has not already done so). This is commonly known as the ~~an~~ automatic stay.
4. The contracting authority may however apply to the Court to set aside the automatic stay under reg. 47H(1), which provides in relevant part:

---

<sup>1</sup> See the Public Contracts (Amendment) Regulations 2009, SI 2009/2992.

the Court may, where relevant, make an interim order-

- (a) bringing to an end the requirement imposed by regulation 47G(1);
- (b) restoring or modifying that requirement; ...+

5. Reg. 47H(2)-(3) should also be noted:

(2) When deciding whether to make an order under paragraph (1)(a)-

- (a) the Court must consider whether, if regulation 47G(1) were not applicable, it would be appropriate to make an interim order requiring the contracting authority to refrain from entering into the contract; and
- (b) only if the Court considers that it would not be appropriate to make such an interim order may it make an order under paragraph (1)(a).

(3) If the Court considers that it would not be appropriate to make an interim order of the kind mentioned in paragraph (2)(a) in the absence of undertakings or conditions, it may require or impose such undertakings or conditions in relation to the requirement in regulation 47G(1).+

6. Given reg. 47H(2), it is perhaps unsurprising that an application to lift the automatic stay falls to be considered on the usual *American Cyanamid*<sup>2</sup> basis (i.e. the basis on which the Court would previously have considered a claimant tenderer's application for an interim injunction). This much was confirmed by the first three judgments to appear on regs. 47G-47H: *Indigo Services (UK) Ltd v. Colchester Institute Corp* [2010] EWHC 3237 (QB), *Exel Europe Ltd v. University Hospitals Coventry and Warwickshire NHS Trust* [2010] EWHC 3332 (TCC) and *Halo Trust v. Secretary of State for International Development* [2011] EWHC 87 (TCC). For the fullest discussion, see *Exel Europe* at §§26-28.

7. In effect, the test for whether the contracting authority will be prevented from entering into the contract prior to trial remains as before, but the onus on applying to Court has been transferred from the claimant tenderer to the defendant contracting authority.

8. Akenhead J explained the *American Cyanamid* test in §26 of *Exel Europe*:

The first question which must be answered is whether there is a serious question to be tried and the second step involves considering whether the balance of convenience lies in favour of granting or refusing interlocutory relief that is sought ...

9. The second step - assessing the balance of convenience - will involve considering the adequacy of a remedy in damages for both the claimant and the defendant,<sup>3</sup> together with a consideration of any other relevant factors that arise in the case at issue, including any relevant public interest issues.

---

<sup>2</sup> *American Cyanamid Co v. Ethicon* [1975] AC 396.

<sup>3</sup> See *American Cyanamid*, at 808B-E per Lord Diplock, and *Morrison Facilities Services Ltd v. Norwich City Council* [2010] EWHC 487 (Ch), per Arnold J at §4.

10. In §6 of *Indigo*, David Donaldson QC (sitting as a Deputy High Court Judge) rejected an argument that the 2006 Regulations provided a %steer+in favour of maintaining the automatic stay.<sup>4</sup> This argument has not found favour in any of the later cases (namely, *Metropolitan Resources North West Ltd v. Secretary of State for the Home Department*, unrep., 1 April 2011, *Elekta Ltd v. Common Services Agency* [2011] CSOH 107 in the Scottish Outer House of the Court of Session and, in the Northern Ireland High Court, *First4skills Limited v. Department for Employment and Learning* [2011] NIQB 59 and *Rutledge Recruitment and Training Limited v. Department for Employment and Learning* [2011] NIQB 61). Indeed, if anything, it seems that the Courts have had little enthusiasm for maintaining automatic stays: contracting authorities have succeeded in their application to lift them in all but one of the reported cases.

### ***Assessing the balance of convenience in an application to lift the automatic stay***

11. Three issues regarding balance of convenience merit further consideration.
12. The **first** is the relevance of the public interest.
13. In §45 of *Exel Europe*, Akenhead J stated:

%a. the public interest is something which in appropriate cases, such as this, needs to be weighed by the court in the balance of convenience exercise. That public interest includes the desirability of ensuring fair and transparent procurement processes by contracting authorities as well as other areas of public interest. In my judgement, one important area of the public interest is the efficient and economic running of the National Health Service. In these times of economic difficulties and constraints, there is massive pressure on the different arms and parts of the NHS to make savings.+

Against this background, the fact that the contract at issue sought to introduce various important cost savings for NHS bodies appears to have been taken by Akenhead J as a factor that militated against continuing the automatic stay.

14. Similarly in *Elekta*, which concerned a procurement exercise for radiotherapy equipment for several Scottish cancer centres, the %legitimate interests+of the health boards in the timely procurement of the equipment in question was taken in §29 to be a factor that weighed strongly in favour of granting relief to the defendant contracting

---

4 In §37 of *Halo Trust*, Akenhead J declined to express a view on the related issue of what the Court should do if there is a serious issue to be tried but the balance of convenience is exactly equal, albeit that he observed that it would be %are+for such a case to arise.

authority.

