public matters newsletter

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public sector lawyers

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talk to us...

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Supply of information and communications technology to the public sector

As some of you may be aware, in October last year the Office of Fair Trading (OFT - prior to its demise) launched a market study into the supply of information and communications technology (ICT) to the public sector. This followed a call for information which had raised a number of issues. In particular, respondents indicated concerns about:

- certain businesses appearing to have a large share of contracts in some areas of the sector
- high barriers to entry and expansion (especially for SME businesses)
- difficulties and high costs in switching between suppliers.

The study sought to look at both 'off the shelf' software and whole outsourced solutions. The results of this investigation were released at the end of March. Perhaps unsurprisingly, the OFT identified a number of issues that suggested that competition in this sector was not working as effectively as it should. These areas of concern broke down into three areas, structural issues, buyer conduct and supplier conduct.

The OFT reported that the structural issues were prevalent in a number of key areas:

- there were a small number of suppliers for certain types of software (in particular, local authority housing, planning and pension administration software and management information system for schools)
- there were significant barriers to entry and expansion with public procurement practices frequently highlighted as the key barrier
- there were significant barriers to switching across the sector, and
- it was clear that suppliers knew much more about the quality of ICT, goods and services, their suitability for meeting particular needs and the costs involved in their production than the buyers of those goods and services.

The prevalent buyer conduct issues were:

- public sector procurers did not have access to the requisite commercial and technical expertise when procuring ICT. This meant they were unable to define ICT requirements and specification sufficiently clearly, there were problems in evaluating the best placed suppliers and there was an inability to challenge poor supplier performance when contractors were in place

- public sector organisations do not routinely collect procurement data to make full use of market intelligence, and
- public sector organisations are seemingly generally adverse to switching supplier.

In relation to supplier conduct the key issues were:

- supplier conduct would seem to limit the ability of customers to shop around by using complex pricing and un-transparent pricing methodologies
- incumbent suppliers were often seen to behaving in a way so as to create or increase obstacles to public sector organisations switching to other suppliers when contracts came to an end.

The OFT report did note that there were various initiatives throughout the public sector to improve procurement processes although it was too early to consider whether these initiatives would rectify some of the key conduct problems highlighted.

The OFT made a number of recommendations which it hoped would help to rebalance the position as between public sector buyers and ICT sector suppliers. Interestingly, the OFT suggested that the public sector should work to put in place systems which would allow for information to be shared within the public sector (without it being shared with suppliers). This, it was suggested, would facilitate bench marking, driving better value for money and intensify the competition across the sector. This is an extremely strong and welcomed suggestion from the OFT. Purchasing organisations throughout the public sector should endeavour to look at this recommendation and to best consider how they can, within the legal competition framework, look to share such information.

Furthermore, the OFT has also highlighted the need to share experiences of things that have been successful when it comes to ICT procurement so that best practice can be shared. It also made it clear that public sector buyers should assess whether they are getting value for money by ensuring that they test the market and retender contracts with sufficient frequency to achieve competitive prices and service levels. Finally, the public sector buyers should consider whether there is greater scope to standardised products and services to potentially allow them to aggregate their requirements.

This is an extremely welcome report by the OFT and the public sector should pay particular heed to the suggestions that are set out within it. The recommendations in relation to sharing of information and best practice are of course obvious but are too rarely achieved in the public sector. This is something that local government organisations should take up and perhaps suggest

that local government groupings like the LGA could facilitate. One of the challenges to the public sector is greater standardisation and if this could be achieved then the huge buying power that the public sector holds could actually be used to deliver much better value for money for the already stretched public sector purse.

OFT findings can be found at http://www.oft.gov.uk/OFTwork/markets-work/government-ict/#named2

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PFI savings - gaining traction?

The story so far…

Public infrastructure projects procured under the Private Finance Initiative (PFI) have been under the spotlight since the Coalition came to power in 2010. In particular, there has been much discussion about the need to drive savings from PFI and other forms of public/private partnership (PPP).

However, any public body which has negotiated a PFI/PPP will attest to the complexity of many of these arrangements. Seeking to re-write aspects of these arrangements may involve complex discussions with contractors (and, for capital projects, their funders). Moreover, re-visiting the way in which PFI/PPP contracts work in practice is perceived with some justification as a complex, time consuming (and therefore expensive) process.

Given these hurdles, and against the backdrop of austerity, it is easy to see why the tidal wave of savings heralded by the government has, until recently, seemed more like a ripple.

Spending to save?

However, this may be changing. A pilot scheme operated by the Department for Communities and Local Government found that around £100 million of savings were available from just eight contracts. Around 80% of this figure has now been delivered through adjustments to those contracts.

Many contractors have also signed up to the Code of Conduct for Operational PFI/PPP Contracts, issued by HM Treasury and Infrastructure UK, and shown a willingness to participate in government bodies' drive for savings.

