

Procurement Bill debarment regime and ECHR issues

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On 25 January 2023, the Government published a [policy paper](#) addressing the debarment regime under [the Procurement Bill](#) and the issues that arise under the [European Convention on Human Rights \(ECHR\)](#) as a result. The Cabinet Office prepared the memorandum, and the Minister for the Cabinet Office has made a statement under section 19(1)(a) of the Human Rights Act 1998 that, in his view, the provisions of the Procurement Bill are compatible with the Convention rights. In this note, I will provide a high-level summary of the key points and reasoning for the Minister's conclusion.

Article 1 of Protocol 1 of the ECHR

Article 1 of Protocol 1 provides that:

Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.

- The removal of a right to participate in procurements and to be awarded public contracts do not amount to 'possessions' protected by Article 1 of Protocol 1. In these cases, there is no enforceable claim, or legitimate expectation, to bid for or to be awarded a contract
- However, if a contract is terminated or a supplier is excluded from the selection process under a framework following a debarment decision, therefore, depriving them of their right to receive incurred expenditure, then this may be capable of engaging Article 1 of Protocol 1.
 - For example, the supplier may benefit from enforceable claims to be paid for work undertaken but not yet paid or where the supplier has incurred costs in the pursuit of obligations under the contract. In addition, the supplier may, in certain circumstances, have contractual rights to bid in a selection process under a framework
- Loss of goodwill may also engage Article 1 of Protocol 1 (in limited circumstances) however, if this were to create any residual interference, the Government is content that the interference serves public interest, complies with conditions provided for by law and passes the fair balance test

Article 6 of the ECHR

Article 6 provides that:

In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.

- Since public contracts are, in most cases, openly tendered and offers may never be accepted, procurement does not generally give rise to civil rights for the purposes of Article 6
- However, in some circumstances a supplier whose name is added to the debarment list, and therefore deprived of, or at least potentially deprived of, the opportunity to bid for and be awarded public contracts, might be entitled under Article 6 to a fair and public

hearing within a reasonable time by an independent tribunal established by law. The grounds of appeal are limited to material mistakes of law

- The Procurement Bill provides for significant procedural safeguards built into the debarment decision-making procedure including the need for a prior investigation and the duty of the Minister to notify the supplier of a debarment decision before the supplier is put on the debarment list, to publish the list and to keep the list under review

Article 7 of the ECHR

Article 7 provides that:

No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.

- Some of the conduct that may be considered by a contracting authority when deciding whether to exclude suppliers can be considered even where that conduct took place before the Schedule came into force. The Government is content that the exclusion does not amount to a conviction for a criminal offence and that even if it was, the exclusion provisions are not a “penalty” within the meaning of Article 7. The Government is therefore, of the view that these provisions are consistent with Article 7. The purpose of the exclusion is not punitive, but the protection of public bodies and the public purse from exposure to suppliers whose past activities would mean there is a risk that they will have a detrimental effect
- Even if there was a chance that the exclusion regime could be in some way viewed as criminal in nature, the Government is also content that exclusion in such circumstances would not constitute a heavier penalty than was applicable at the time of the commission of the offence. As has been set out above, the effect of exclusion is not a “penalty” for the purposes of Article 7 so it cannot be considered to be a heavier penalty

Therefore, the conclusion to come from the memorandum is that all of the circumstances in which a contracting authority could exclude a supplier for conduct carried out before the commencement of the Schedules are covered by circumstances in which it would already be open to a contracting authority to exclude them under the existing procurement regime. Therefore, even if this was to be considered a “penalty,” there would be no increase in the severity of the penalty as a result of the new regime.

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