15. *Rutledge Recruitment* offers a third example. The case concerned a contract for the provision of employment training services as part of the 'Steps to Work' programme. The area in question (Foyle) was the only one in the UK where this programme was not provided. McCloskey J held that there was a compelling need to allow the Department to award the contract 'without further delay, interruption or uncertainty' and that further delay would give rise to a 'clear detriment to vulnerable and socially disadvantaged members of society' (§33).<sup>5</sup>
16. The importance placed on these public interest factors in the above cases is likely to be useful for contracting authorities that seek in the future to lift automatic stays. As a practical matter, contracting authorities should ensure that the evidence that they file for any reg. 47H application draws out any significant or particular public interest factors that arise in the case.
17. As a related point: in the two recent Northern Ireland cases - *First4skills* and *Rutledge Recruitment* - McCloskey J had regard to how quickly the substantive trial could be listed (see §23 of the former and §34 of the latter). Given this, claimant tenderers would generally be well-advised to try to ensure that any reg. 47H application is heard on the basis that there is to be a speedy trial in the main proceedings. This will make it easier for the tenderer to downplay the significance of any public interest detriment that flows from the continuation of the automatic stay prior to trial on the basis any such detriment will be short-lived.
18. The **second** issue to note is the relevance of the strength (or lack thereof) of the claimant's challenge for the purposes of determining the balance of convenience. In some of the recent cases, the Courts have had regard to the apparent merits of the claim. Thus, in §30 of *Exel Europe*, Akenhead J concluded that the strength of the tenderer's claim could be a relevant factor at this stage of the analysis, on the basis that 'there is a public interest in securing valid and properly executed public procurements'. In §28 of *Elekta*, Lord Glennie stated that the strength of the challenge 'will to my mind often be a very important factor'.
19. However, in *American Cyanamid* itself, Lord Diplock urged caution as regards taking account of the apparent merits of the claim. It should be done 'only where it is

---

<sup>5</sup> See also the earlier case of *Alstom Transport v. Eurostar International Ltd* [2010] EWHC 2747 (Ch) (a interim injunction application under the 2006 Regulations prior to the new remedies regime amendments). §138(iv) of the judgment of Vos J makes explicit reference to public interest factors (in the *Alstom* case, the public interest in introducing timely and effective competition for Tunnel train services) as being relevant to the balance of convenience.

apparent upon the facts disclosed by evidence as to which there is no credible dispute that the strength of one party's case is disproportionate to that of the other party, and the Court was not justified in embarking upon anything resembling a trial of the action upon conflicting affidavits in order to evaluate the strength of either party's case (p. 409C). Given these *dicta*, it is possible that a Court could be persuaded not to follow *Exel Europe* and *Elekta* on this issue in the future, at least where there are substantial disputes of fact between the parties.

20. The **third** issue is the adequacy of damages for a claimant tenderer. In *Exel Europe*, Akenhead J expressed himself at §48 to be wholly satisfied that damages would be an adequate remedy for the claimant. Damages would be calculated on a loss of a chance basis, and Exel's loss of profit would, Akenhead J said, be readily assessable by forensic accounting experts.<sup>6</sup> Akenhead J expressed similarly positive views about the adequacy of a remedy in damages for the claimant tenderer in §61(h) of the later *Halo Trust* case. Akenhead J's confidence regarding the adequacy of a damages remedy for a claimant tenderer can be contrasted with the more pessimistic views of the Court of Appeal in *Lettings International Ltd v. London Borough of Newham* [2007] EWCA Civ 1522, at §§33-39 *per* Moore-Bick LJ.<sup>7</sup> Further, in *Metropolitan Resources*, Newey J appears<sup>8</sup> to have concluded that damages would not be an adequate remedy for the claimant.
21. As yet, therefore, there is no clear consensus about the extent to which damages are an adequate remedy for claimants in procurement claims. Practical experience suggests that Akenhead J's optimism may be somewhat misplaced, but nonetheless, for the moment, *Exel Europe* and *Halo Trust* are likely to be useful on this point for contracting authorities that want to persuade a Court to lift the automatic stay.

#### ***Automatic stays: other practical considerations***

22. Prior to the remedies amendments to the 2006 Regulations, a Court injunction would ordinarily have been granted only on the basis that the claimant tenderer provided the contracting authority with a cross-undertaking in damages. By contrast, the automatic stay that arises under reg. 47G(1) of the 2006 Regulations does not of itself provide any specific financial protection for a contracting authority that may in event be found to have been unnecessarily restrained from proceeding with a perfectly lawful

---

<sup>6</sup> Akenhead J had earlier found that Exel's complaint of inappropriate pre-tender discussions / negotiations between the NHS Trust and the ultimately successful tenderer raised a serious issue to be tried ( §38). He was thus presumably referring to this alleged breach of procurement law when addressing the adequacy of damages.

<sup>7</sup> Compare also the views of Vos J at §129 of *Alstom*, which suggest that where a claimant tenderer can realistically claim significant reputational damage, damages may be very difficult to quantify.