Further pilot projects, at the Queen's Hospital in Romford and two Ministry of Defence projects, have confirmed savings opportunities of around 5% of annual costs. Given the value of some PFI projects, and the annual sums spent by many local authorities on PPP arrangements, savings of this magnitude would be extremely significant.

However, with 495 operational PFI contracts in England, and many more high-value arrangements that might be more broadly classified as PPP, the work of engaging with private sector partners to generate savings has only just begun. Indeed, HM Treasury recently announced a target of £1.5 billion of savings from operational PFI arrangements alone.

So you have an operational PFI/PPP arrangement – what now?

Each PFI/PPP arrangement is different and will have bespoke elements that are more likely to drive savings. However, there are some general principles that should be considered when seeking savings:

- is the arrangement 'over-specified'? Can building space be mothballed, sub-let or used for a different function?

- is there any element of 'gold-plating' of services? When PFI contracts were let, it was often the case that risk transfer to the contractor, including the risk of providing first-rate services, was seen as key to the transaction. Are there any elements of the services that are not necessary and which, for example, the public body might not perform were it carrying them out directly? For example, decorating less frequently, and delaying lifecycle maintenance

- how is the contract currently managed? Some elements of a high-value PPP or PFI contract can be complex and, accordingly, difficult to monitor. Indeed, many such contracts embrace the concept of 'self-monitoring' by the contractor. Audit rights will no doubt exist but, understandably where the arrangement is proceeding in a broadly satisfactory way, the public body may not have been incentivised to exercise them or otherwise monitor performance in detail. Ensuring a clear picture of the way in which the contractor is performing, and any contractual provisions which are not being performed, may be important in any negotiations

- have key financial provisions been operated in accordance with their terms? For example, terms dealing with increased insurance costs, indexation re-basing, the risk of utilities tariff and consumption, and benchmarking/market testing?

- are there any elements where risk could sensibly be transferred from the contractor, with a commensurate reduction in cost? For example in relation to change in law, utilities and lifecycle maintenance? The new government private finance model, 'PF2' suggests that shifting risks in these areas back to the public sector might prove better value – they could therefore be appropriate areas to consider in relation to existing schemes

- What change provisions are included in the arrangement? Although negotiation will be key, it is important to know the contractual back-stop and, therefore, the public body's ability to press through changes if necessary.

Public bodies will appreciate that PFI/PPP arrangements are complex, and no change to their terms should be made without detailed consideration of the long-term consequences. It will also

be important to take advice (whether internal or external) on finance, legal, insurance, technical and contract management issues. Local authorities should also discuss with their sponsoring departments and their private finance units any changes proposed, the overall balance of risk after any changes proposed, and whether any PFI credits attached to the scheme may be affected.

Browne Jacobson have developed a product, PPP Review, to assist public bodies in review of existing PFI/PPP arrangements, with charges linked directly to any savings made.

talk to us...

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As ever, there's been plenty.

Environmental and energy state aid guidelines

The Commission has just issued the definitive version of the Guidelines on environmental and energy state aid, which will apply from 1 July until 31 December 2020.

The guidelines provide a framework for public support of projects relating to environmental protection and (non-nuclear) energy, tying into the development of member states' energy policies and the application of state aid rules.

The main drivers for the new guidelines have been the need to help member states reach their 2020 climate targets and to try to address market distortions arising from the spectacular growth of renewable energy in the recent past and the subsidies applied to this. However, the Commission has aimed to ensure that competition between different technologies is to be introduced.

In short, the main elements of the guidelines include:

- the gradual introduction of competitive bidding processes for allocating support to renewable energy and the gradual replacement of feed in tariffs by feed in premiums. Small installations or technologies in an early stage of development can be excluded from the requirement to participate in competitive bidding processes
- moving an increased range of measures to the new General Block Exemption Regulation (e.g. measures to promote renewable energies, clean up contaminated sites, promote district heating aid and improve energy efficiency)
- allowing aid to secure adequate electricity generation where there is a real risk of insufficient electricity generation capacity generation. Member states will be able to introduce capacity mechanisms to encourage producers to build or retain plants and reward customers for reducing peak electricity consumption
- simplifying the granting of state aid in that the methodology for calculating costs has been simplified, the principles on which aid is assessed have been aligned through all state aid guidelines and, as mentioned above, some measures have been moved into GBER.

You can read the guidelines in full at
http://ec.europa.eu/competition/sectors/energy/legislation_en.html

Mandatory complaint form – and who can complain

As of 9th April, where third parties want to make a formal state aid complaint to the Commission, the information they provide must fulfil two criteria:

- the information must be filed by an *"interested party"*. This is set out in the state aid Procedural Regulation (as amended) and by the EU courts and only member states and any person, undertaking, or association of undertakings whose interests might be affected by alleged illegal aid may submit a complaint to the Commission. Importantly, anyone – whether they have locus to make a complaint or not – can still submit market information to the Commission, which could still trigger an investigation
- also, the information must be submitted in a complete and structured manner, using the compulsory complaint form. This is available at: http://ec.europa.eu/competition/forms/download_en.html

State aid, *"preparatory works"* and infrastructure projects – Leipzig Halle in 2014

Following a notification by Germany to the Commission requesting a review of its 2002 ruling, the Commission confirmed that the development of land by municipalities was *"part of their public tasks"*. This was in the context of making land ready to build on – e.g. connected to utilities and infrastructure, rather than constructing buildings or managing land. Also, developers of the land are selected by an open, transparent and non-discriminatory procurement procedure and the land sold in line with the Commission's communication on the disposal of land. My colleague, Alex Kynoch, dissects the decision in a very useful short article on pages 21 and 22 of this issue of Public Matters.

