

DIRITTI COMPARATI

Comparare i diritti fondamentali in Europa

ARE THE EU INSTITUTIONS (ABOUT TO START) BREACHING ART 50 TEU & EU PUBLIC PROCUREMENT LAW IN THE CONTEXT OF BREXIT?

Posted on 15 Maggio 2017 by [Albert Sánchez-Graells](#)

Tags: [Art. 50 TEU](#), [Brexit](#), [EU Institutions](#), [Public procurement](#)

The Financial Times has reported that "[Brussels starts to freeze Britain out of EU contracts ~ Commission memo tells staff to prepare to 'disconnect' UK](#)". According to the FT, an internal European Commission memorandum urges its senior officials to start introducing Brexit considerations in their decision-making, seemingly to avoid "unnecessary additional complications". As public procurement is concerned, the FT indicates that

Where legally possible, the ommission and its agencies will be expected in all activities to "take account" of the fact that Britain may be "a third country" within two years, including in appointing staff and in awarding billions of euros of direct contracts for research projects or services.

"Apart from the legal requirement for a contracting party to be established in the EU, there may be political or practical reasons that speak in favour of contracting parties established in a specific member state, not only at the conclusion of the contract, but also throughout the duration of the contract," the note states.

The FT piece lacks the necessary detail for a full legal assessment and the caveat that this strategy should be undertaken "where legally possible" may well deactivate it. However, at least in its thrust, this is a rather clear breach of Article 50(3) TEU.

Inasmuch as it states that "*The Treaties shall cease to apply to State ... from the date of entry into force of the withdrawal agreement or, failing that, two years after the notification*" (given by the UK on 29 March 2017), unless this period is extended unanimously by the European Council; **Art 50(3) TEU does not allow for any anticipatory effects of a decision to withdraw.** Until withdrawal and its terms are actually agreed and legally effective, both the withdrawing Member State and the EU Institutions remain bound by EU law in its supremacy, direct effect and the mandate to respect the rule of law (Art 2 TEU). This is an appropriate measure aimed at the preservation of the rule of law in the form of compliance with EU law during the withdrawal negotiations, not least **because nobody knows if withdrawal is legally irreversible and unavoidable** -- and, quite frankly, every day that goes by without the EU Institutions (as well as the UK) seeking clarification from the Court of Justice of the European Union is a missed opportunity and another blow to the foundations of the rule of law in the EU.

Such prohibition of anticipatory effect goes both in the direction of preventing the 'freeing up' of the withdrawing Member State from compliance with EU law (which is obvious from Art 50(3) TEU itself), as well as in the opposite direction of preventing the EU Institutions from discriminating against the withdrawing Member State. It is clear to me that EU law will always bind the EU Institutions vis-a-vis a withdrawing Member State all the way up to the point of legal withdrawal - and from then onward, the legal regime setting up mutual duties will be that of any transitory arrangements created by the withdrawal agreement, and/or the legal regime governing the "*the framework for future relationship with the Union*". Violating the absolute mandate of subjection to EU law up to the point of withdrawal would be an infringement of Art 50(3) TEU by the EU Institutions -- if not by itself, certainly in combination with the duty of non-discrimination and equal treatment between Member States of Art 4(2)

TEU, as well as the duty of sincere cooperation of Art 4(3) TEU.

In the specific area of public procurement, just as it was illegal for the UK's Department for International Trade to tender contracts screening contractors on the basis of their commitment to support the delivery of Brexit as a cultural fitness criterion (see [here](#)), it is also illegal for the EU Institutions to tender contracts on the basis of "*political or practical reasons that speak in favour of contracting parties established in a specific member state, not only at the conclusion of the contract, but also throughout the duration of the contract*". Article 102 of the [Financial Regulation](#) governing the award of contracts by EU Institutions clearly establishes that "All public contracts financed in whole or in part by the budget shall respect the principles of transparency, proportionality, equal treatment and non-discrimination". Imposing requirements around the Member State of incorporation, registration or sit of a public contractor runs against these general principles.

There may be some specific circumstances or projects (the FT piece mentions the Galileo project) where it would not be possible for public contractors to be based outside the EU, but these are clearly exceptional and need to be subjected to a very strict proportionality analysis. In most cases, particularly for services and research contracts, there is no need for any physical presence in the EU (or elsewhere). This is clearly demonstrated by the coverage of a good number of Brexit-sensitive services markets in the EU's [market access concessions](#) under the World Trade Organisation's Government Procurement Agreement (albeit on a reciprocal basis, for obvious trade policy reasons).

Moreover, the extent to which it would be impossible for UK-based contractors to complete the execution of public contracts post-Brexit depends on the existence or not of transitory arrangements, as well as the framework for the future EU-UK relationship (which may well imply mutual coverage of services procurement in WTO GPA terms). Therefore, a decision made now that determined such impossibility and thus served as the basis for the exclusion of UK tenderers from procedures carried out by the EU Institutions would be legally defective.

Beyond these technical issues, it is shocking and worrying to see the EU Institutions engage in what can be seen as trade war by erecting non-tariff barriers against a withdrawing Member State, just as it was worrying and unacceptable to see the UK do that. If both parties to the withdrawing negotiations "prepare" for a disorderly Brexit in this manner, this will be a self-fulfilling prophecy. And the only stopper to such noxious developments is to be found in the rule of law and the EU's and the withdrawing Member States' obligations under the Treaties to comply with EU law until the withdrawal is effective in terms of Art 50(3) TEU. If the European Commission is itself not able to abide in this manner, then my pessimism about the [irreversible effects of Brexit on EU law](#) can only plummet even further....