<sup>8</sup> The judgment was *ex tempore*, and no transcript is currently available.

procurement.

23. However, reg. 47H(3) provides a route by which a contracting authority may seek to require the claimant tenderer to provide a cross-undertaking in damages whilst any automatic stay continues. It is difficult to imagine a case where the Court would refuse to provide at least this minimal protection for the defendant contracting authority. Thus, even if a contracting authority decides against applying to lift the automatic stay, it should still seek to secure a cross-undertaking from the claimant tenderer if it intends to defend the claim. If the claimant tenderer refuses, careful consideration should be given to applying (or threatening to apply) for the automatic stay to be lifted, on the basis that the balance of convenience cannot possibly tip in the claimant's favour in circumstances where no cross-undertaking has been given to protect the contracting authority's interests.
24. What happens if more than one tenderer brings proceedings that result in the imposition of multiple automatic stays under reg. 47G(1)?
25. This issue was considered in *First4skills*. The Department for Employment and Learning was the Defendant in two claims, brought by different tenderers, in relation to the same procurement exercise (concerning the provision of training services). The Department applied to lift the automatic stay in both proceedings. The application in the *First4skills* proceedings came to Court after the Defendant's application in the other proceedings had already been heard, and dismissed. In *First4skills* McCloskey J held that, at this second hearing, the Court could not make an order that conflicted with the order made in the other proceedings, and that it would be "simply incongruous" for the Court in the second hearing to make an order purporting to authorise the Department to take a course (namely, entering into the contested contract) which would be unlawful and in breach of the order made in those other proceedings. In these circumstances, the Department's application in *First4skills* was a "misuse" of the Court's process. Once the Court had dismissed one application to lift the automatic stay, the Department was prohibited from entering into the contract with any party (see *First4skills*, §10). McCloskey J hinted, however, that there may be "possible exceptions" to this approach, albeit that he did not give any indication of what they might be.
26. Thus, if a contracting authority that is facing multiple claims wants to proceed to enter into the contract at issue, it will need to obtain a lifting of the automatic stay in each set of proceedings. If it fails in any one set of proceedings, then the stay continues to operate for all purposes.

27. McCloskey J suggested that, if this situation were to arise again, the Court would need to give careful consideration to appropriate case management directions. One possibility, he noted, was to direct that the applications be heard together. Another would be to list the first application that had been issued, and adjourn the others (*First4skills*, §12). From the point of view of a contracting authority, the former would seem to be preferable, unless it is clear that a particular application will be, in effect, determinative of the remainder.

### ***Alstom and declarations of ineffectiveness***

28. With one exception, the cases so far on the new remedies regime have all involved applications to lift the automatic stay under reg. 47H of the 2006 Regulations.
29. The exception is *Alstom Transport Ltd v. Eurostar International Limited* [2011] EWHC 1828 (Ch). *Alstom* was a case about the Utilities Contracts Regulations 2006, SI 2006/5, rather than the 2006 Regulations, but the relevant provisions - concerning declarations of ineffectiveness - are very similar.
30. Under reg. 47J of the 2006 Regulations, and where the challenged contract has already been entered into, the Court is in certain circumstances required to make a declaration of ineffectiveness. The consequences of such a declaration is that the contract becomes prospectively (but not retrospectively) ineffective such that the obligations under the contract which have yet to be performed are not to be performed (see reg. 47M(1)).
31. For a declaration of ineffectiveness to be made under the 2006 Regulations, there must be a breach of regs. 47A or 47B (*i.e.* some relevant breach of the Community law procurement regime) and at least one of the three grounds for ineffectiveness in reg. 47K must apply. For the purposes of understanding the significance of *Alstom*, the first and second grounds in the 2006 Regulations should be noted.
32. The first ground relates to the failure to publish a contract notice (see regs. 47K(2)-4)).
33. The second ground requires four conditions to be satisfied (see reg. 47K(5)). First, the contract must have been entered into in breach of the standstill period requirement (under reg. 32A) or the automatic stay (whether imposed by reg. 47G, or re-imposed under reg. 47H). Secondly, there must be some breach of regs. 47A or 47B. Thirdly, the breach at issue under the first condition must have deprived the tenderer of the possibility of starting proceedings in respect of the breach that is at

issue for the purposes of the second condition, or pursuing them to a proper conclusion, before the contract was entered into. Fourthly, the breach of regs. 47A or 47B must have affected the chances of the tenderer obtaining the contract.

34. By reg. 47E, special time limits apply when a declaration of ineffectiveness is sought. In general, proceedings must be started within 6 months of the contract being entered into. However, in certain circumstances, that relatively generous time limit is replaced by a 30 day time limit from the ~~relevant date~~, as defined in regs. 47E(3) and 47E(5). One such circumstance is provided for in reg. 47E(5):

~~This~~ This paragraph applies where the contracting authority has informed the economic operator of:

- (a) the conclusion of the contract; and
- (b) a summary of the relevant reasons [defined as the reasons that the tenderer would have been entitled to receive in response to a request under reg. 32(9), including why it was unsuccessful],

in which case the relevant date is the day after the date on which the economic operator was informed of the conclusion or, if later, was informed of a summary of the relevant reasons.