The new General Block Exemption Regulation

2014 started with the Commission consulting on the draft revised General Block Exemption Regulations (or GBER for short). The consultation closed in mid-February.

GBER really matters as far as state aid is concerned. GBER historically covers around two thirds of all aid measures and over 20% of total aid annually – and the Commission reckons that it will cover as much going forward as so what's in there is significant for all public sector bodies.

The current GBER was adopted by the Commission in 2008, giving automatic approval for a range of aid measures – so enabling public bodies to grant aid, without the need to notify the Commission first. It was intended to finish at the end of 2013 but was extended to 30th June 2014 to allow for further consultation as part of the Commission's state aid modernisation programme. The new GBER will apply from 1 July until 2020.

The Commission's previously stated basic aims for the revised GBER are that it:

- simplifies administration of well-designed measures of relatively low amounts of aid and limited competition distortions
- facilitates granting of *"good aid"*, contributing to growth and jobs
- focuses state aid enforcement on the most distortive cases.

The new draft GBER comprises 39 exemptions which are expected to be used for the majority of State Aid measures awarded between 2014 and 2020. The scope of the exemptions under the GBER will be significantly extended: based on a simulation on 2012 data it has been estimated that three quarters of today's state aid measures and around two thirds of aid amounts could be exempted.

The new GBER proposes additional exemption categories such as innovation aid for large companies, revised aid for broadband infrastructure, aid for culture (including audio-visual works), aid for sport, aid to make good the damage caused by natural disasters and social aid for the transport of residents of remote regions. It also proposes notification thresholds so that some higher aid amounts will be exempted from prior notification.

The final version of the new GBER will be published next month and we'll set out a more detailed summary of what is there in next month's Public Matters newsletter.

talk to us...

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so which procedure will you choose?

On 17 April the new public procurement directive came into force. Whilst we await the draft regulations to be published everyone is considering what impact the new regime will have on existing public sector procurement. One area of particular interest is the choice of procurement procedure.

Under the current regime, contracting authorities can freely use the open or restricted procedures and indeed, these are the most commonly used procedures for straightforward procurements. For more complex procurements in the UK, the competitive dialogue procedure has been touted as the preferred procedure providing the strict conditions for its use are met. The negotiated procedure has lost its popularity in recent years largely because of the warnings issued by the European Commission and central government about the misuse of that procedure and that it should be used in exceptional circumstances only. Historically and prior to the introduction of the competitive dialogue procedure, the negotiated procedure had been used widely in the UK because of the flexibility it appeared to allow, especially with regard to post-tender negotiations.

So, how do things look under the new directive?

Well, for straightforward procurements, the open and restricted procedures are still likely to be used most often. The revised procedures contain reduced timescales (roughly by a third) which means that they can be run more efficiently going forward.

For non-straightforward procurements, the position is not so clear.

Both the competitive dialogue and negotiated procedures remain in the directive but in slightly different form.

Whereas under the existing directive, different strict conditions must be satisfied for choosing one of these procedures, the same conditions will apply for using either procedure under the new directive and these conditions have been relaxed significantly. At first glance, it appears that these procedures will be able to be used for anything that is not off the shelf going forward. For example, they can be used where the requirements include design or innovative solutions or where the requirements cannot be met without adapting readily available solutions. They can also be used if negotiation is needed because of 'specific circumstances related to the nature, the complexity or the legal and financial make-up or because of the risks attaching to them' or where the technical specifications cannot be established with sufficient precision by reference to established standards.

As for the competitive dialogue procedure, the new directive includes some clarifications in relation to providing an indicative time frame and obligations in relation to confidentiality, equal treatment and non-discrimination. The ability of the contracting authority to 'clarify, specify and fine-tune' tenders after dialogue is closed but before appointing the winning bidder has been modified very slightly with 'fine-tune' being replaced with 'optimise'. This does not appear to have much significance as the main principle still remains that bidders cannot be allowed to improve their bids at this stage.

Of more interest are the changes to the competitive dialogue procedure post appointment of the winning bidder. 'Negotiations' are to be permitted at this stage to confirm financial commitments or 'other' terms in the tender by 'finalising the terms of the contract'. This introduces a degree of flexibility that will be most welcome for complex projects, for example where the design detail still needs to be completed or where changes are required by funders.