35. *Alstom* concerned tenders for a new generation of trains to run under the English Channel. Alstom, the unsuccessful tenderer, had commenced proceedings and had sought an interim injunction to prevent Eurostar from entering into a contract with the successful tenderer. The interim injunction application had failed (see footnote 5 above), and Eurostar had entered into the contract at issue. Alstom then sought to pursue a claim for a declaration of ineffectiveness. Eurostar applied to strike this claim out.

36. In the event, Eurostar was successful. It established that Alstom could rely on neither the first nor the second ground for ineffectiveness (Alstom had not sought to rely on the third). The Court's reasoning on this aspect of the case is somewhat confined to the particular circumstances of the case. Two points are, however, worth noting:

- 36.1 As regards the first ground for ineffectiveness, Mann J held that the existence or absence of a notice was a ~~mechanistic test~~ (§41). However, he stopped short of finding that reliance on the first ground would necessarily be precluded so long as a notice had been published at any stage prior to the conclusion of the contract (e.g. up to the day before, as one of the counsel had suggested). The test was rather whether the notice is ~~capable~~ capable of being related to the procedure [that was followed by the contracting authority] and the contract (§42). So, if, under the 2006 Regulations, a contract notice has been published a little late such that there has been a minor breach of the timetables laid down (e.g. in the open procedure, too little time has been

allowed for the submission of tenders) it appears that the first ground for ineffectiveness would not be available. By contrast, a serious breach of the timescales that, in effect, deprives a published notice of much of its practical value will be likely to enable a tenderer to rely on the first ground.

- 36.2 As regards the second ground of ineffectiveness, the *Alstom* judgment indicates that the question whether the third condition is satisfied (*i.e.* the condition in reg. 47K(5)(c)) requires, in effect, a common sense assessment on the facts. Mann J helpfully explained the rationale in §55:

~~To~~ some extent the ineffectiveness provisions are obviously intended to operate only when anticipatory proceedings could not be brought. One can understand that as a rationale - it was obviously thought that it would better to try to stop a contract than to try to bring an existing contract to an end. Particularly after it has been on foot for some considerable time. The possibility of the former should exclude the latter; the latter should only be available when the former has not been possible because of [an] act of the utility in not holding its hand on contracting to the requisite extent.+

As Alstom had in fact been able to launch proceedings before the contract had been entered into, it could not bring a claim under the second ground.

37. Mann J also considered and upheld (albeit *obiter*) a limitation defence. This aspect of the case turned on whether the 6 month time limit or the 30 day time limit applied (if it was the former, Alstom's claim was in time, if the latter, then it was not). The point of interest is in §§65-66, where Mann J rejected the suggestion that the summary of the reasons required by reg. 47E(5) had to be provided in some sort of formal and identifiable form, rather than in different forms and in a variety of contexts. Mann J held that the reasons do not have to be provided in any particular form, and did not need to be in writing.

### **(ii) The Teckal exception and the Supreme Court's judgment in Brent**

38. In February this year the Supreme Court handed down judgment in *Brent London Borough Council v. Risk Management Partners Ltd* [2011] UKSC 7; [2011] 2 AC 34. The *Brent* judgment provides important guidance on the breadth of the so-called ~~Teckal~~+exception to the application of the Community law procurement regime.
39. The exception derives from the judgment of the European Court of Justice (~~the~~ ECJ) in *Teckal SRL v. Commune di Viano* (C-107/98) [1999] ECR I-8121.

## ***Teckal***

40. The municipal council of Viano had decided to use a consortium set up by several municipalities (including that of Viano) to supply it with fuel and provide other heating services. The council's decision had not been preceded by a contract award procedure that complied with the public procurement regime. *Teckal*, a private company that provided heating services, complained of a breach of procurement law.
41. As the value of the fuel to be supplied exceeded the value of the heating services, the council's decision fell to be considered by reference to Directive 93/36 (the Directive in force at the time for public supply contracts).
42. At §§42-44 of the judgment, the ECJ stated that the fact that the supplier (*i.e.* the consortium) was itself a contracting authority did not preclude the application of Directive 93/36. The issue was instead whether the relationship between the council and the consortium amounted to a "public supply contract" for the purposes of procurement law. The key passages in the ECJ's analysis of this issue are in §§50-51 of the *Teckal* judgment:

50. ... it is, in principle, sufficient if the contract was concluded between, on the one hand, a local authority and, on the other, a person legally distinct from that local authority. The position can be otherwise only in the case where the local authority exercises over the person concerned a control which is similar to that which it exercises over its own departments and, at the same time, that person carries out the essential part of its activities with the controlling local authority or authorities.

51. The answer to the question must therefore be that Directive 93/36 is applicable in the case where a contracting authority, such as a local authority, plans to conclude in writing, with an entity which is formally distinct from it and independent of it in regard to decision-making, a contract for pecuniary interest for the supply of products, whether or not that entity is itself a contracting authority. (Emphasis added.)

43. *Teckal* thus recognised a significant exception to the application of the procurement regime. The final sentence of §50 of *Teckal* (as underlined above) gave rise to two tests for determining whether the *Teckal* exception applies:

43.1 the "control" test (whether the contracting authority exercises over the person concerned a control which is similar to that which it exercises over its

own departments); and

43.2 the function test (whether the tenderer carries out the essential part of its activities with the controlling local authority or authorities).

### ***The Supreme Court's judgment in Brent***

44. Brent had entered into arrangements for mutual insurance with various other London local authorities. The insurance was to be provided by London Authorities Mutual Ltd (LAML), a company limited by guarantee. LAML's business was restricted to the provision of insurance to participating members. It was managed by a board comprised of a majority of directors appointed by participating members. A private company, Charles Taylor & Co Ltd, provided various management services to LAML under contract.
45. Brent had been tendering for an insurance contract in accordance with the 2006 Regulations (under which the contract at issue was as a Part A services contract). The eventual claimant in the proceedings, Risk Management Partners (RMP), participated as a tenderer in this process. However, LAML played no part. After RMP had submitted its tender, Brent informed RMP that it was in fact abandoning the contract award procedure for the majority of the lots at issue. Thereafter, Brent sought to obtain the insurance in question through LAML instead.
46. RMP challenged Brent's approach by bringing (i) a judicial review claim that Brent lacked *vires* to participate in LAML and (ii) a damages claim for a breach of the 2006 Regulations.
47. The Court of Appeal ([2009] EWCA Civ 490) upheld the judicial review challenge on the basis that neither s. 2 of the Local Government Act 2000 nor s. 111 of the Local Government Act 1972 provided the requisite *vires*. This aspect of the judgment was not appealed.
48. What was appealed was the Court of Appeal's conclusion that Brent's decision to award its insurance business to LAML fell outside the *Teckal* exception, and was thus subject to the 2006 Regulations.
49. The Supreme Court allowed the appeal and held that Brent's arrangement with LAML fell within *Teckal*.
50. The four key aspects of the Supreme Court's judgment are as follows.

51. **First**, the Supreme Court confirmed that the 2006 Regulations incorporate the *Teckal* exception, even though they do not make express reference to it (see Lord Hope at §26 of *Brent*).
52. More generally, this aspect of the judgment suggests that it will in the future be difficult to argue that the scope of the 2006 Regulations differs from that of Directive 2004/18 in any relevant respect. As Lord Hope observed at §22, the underlying purpose of the 2006 Regulations was to give effect to this Directive, and a purposive approach to construction of the 2006 Regulations was thus required (§25).
53. **Secondly**, the Supreme Court rejected a submission by RMP that *Teckal* only applied if there was in substance no agreement between two legally separate persons (so that the *Teckal* exception could not apply to contracts of insurance, which necessarily are of this form). Lord Hope observed that the *Teckal* exception assumes a contract between two separate entities (*Brent*, at §29), and held that the true issue was whether the arrangement in question satisfied the control test (§30).
54. The Supreme Court went on to consider the control test in some detail. This is the **third** aspect of *Brent* that is worth noting.
55. The Court began by confirming an important point of principle regarding the control test. Where several local authorities combine to procure services from an entity that is formally distinct from them, the control test can be satisfied so long as collectively the local authorities exercise control over the distinct entity that is similar to that which it exercises over its own departments. In other words, in such a case, it is not necessary that each local authority exercises such control (§53 of *Brent*, *per* Lord Hope).
56. In reaching this conclusion, Lord Hope reviewed the ECJ case law on the *Teckal* exception. He noted that, in the cases since *Teckal*, the ECJ had placed a growing emphasis on the exception's underlying rationale (§36) and that the ECJ had travelled ~~far~~ since the *Teckal* judgment (§52). The key passages in Lord Hope's judgment on this issue are in §§52-53 of *Brent*.

52. .... There is now a much clearer focus on the purpose of the Community rules on public procurement so as not to inhibit public authorities from co-operating with other public authorities for the purpose of carrying out some of their public service tasks .... Collective control is enough, and para 47 [of *Commission v. Germany* (C-480/06) [2009] ECR I-4747] tells us that public authorities do not require to follow

any particular legal form in order to take advantage of it. So long as no private interests are involved, they are acting solely in the public interest in the carrying out of their public service tasks and they are not contriving to circumvent the rules on public procurement (see para 48), the conditions are likely to be satisfied. As to the last point, it should be noted that the management agreement between LAML and Charles Taylor & Co was put out for public tender, as were all LAML's reinsurance contracts ....

53. I would sum up my conclusions on the control test, in the light of the guidance offered by these authorities, as follows. Individual control is not necessary. No injury will be caused to the policy objective of the Directive if public authorities are allowed to participate in the collective procurement of goods and services, so long as no private interests are involved and they are acting solely in the public interest in the carrying out of their public service tasks. *Asemfo*<sup>9</sup> shows that the decisive influence that a contracting public authority must exercise over the contractor may be present even if it is exercisable only in conjunction with the other public authorities .... Where such a body takes its decisions collectively, the procedure used for the taking of those decisions is immaterial ....+(Emphasis added.)