Turning to the new form of negotiated procedure, new rules have been introduced to tighten up the use of this procedure – a price to be paid for the wider availability of the procedure under the new regime! In particular, the contracting authority must indicate minimum requirements to be met by all bidders which cannot subsequently be changed. It must also negotiate all tenders to improve their content, except final tenders and except where it awards the contract based on the submission of initial tenders only without negotiation (this possibility must be indicated in the contract notice or invitation). This envisages the possibility of the contracting authority running the process like a standard restricted procedure but reserving the right to negotiate if it needs to. There is also an express prohibition on changing contract award criteria.

The most striking change to the negotiated procedure is the requirement to set a 'common deadline' for 'final tenders' after which it must confirm that the tenders satisfy the relevant minimum requirements and award the contract based on the published award criteria. Time will tell what the meaning of this provision is but it looks as though it might offer less flexibility than the competitive dialogue procedure when it comes to the final tender stage. On a strict interpretation, it appears to follow the open and restricted procedures in not including any express provision for contract changes post contract award.

So query whether the competitive dialogue procedure will become the procedure of choice for complex procurements going forward.

The European Commission didn't stop there. Added to the mix is the new innovation partnership procedure which will be available where the contracting authority intends to develop and purchase innovative products, services or works. The procedure can only be used for requirements

not already available on the market. The procedural rules that must be followed are broadly similar to the negotiated procedure except that there is no requirement for a final tender to a deadline. It contains more specific rules also relating to the structure of phases, setting targets, payment to partners and the post-award phase (which may involve more than one partner). The new innovation partnership procedure does not introduce something that is not already allowed for contracting authorities but it does create a more regulated process that should be used for innovative projects involving the development and purchase of something.

The directive contains further nuances to the above. For example, for sub-central contracting authorities (including local authorities), it is expected that the regulations will allow prior information notices (PINs) to be used when using the restricted or negotiated procedure. The idea is that the PIN would cover procurements by the contracting authority over the next twelve months allowing invitations to confirm interest to be sent only to those who responded to the original PIN when a contract needs to be awarded during that period.

Watch out for further analyses on the new rules in Public Matters newsletters over the next few months.

talk to us...

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Transformation Challenge Award – think differently!

Budgets for local government continue to be squeezed but central government is keen to encourage local authorities to look at ways in which those reduced budgets can be maximised. The Transformation Challenge Award (the 'Fund') has been established by the Department for Communities and Local Government ('DCLG') to encourage public authorities to think differently about the way that services are delivered and to look at all aspects of their organisations to see where joint delivery is possible.

This is not the first round of the Fund. So far about 30 successful projects have each received funding to further the work of the local authorities involved to improve the sharing of services, including with other parts of the public sector. These winning bids included looking at sharing data between public sector agencies to allow for more efficient service provision, starting and continuing the process of sharing senior management between two local authorities and the co-location of blue light services.

For the years 14/15 and 15/16 there is £320 million of funding available to encourage more projects similar to these. Not all of that funding is in cash from central Government, approximately £200 million will be by way of approval for local authorities to use particular capital receipts more flexibly. The two main aims for the Fund are:

1. **Business re-engineering** – basically changing the business processes of a local authority to incorporate shared working with another local authority. This could be management, back office staff or assets, as examples. Central government sees such re-engineering as key to the success and resilience of local authorities. Interestingly, it also believes that some resources could be shared with the private sector as well as the wider public sector. One of the key drivers is to improve the sharing of resources at the highest level of local government.

2. **Service re-design** – DCLG wants to build on the success of the Community Budget pilots, by working with citizens and the voluntary and community sector to change and improve the commissioning of services at a local level, both the design of the services and how they are delivered.

For many of our clients who we know are considering, at some level, joint working with public sector partners, at least in part to make savings, now may be the time to start putting some of those plans into action if additional financial support to do so is available. For the year 14/15 (closing date for applications 1 July 2014) funding of £15 million is split into two parts:

- **Part A** – facilitating small district councils to share senior management, including the chief executive. DCLG defines a small district council as being one with spending power of £15 million or less (we assume per annum). DCLG sees small councils as having particular problems with service resilience and breadth, which is probably true in the main. However, the suggestion seems to be that all small district councils should have shared management and workforce or, interestingly, a contracted out workforce which may not be achievable in some cases. The paperwork does highlight one of the key issues for shared services, that is the retention of democratic processes for each individual authority. I would suggest that this has to include certain statutory officers, the monitoring officer being one, whose duties may be compromised if they were split between the processes and places of two or more local authorities. Please note that funding under this section will be for up to £400,000 with more being considered by DCLG if more than two district councils are involved

- **Part B** – a small amount of the £15 million will be made available to local authorities working in partnership with other agencies to reform service delivery and make a return during 14/15. What *"a return"* means isn't clear but the guidance suggests that increasing the number of services users or successful interventions without increasing the overall cost of the service, or better still, reducing costs, would be a good example. Projects must be ready to go and utilise funds on the ground immediately.