57. Lord Hope's reference to there being no private interests involved<sup>10</sup> appears to derive from *Stadt Halle v Arbeitsgemeinschaft Thermische Restabfall und Energieverwertungsanlage TREA Leuna* (C-26/03) [2005] ECR I-1, to which Lord Hope had earlier referred at §§37-38. *Stadt Halle* concerned a contract that had been awarded by the City of Halle to a company that was, in effect, majority-owned by the City of Halle, but minority-owned (slightly less than 25%) by a private company. The ECJ held that this element of private capital prevented the control test from being satisfied. The rationale for this appears most clearly from §51 of *Stadt Halle*: the award of a public contract to a company that was, at least in part, privately funded without calling for tenders would interfere with the objective of free and undistorted competition and the principle of equal treatment of the persons concerned ... in particular in that such a procedure would offer a private undertaking with a capital presence in that undertaking an advantage over its competitors. It appears from §50 of *Stadt Halle* that any amount of private capital is sufficient for this purpose.

58. Further useful guidance on the application control test can be derived from the Supreme Court's application of it to the facts of *Brent* (see, in particular, §§55-57 *per* Lord Hope). At §56, Lord Hope noted the composition of LAML's board. He also noted that each participating member had a vote at general meetings, and that the

---

<sup>9</sup> *Asociación Nacional de Empresas Forestales (Asemfo) v Transformación Agraria SA (Tragsa)* (C-95/05) [2007] ECR I-2999.

<sup>10</sup> See also, to like effect, Lord Rodger at §75.

board was subject to direction by a 75% majority of participating members in a general meeting. By contrast, it was merely a matter of detail that a member director of a participating member would normally be excluded from the board's consideration of any insurance claim that it might make (§57). Overall, on these facts, collective control over strategic objectives and significant decisions was with the participating members at all times. Given that these members controlled a service which was designed exclusively for the performance of their public functions and that no private interests were involved, Lord Hope concluded that the control test was satisfied.

59. The Supreme Court also considered the application of the function test to the facts of *Brent*. This is the **fourth** point of interest.

60. Lord Hope considered it plain that the function test was satisfied (§60). It was not necessary that the essential part of LAML's activities be carried out with each participating member individually. It was enough that the essential part of LAML's activities were carried out with the same authorities collectively as exercised control over it. See Lord Hope at §58.

61. It is also worth noting Lord Rodger's useful analysis of the purpose of the function test at §85 of *Brent*:

... the Directive will apply ... if the body is market-oriented. The Directive has to apply in such circumstances in order to prevent the body concerned enjoying an unfair competitive advantage. The second *Teckal* criterion [*i.e.* the function test] is therefore designed to ensure that the Directive always applies unless, in substance, the body concerned only trades with the local authority or authorities . unless, in short, it is not market-oriented. In other words, the body must remain within the public authority sphere and cannot go out and compete with other suppliers for other primary insurance business on the open market. It would obviously be unfair if the body could compete in this way, but, when one of the local authorities was contemplating contracting with it, other suppliers were prevented from competing for the business. The second criterion prevents this.

62. The key point in all this is that *Brent* will make it significantly easier for local authorities to co-operate between themselves in obtaining services without having to conduct procurement exercises under the 2006 Regulations.

63. But the *Teckal* exception does still have its limits. For instance, nothing in *Brent* suggests that it will be capable of applying where the overarching purpose of the arrangement is profit-making. For instance, assume a local authority owns a company

that provides a service, and it wants to sell that service to other local authorities. The deal is structured on the basis that the other local authorities will get minority shareholdings. It might at first seem that, given this latter feature, the *Teckal* tests would be satisfied. But, on analysis, this is unlikely to be correct. The local authority company would in essence be competing for business against other private sector providers. This would be likely to take it outside *Teckal*, not least given Lord Rodger's analysis at §85 of *Brent* of the underlying purpose of the exception, and Lord Hope's recognition in §52 that the exception would not apply if the arrangement is an attempt to circumvent the public procurement regime.

64. This is not to say that any profit-making necessarily takes an arrangement outside *Teckal*. A company that was majority owned by local authority X (which had done the bulk of the work to set it up, etc.), and minority owned by local authorities Y and Z (which had materially assisted in setting up the company, etc.), might make a modest profit and still fall within *Teckal*, assuming that it did not seek to sell its services to other local authorities. Any such arrangement would need, however, to be carefully considered.
65. Also, *Teckal* does not apply where what takes place is direct cooperation between different local authorities that have no particular means of exercising control over each other. That said, *Commission v. Germany* (C-480/06) [2009] ECR I-4747 (considered in *Brent* at §§50ff) confirms that an analogous exception may apply in these circumstances, at least where no private entities are involved in the arrangement.
66. The Commission is considering further legislation to clarify the scope of the exceptions recognised in *Teckal* and *Commission v. Germany*, as part of wider reforms (see the Commission's Green Paper of 27 January 2011, COM(2011)15).