For the 15/16 round of funding, applications are to be made no later than 1 July 2014 for a pre-bid expression of interest and 1 October 2014 for a full application. The guidance sets out the parameters of the use of capital receipts. Funding from sales of capital assets can only be used if realised on or after 1 August 2013 and spent between 1 April 2015 and 31 March 2017. The government has set an overall limit of £200 million of capital receipts within England so it would appear to be on a first come, first served basis. The guidance provides a pro-forma letter which should give the finance officers of local authorities some comfort as to the legitimacy of the scheme!

The two strands to the 15/16 funding stream are:

- **Part A** – further developing plans for local authorities which already share senior management. Considering the application dates, these are likely to be different local authorities to those coming under Part A of the 14/15 funding and it is not limited to small district councils

- **Part B** - further re-design of services in partnership with both the wider public and the voluntary and community sectors. The outcome must be better delivered services and improved outcomes for local people.

The guidance which can be found here https://www.gov.uk/government/publications/transformation-challenge-award-and-capital-receipt-flexibility-2014-to-2016-prospectus sets out the application process for both funding years and gives further information.

All local authorities are facing financial pressures so the prospect of not having to make changes in service delivery is remote. Therefore, looking at the two years' funding streams, a good number of local authorities will have projects worth putting forward. Those authorities that already have embedded shared service practices may wish to try and do more. The main thing that both central and local government need to remember is that all local authorities have their own issues and there can be no one size fits all approach to joint working.

talk to us...

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are you undertaking a fair consultation procedure?

On 4 April 2014 the Court of Appeal held in R (on the application of LH) v Shropshire Council [2014] EWCA Civ 404 that the council's failure to specifically consult with the users of an adult day centre before it was closed, even though the council had consulted generally on its reconfiguration proposals for all the day centres in its area (which included their possible closure), was unlawful.

This case is significant as the council, although not under a statutory duty to consult, had gone to great lengths (including hiring a football stadium) to consult regarding the proposed changes to its adult day care and its proposals for personalised budgets for disabled persons. The consultation included the fact that a number of day centres may have to close. There is no question that the council's consultation was not extensive; approximately 600 people took part in the consultation procedure over a two year period.

This is a warning to local authorities that the duty to consult is not limited to the initial stages of a decision and that if consultation is undertaken it must be undertaken fairly.

The law – the requirement to act fairly

Apart from those situations in which legislation imposes an express duty to consult, the incidence of a duty to consult and its content are governed by the application of the administrative law rules of natural justice. This has been equated to a principle of fairness being imported into local authority decision-taking. Unless there are prescribed procedures for consultation in statute, and subject to the overall requirements of fairness, a local authority usually has a broad discretion as to whether consultation should be carried out and how a consultation exercise should be carried out.

In the absence of an express duty to consult, the essential question for a local authority is *"What does fairness require in all the circumstances of this case?"* This question can be broken down into two issues:

- whether there is a duty to consult anyone at all?
- if there is a duty, what fair consultation entails in the circumstances?

The requirements of fairness are heavily dependent on context and do not readily lend themselves to the formulation of clear rules, but it is possible to extract from the relevant cases some key factors that should steer a local authority in determining whether fairness requires consultation and, if so, in what form?

Key factors to consider when determining if there is a duty to consult in the first place include:

- the nature and impact of the decision
- the legislative framework purpose
- the practicalities of the situation
- whether they are imperatives of urgency or national security, and
- whether the public authority has, through representations or its own past practice, promised to consult in a particular way.

The form of a consultation should be guided by the principles set out in R v London Borough of Brent, ex p Gunning [1985] LGR 168 (frequently referred to as the Gunning principles):

- the consultation must be at a time when proposals are still at a formative stage
- the proposal must give sufficient reasons for any proposal to permit intelligent consideration and response. Those consulted should be aware of the criteria that will be applied when considering proposals and which factors will be considered decisive or of substantial importance at the end of the process
- adequate time must be given for consideration and response, and
- the product of consultation must be conscientiously taken into account in finalising any statutory proposals.

In the LH case above, it was accepted by both parties that there was not a statutory duty to consult. The local authority accepted that fairness in relation to the closure of day centres required consultation with users. The issue before the court was therefore how specific the consultation duty should be?

What consultation is required in relation to the closure of adult day centres?

In the LH case, the council argued that it had discharged its duties to consult through its wider consultation on the reorganisation of adult social care in the county. It relied upon the fact that its earlier proposals made it clear that someday centres would shut. It also submitted, and the court agreed at first instance, that the nature and scope of the consultation was a decision for the council. The council submitted that its decision can only be challenged on standard public law grounds of irrationality.

However the Court of Appeal determined that the level of consultation required to satisfy the demands of fairness is a matter for the courts not the council and that a fair procedure in relation to the closure of day centres involves consulting with the users of the day centres and their carers. It stated that if fairness required the local authority to consult regarding individual closures, the local authority could not say that it could choose a method of consultation which by-passed the question of whether a particular day centre should be closed.

Conclusion

The case of LH does not introduce any new legal concepts, however it does provide further clarification on what the Court of Appeal sees as a 'fair consultation procedure'. This is significant as a failure to undertake a lawful consultation can lead to decisions of the local authority being quashed and significant additional expense for the local authority in rectifying the situation. It may also lead to negative publicity.

In its narrowest sense, the judgement of the Court of Appeal in LH makes it clear that the closure of day centres requires the council to consult with the individual users of that day centre regardless of the wider consultation which had already been undertaken. This is also likely to be directly applicable in relation to the closure of other care facilities such as care homes.

However this case could have wider significance. Whilst local authorities understand that before significant public services are withdrawn consultation is required, it is not necessarily as clear that specific consultation with those affected by the closure is required after a more general consultation on the withdrawal of services has taken place. Accordingly, when undertaking consultations, local authorities should consider either setting out precisely what they intend to do and specify precisely which facilities are to cease and consult to include the affected service users or use a two stage process where the principles of funding are determined initially and then specific consequential decisions are taken involving consultation with those particularly affected. The second stage of the consultation could be narrower, focussing on affected users, staff and key stakeholders.

It remains to be seen whether the judgement in LH will be used by those unhappy with the decision of a local authority to close services to mount a challenge to the consultation procedure on the basis of fairness. However it is a helpful reminder to local authorities that any consultation undertaken needs to be fair and that while the local authority has discretion to choose between a variety of 'fair' ways of conducting a consultation exercise, the level of consultation required to satisfy the demands of fairness is ultimately a question for the court, not the local authority.

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Commission approves German infrastructure scheme

A shift away from Leipzig-Halle?

The European Commission has recently approved a German scheme providing direct grants to local authorities to carry out preparatory work on sites with a view to development. This was on the basis that the development of land by local authorities is part of their public tasks and so falls outside state aid rules.

Although the decision text is not yet available, the Commission has published a press release (IP/14/332) on the decision setting out the facts and the basis for the decision. According to the press release, the Commission's view is that where funding is provided to local authorities to carry out preparatory works (making the land 'ready to build' including connection to utilities and transport networks) this forms part of the authorities' public duties and so does not constitute state aid.

This does not eliminate any potential aid to developers and contractors further down the chain as the scheme was approved on the basis that any disposal of land by the authority would be at market value (using the Commission's published methodology for calculation) and that any developers and contractors are procured using an open and transparent process. This means the relevant works carried out by local authorities will not constitute economic activity and therefore the local authority will not be an aid recipient – even where it makes a profit selling the 'oven-ready' land.

Since the infamous Leipzig-Halle judgement many local authorities have taken a cautious approach to infrastructure projects due to the risk of them being classed as economic activity. This decision moves the position closer to that set out in the Welsh Development Agency property development scheme decision (SG(2001) D/ 285044) which stated that acquisition, disposal or leasing of land benefiting from development by the Welsh Development Agency did not constitute state aid. Again any transfers to third parties needed to be at market rate and any arrangements with contractors or developers needed to be procured openly and transparently.

Where local authorities are funding these activities internally and taking the same steps to ensure no state aid is granted to third parties this should not constitute state aid in any event (as neither the authority nor the third parties receive aid) so this decision is only really relevant where external funding is being provided to the local authority.

Still, this is a welcome decision and will hopefully give local authorities (and funding bodies) renewed confidence when redeveloping land to promote regeneration in their areas.
Link is http://europa.eu/rapid/press-release_IP-14-332_en.htm

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avoiding the first ground of ineffectiveness

Cases relating to declarations of ineffectiveness are few and far between. However, a recent opinion by an Attorney General of the European Court of Justice ('ECJ') has given further guidance to help demystify the uncertain application of this particular EU procurement remedy.

As a reminder, a declaration of ineffectiveness can only be made by a court once a contract has been entered into. The declaration sets aside the contract prospectively so that all future rights and obligations of the parties arising under the contract are cancelled and the contracting authority involved must reprocure whatever works, goods or services were being provided under the agreement. A claim for a declaration of ineffectiveness can be brought up to six months after the contract is entered into. This time limit is reduced to 30 days if the contracting authority publishes a contract award notice or if the economic operator wishing to bring the challenge was informed by the contracting authority of the conclusion of the contract and given reasons for the decision to enter into the contract.

When considering the possibility of a challenge, the outcome of which could be a declaration of ineffectiveness, it is often thought that the publication of a voluntary ex-ante transparency ('VEAT') notice will, if unchallenged for the relevant 10 day period, remove all risk of a declaration of ineffectiveness. The use of a VEAT notice is often part of a risk mitigation strategy if a contract is directly awarded which either should be or may need to be advertised prior to award.

The most well-known case for the remedy of ineffectiveness is the Alstom case[1] where the application was rejected. The Alstom case was based on the Utilities Contracts Regulations 2006 (as amended) but the principles applied in that case are equally applicable to claims brought under the Public Contracts Regulations 2006 (as amended) (the 'Regulations').