#### ***Other case law on Teckal***

67. The ECJ's judgment in *Mehilainen Oy v. Oulun kaupunki* (C-215/09), 22 December 2010, pre-dates *Brent*, but it was published after the oral argument in *Brent* and was thus not referred to in the Supreme Court's judgment. The case concerned an arrangement under which the Oulu City Council set up a joint venture with a private partner to provide occupational health services. The departments within the Council and the private partner that provided such services were transferred to the joint venture. The contentious issue was that, as part of the overall contract that established the joint venture, the Council agreed to obtain occupational health services from the joint venture for a four year transitional period without complying

with the Community law procurement regime (the joint venture would also be providing these service to private parties during this period). The ECJ found that the control test was not satisfied given that the private partner had a holding in the joint venture (§32).

68. As regards the specific arrangement at issue, the ECJ further held that the agreement to obtain occupational health services from the joint venture was severable from the overall contract that established the joint venture (see §§33-46). On this basis (and given that the sums involved exceeded the relevant threshold) the procurement regime had applied: §47 of the judgment. In conducting this latter analysis, the ECJ referred to its earlier judgment in *Club Hotel Loutraki v. Ethniko Simvoulío Radiotileorasis* (C-145/08 and C-149/08), 6 May 2010, in which it had held that a contract for the part privatisation of a casino that involved ancillary services and works elements was an indivisible whole that fell outside the scope of the procurement regime.

69. The distinction appears to be that in *Club Hotel* the services and works elements of the contract were necessary parts of the overall part privatisation scheme, whereas in *Mehiläinen Oy* the agreement to provide the joint venture with four years worth of work was, in effect, an optional extra (not least given that the Oulu City Council would be tendering for those services after four years, and that - whilst the proceedings had been on foot - the joint venture had in fact been operating satisfactorily without providing occupational health services to the Council).

70. There have been no significant cases on *Teckal* since *Brent*.

### **(iii) Procurement and the Localism Bill.**

71. The Localism Bill is currently at the Report Stage in the House of Lords. Procurement lawyers need in particular to be aware of two aspects of the Bill:

71.1 Part 2 (currently, clauses 31-37) on EU fines; and

71.2 Chapter 3 of Part 4 (currently, clauses 69-74) on the community right to challenge.

### ***EU fines***

72. Art. 258 of the Treaty on the Functioning of the European Union (TFEU) empowers the European Commission to bring infraction proceedings in the ECJ against a

Member State for a breach of Community law, including a breach committed by a local government body. Further, under Art. 260 TFEU, the ECJ may impose fines, in the form of lump sums or penalty payments, for a failure on the part of a Member State to comply with any judgment in such infraction proceedings. In serious cases, the amounts involved may run into millions of euros.

73. There is thus the possibility that the United Kingdom may be fined for a breach of Community law that has been committed, and not remedied, by a local authority.<sup>11</sup>
74. When brought into force, the provisions in Part 2 of the Localism Bill will in effect enable central Government (in the form of Ministers of the Crown) to pass on to local authorities (and other public authorities) some or all of a fine imposed by the ECJ. The test will be whether the Minister is ~~satisfied~~ the authority has ~~caused~~ or contributed to the infraction of EU law for which [the] financial sanction was imposed+ (clause 33(1) of the Localism Bill). A local authority will first receive a ~~warning notice~~, which, in effect, sets out the case against it. The local authority will be entitled to make representations in response (clause 32). Thereafter, central government may give the authority an ~~EU financial sanction notice~~ requiring a payment to be made into central funds (clause 33). Once registered, an EU financial sanction notice will become enforceable as if it were an order of the High Court (clause 31(6)).
75. Where the financial sanction imposed on the UK includes a requirement to make periodic payments, provisions will allow further EU sanction notices to be given to the local authority subsequently if it has ~~caused~~ or contributed to+ the continuing infraction of EU law at issue (see clauses 34 and 35).
76. In practical terms, the European Commission is only likely to take an interest in procurement issues that arise in the context of large-scale contracts. As regards such contracts, Part 2 of the Localism Bill serves to emphasise the importance of complying with Community law, in that it will provide a mechanism by which a local authority may ultimately be punished financially for a breach of the procurement regime even in the absence of a claim in the domestic courts by one or more of the unsuccessful tenderers.

### ***The Community right to challenge***

---

<sup>11</sup> If the ECJ finds that there has been a breach of procurement law, it is at present unclear precisely what duty a local authority would owe if it has already entered into the contract in question. One view would be that it is merely obliged to exercise such discretions as it has to bring the contract to an end at the first available opportunity. A more extreme possibility is that it would be required to repudiate the contract so as to permit a re-tendering (notwithstanding the fact that that would give rise to a liability in damages for breach of contract). For further consideration of this issue, see *Wall AG v. Stadt Frankfurt am Main, Frankfurter Entsorgungs- und Service GmbH* (C-91/08), 13 April 2010.