In 2014 there have already been two reported cases relating to a declaration of ineffectiveness under the Regulations. One was a Danish case (unreported in English), Sonderborg Affald A/S mod Affaldsregion Nord I/S[2] where the contract in question was declared ineffective by the Danish Complaints Board for Public Procurement because it wasn't, on the facts, a public-public cooperation agreement as the defendant had argued it was and should, therefore, have been tendered.

[1] Alstom Transport v Eurostar International Ltd & Anor (Rev 1) [2011] EWHC 1828 (Ch)
[2] 10 February 2014

The second case of significance is the opinion of Advocate General Yves Bot (the 'AG') of the ECJ in the Fastweb case[3]. The opinion has been given on the back of a reference for a preliminary ruling from the Italian Council of State on the interpretation of Article 2d(4) of Directive 89/665. Directive 89/665 (as amended to include Article 2d) applies to contracts falling within the scope of Directive 2004/18, the current EU directive regulating public contracts.

Article 2d of Directive 89/665 sets out the remedy of ineffectiveness. In England and Wales this has been transposed into Regulations 47K to 47O of the Regulations. Article 2d(1) (covered by Regulation 47K) requires member states to ensure that a contract is declared ineffective by an independent review body if:

1. There has been a failure to advertise the contract in OJEU where Directive 2004/18 requires it
2. There has been a breach of the procurement regime that affected the chances of a bidder winning the contract together with a breach of the standstill or automatic suspensions rules which prevented the bidder from challenging the decision to award the contract before it was entered into, or
3. There has been a breach of the procedure for awarding a contract under a dynamic purchasing system or a framework agreement if the individual contract value is above the current OJEU threshold.

Article 2d(3) (covered by Regulation 47L) allows a court to declare that a contract is ineffective on one of the above grounds except where there are overriding reasons in the general interest requiring the contract to be maintained. Economic interests can be considered to be overriding reasons only in exceptional circumstances. In particular, economic interests directly related to the contract concerned e.g. the costs of re-running the tender exercise, can never constitute such overriding interests. If there is a general interest to maintain the contract then there are other remedies such as shortening the term of the contract and imposing a fine that can be granted by the court instead.

Article 2d(4) (also covered by Regulation 47K) sets out the specific circumstances in which a contract should not be declared ineffective even if, technically, covered by the first ground of ineffectiveness above (failure to issue an OJEU notice). These are:

1. That the contracting authority considered that the award of the contract was permissible without publication of a notice in OJEU.
2. That the contracting authority has published a VEAT notice, and

[3] Case C-19/13 - Italian Interior Ministry v Fastweb SpA

3. That the contract is not concluded until a period of 10 clear days after the VEAT notice is published.

Article 3a (also covered by Regulation 47K) sets out the information that a VEAT notice must contain.

The facts of the Fastweb case are that the Italian Interior Ministry entered into an agreement with Telecom Italia SpA for the supply of electronic communications for seven years until 31 December 2011. The Ministry the re-awarded the contract directly to Telecom Italia SpA with a future value of €521 million. Fastweb SpA challenged the re-award and the initial ruling of an illegal contract award was upheld by the Italian State Council.

No contract notice had been published but a VEAT notice was published prior to entering into the new contract and the 10 day standstill period was allowed to pass. The Italian courts held that the application of Article 2d(4) meant that, despite the contract being awarded illegally because there had been no competition, it had to be maintained because of the use of the VEAT notice. The Italian State Council obviously wasn't comfortable with having to declare this and referred two questions to the ECJ for a preliminary ruling.

The first question was whether if, before directly awarding a contract when a contract notice should have been published, a national court is always precluded from declaring a contract ineffective if a VEAT notice has been published and timescales followed correctly. The second question was whether such an inability to make a declaration for ineffectiveness is compatible with the principles of equal treatment, non-discrimination and protecting competition and of the right to an effective remedy (the latter is set out in Article 47 of the Charter of Fundamental Rights of the European Union). These questions were considered together by the AG.

The headline opinion from the AG was that the publication of a VEAT notice is not a panacea for all illegal direct award ills. It is only if the three conditions in Article 2d(4) are truly met that the relevant review body does not have the power to declare it ineffective. Any other interpretation of Article 2d(4) would not allow the proper application of the principle of equal treatment and the right to an effective remedy. If the national court has the ability to declare it ineffective, it should do so unless there is an overriding general interest to maintain it.

The AG stated that, often, the conditions set out in the European legislation are a minimum that member states can build upon to create harsher penalties or requirements if they so desire. However, there are certain situations, such as those in Article 2d, where the penalties can only be applied in the situations allowed for by the European directive. Therefore, if the three conditions

in Article 2d(4) are not met cumulatively, and there is no general public interest, a contract must be declared ineffective if one of the three situations in Article 2d(1) has arisen.

The AG considered that, even in circumstances such as Article 2d(4), member states must use the discretion granted to them under EU law to consider whether the conditions of Article 2d(4) had actually been met. Without this, there is no way to properly review a decision of a contracting authority and ensure that the principles of transparency, equal treatment and non-discrimination are being adhered to. Therefore, the conclusion is that, the publication of a VEAT notice must not be taken at face value but the reasons for issuing the notice must be analysed.

The most important of these appears to be the first part of Article 2d(4), that the contract can be awarded without the prior publication of a contract notice and, therefore, without competition. The reasons for direct award must be set out in the VEAT notice so that readers of the notice understand the background and can challenge within the 10 day window.

The next question to ask is whether the reasons for deciding that the contract could be directly awarded were based on a decision made in good faith but in error or whether it was an intentional breach of the procurement regime. In the AG's opinion, if the decision was made in good faith then there may be an argument for imposing alternative penalties to ineffectiveness. A deliberate and intentional infringement should give rise to a declaration of ineffectiveness.

In this case, the defendant had allegedly believed that the contractor was the only economic operator in a position to deliver the services due to technical reasons and the protection of certain exclusive rights. In fact, the courts and the AG found that the reasons for the direct award were actually due to difficulties that could arise from the award of the contract to someone else rather than genuine technical reasons. The AG expressed his surprise at the swift conclusion of the new contract and said that the legal resources at the disposal of the Interior Ministry meant that such an error should have been avoidable. However, the AG said that it was for the national courts to decide whether that error was excusable or a deliberate and intentional infringement so we will need to wait a bit longer to see if we are given any further guidance in the context of the decision made by the Italian Interior Ministry.

So, more broadly, what does this AG opinion mean for contracting authorities in England and Wales? Firstly, a VEAT Notice is not your get out of jail free card. If the reasons given in a VEAT notice for the direct award of a contract are not reasons which, of themselves, would allow for a contract to be awarded directly, for example, an award of a contract to a Teckal company, then the passing of the 10 day standstill period under the VEAT notice does not stop the clock on all challenges. It is, therefore, very important that the use of a VEAT notice is considered on its own

merits after a full analysis of the reasons for wanting to award a contract directly without competition in a particular circumstance.

Secondly, it is worth remembering that even where there is no longer the ability to declare the contract ineffective, that doesn't stop the application of other remedies, if challenged within the correct period of time.

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information sharing – what's happening out there?

Requests for advice on information sharing, and for assistance with the preparation of data sharing agreements, are becoming more and more common. This is in part due to increased co-operation between authorities and in part due to the publicity that the issue has recently received. In her second report, Dame Fiona Caldicott encouraged authorities to share data where necessary and proportionate, but within a framework that guaranteed minimum safeguards. This was met by a positive response by the Government. Since then, concerns about the Caredata scheme (which provided for wide ranging sharing of patient data within and by the NHS) have led to its introduction being delayed and to accusations that the issue has been mishandled. NHS reorganisation has also given rise to questions around data sharing as new organisations enter the picture and new methods of working are required to be developed.

Information sharing requires not only a consideration of the Data Protection Act 1998 but also analysis of the position under the Human Rights Act 1998 and the common law duty of confidentiality. Whilst information sharing without the consent of the data subject may be lawful in principle, it should take place within an information sharing protocol between the relevant parties in order to ensure that information governance and security requirements are met as the sharing proceeds.

The first question for all public authorities will be whether they have the power to share information, whether by way of an express provision or an implied power to do anything incidental or conducive to an authority's principal functions. We have recently advised a client that their powers in a particular area were not sufficient to justify the receipt of personal data and as such this question is not always answered in the affirmative.

Assuming there is power to share, the next question to consider is the extent of sharing. The data protection principles and Article 8 of the European Convention on Human Rights both operate to require that any processing of personal data must only take place where necessary and only to the extent required to achieve a particular (lawful/legitimate) objective. The requirements of necessity and proportionality mean that on occasion not all the information that is requested can be shared. We have recently advised that GPs may share some patient data in the public interest. The sharing was required in a law enforcement context where it would not have been appropriate to seek patient consent. As such GPs were rightly hesitant in relation to sharing. We advised that sharing could take place, but only that which was necessary for the purposes of the intended recipient.

Whilst a public interest defence applies in relation to breaches of the duty of confidentiality, it will only operate in respect of disclosures that are necessary in the public interest. Any disclosure/sharing that goes further than what is necessary and justified is at risk of being unlawful.

Once the legal basis for sharing and the lawful extent of sharing have been confirmed, an information sharing protocol should be drawn up between the parties. This need not be a long document – we have seen protocols that are akin to a schedule and are a single page long – but which contain the principal matters agreed between the parties. Such protocols should identify responsible officers within the participating organisations and make provision for breach management, dispute resolution, review and termination. Some protocols specify particular data security standards that must be met before sharing can take place.

Authorities remain understandably concerned about information sharing and are rightly protective of the personal data and sensitive personal data that they hold. However, the law generally recognises the need for organisations to share data in the public interest, where necessary without patient consent, provided that such sharing is lawful, necessary and proportionate. The taking of a cautious approach does not preclude sharing, but ensures that it takes place in a lawful and structured manner, after careful consideration of the circumstances.

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