77. Chapter 3 of Part 4 of the Localism Bill will introduce a mechanism by which civil society organisations can require local authorities to consider conducting a procurement exercise in relation to one or more of the services that they provide.
78. Some of the important detail remains to be filled in by way of regulations and guidance, and it appears that the relevant clauses may yet be amended in various relatively minor ways. The basic structure is, however, as follows:
- 78.1 A local authority will be under a duty to consider an ~~%~~expression of interest~~+ that has been submitted to it by a %~~relevant body~~+ (subject to the possibility that it need only consider such expressions of interest during time periods that it specifies). See clauses 69(1) and 70.~~
- 78.2 An ~~%~~expression of interest~~+ is an expression of interest in providing or assisting in providing a service provided by or on behalf of the local authority (the Secretary of State will have power to exempt particular categories of services). See clause 69(3)-(4).~~
- 78.3 By clause 69(5), a ~~%~~relevant body~~+ is defined as a voluntary or community body (terms defined in clause 69(6)-8)), a charitable body, a parish council or two or more employees of the local authority at issue (the Secretary of State will have power to add to this list, or to amend it). There is no requirement that a %relevant body+have local connections. Thus, for instance, a national charity may make an expression of interest in providing a particular local service even though it has no presence in the area.~~
- 78.4 However, commercial organisations fall outside the definition of relevant bodies. Thus, the community right to challenge will not enable e.g. a multi-national company to try to force a local authority to contract out its services.<sup>12</sup>
- 78.5 Upon consideration, an expression of interest must either be accepted or rejected (clause 71(1)).
- 78.6 In deciding whether to accept an expression of interest, the local authority must consider ~~%~~whether acceptance of the expression of interest would promote or improve the social, economic or environmental well-being of the

---

<sup>12</sup> It should be noted, however, that if the local authority decides to accept an expression of interest from a relevant body, and thereafter conducts a procurement exercise for the provision of the service in question, there appears to be nothing on the face of the Bill that prevents a commercial organisation from seeking to participate at that stage.

authority's area+ (clause 71(5)). Other than that, the Bill merely provides that an expression of interest may only be rejected on one or more grounds specified in regulations (clause 71(8)).

78.7 If a local authority accepts an expression of interest it must then carry out a procurement exercise (clause 71(1)-(2)). The exercise must be such as is appropriate having regard to the value and nature of the contract that may be awarded as a result of the exercise+ (clause 71(3)). (Insofar as the procurement falls within the scope of the 2006 Regulations, it will clearly also need to comply with the Community law requirements so imposed).

79. Some local authorities wanted the Bill to provide that local authorities could themselves make expressions of interest. It appears that the Government will not be taking this course. See Part 1 of the Policy Statement+ on the Community Right to Challenge that was published by the Department for Communities and Local Government on 12 September 2011<sup>13</sup>.

80. It is not entirely clear how the procurement exercise envisaged in clause 71(2) will work in practice. If the local authority decides to permit an in-house provider to participate, care will be needed to ensure fair competition between the in-house department and the external bodies that tender for the service in question. For instance, it may be necessary to provide the external bodies with significant amounts of information so that they can bid on equal terms with the in-house department. Further, in this type of case, authorities are likely to need to set up some form of Chinese wall+ between the in-house department and the overall decision-maker, so as to ensure appropriately fair and independent decision-making (in effect, a return to the old Compulsory Competitive Tendering approach under the Local Government Act 1988).

81. This clearest indication yet of the likely content of the regulations that will flesh out the statutory scheme is to be found in Part 2 of the recent Policy Statement on the Community Right to Challenge.

82. The Policy Statement proposes various grounds on which a local authority may reject an expression of interest, including the following:

82.1 the relevant body is not suitable to provide the relevant service;

82.2 the service has been stopped or de-commissioned or a decision taken to do

---

<sup>13</sup> <http://www.communities.gov.uk/publications/localgovernment/righttochallengestatement>

this;

- 82.3 the relevant service is already the subject of a procurement exercise or negotiations for a service agreement;
  - 82.4 the expression of interest is frivolous or vexatious;
  - 82.5 the relevant body provides unsatisfactory, inadequate or incorrect information in the expression of interest;
  - 82.6 the authority believe that acceptance of the expression of interest would lead to contravention of an enactment or a rule of law (the Policy Statement gives the best value duty and the duties under the Equalities Act 2010 as examples); and
  - 82.7 where the relevant authority has not specified a period during which expressions of interest can be submitted for a relevant service and there is an existing contract or other service agreement in place . except when the authority is considering the future provision of the service.
83. This last ground will ensure that a local authority is not obliged to conduct a procurement exercise for a service where it already has a contract in place for the provision of that service.
84. Note that it is not envisaged that an expression of interest will be able to be rejected on the ground that the local authority considers the current service provision to be of sufficient quality. However, overall, the proposed grounds in the Policy Statement suggest a reasonably balanced scheme which ought to prompt a degree of useful innovation in service provision, and encourage engagement by civil society organisations, whilst avoiding burdening local authorities with a large number of essentially pointless procurement exercises.

**September 2011**