

Written Evidence to the House of Commons Transport Select Committee in relation to its inquiry “Freight and Brexit”

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Executive Summary

1. The award of three contracts for ‘additional shipping freight capacity’ in the context of the Government’s ‘No-Deal’ preparations raises important illegality concerns.
2. The Department for Transport justified the award of the three contracts without a prior call for competition on the basis of the ‘extreme urgency’ created by the prospect of a ‘No-Deal’ Brexit.
3. Under reg.32(2)(c) of the Public Contracts Regulations 2015, ‘extreme urgency’ only exists where an unforeseeable event renders impossible the observance of the time-limits laid down for calls for tenders.
4. The award of the three contracts for additional capacity seems likely to be in breach of reg.32(2)(c) of the Public Contracts Regulations 2015, as there was time to comply with the 60 calendar days’ time limit required by alternative, transparent competitive procedures with negotiation.
5. Even if it was accepted that there was no time for alternative competitive procedures due to the specific characteristics of the shipping market, the award to Seaborne Freight (UK) Ltd still raises issues of potential illegality. The Secretary of State for Transport has justified the award as an act of support for a new British start-up business. This fact, coupled with eg the lack of readiness of the port infrastructure from which Seaborne plans to operate, undercuts the rationale of the extreme urgency of the procurement and heightens the likely illegality of the award.
6. All contracts, and Seaborne’s in particular, raise potential risks of illegal State aid that require further investigation.
7. This event indicates that the Government seems intent on pursuing a transport policy—and, possibly, a broader procurement policy—that runs against the core rules of EU law and policy. This is an unwelcome indication of potential roadblocks in the path towards reaching an agreement on a future UK-EU trade deal.

Submission

The purpose of this document is to provide the House of Commons Transport Select Committee with written evidence of the potential illegal award of contracts for 'additional shipping freight capacity' in the context of the Government's 'No-Deal' preparations.

Public information about these awards indicates not only that the awards are likely to be illegal under the applicable UK procurement rules and that they can create additional risks of illegal State aid, but also that the Department for Transport may be pursuing a broader industrial policy that undermines the possibility of an orderly Brexit and a functioning future trade relationship with the EU.

These issues should be further investigated by the Transport Committee, as they fall within the remit of the 'Freight and Brexit' inquiry and, in particular, concern issues around the 'the adequacy of steps being taken by ... the Government in preparation for the challenges and opportunities of Brexit'.

'No-Deal' shipping services contracts

On 28 December 2018, the Department for Transport published in the Tenders Electronic Daily (TED) of the Official Journal of the European Union (OJEU) a contract award notice indicating that it had awarded a contract for 'additional shipping freight capacity' in the value of £13.8 mn to Seaborne Freight (UK) Ltd (hereinafter, 'Seaborne' or the 'Seaborne award').¹ Two other contracts for additional shipping freight capacity were awarded to Bretagne Angleterre Irlande SA (valued at £46.6 mn)² and to DFDS A/S (£47.2 mn)³.

The contract award notices indicate that the three contracts had been awarded under negotiated procedures without publication of a call for competition in the OJEU due to 'extreme urgency', and the Department for Transport explained that it relied on this exceptional possibility because 'A situation of extreme urgency exists in the context of UK-EU roll-on-roll-off ferry capacity by virtue of the UK leaving the EU on 29.3.2019 and the prospect that this exit may be on a no-deal basis'.

Award of contracts under 'extreme urgency' exemption from a call for competition

The direct award of contracts under conditions of 'extreme urgency' is enabled by reg.32 of the Public Contracts Regulations 2015 (hereinafter, 'PCR2015'). This is a direct transposition of Art 32 of Directive 2014/24/EU and it must be interpreted in accordance with the case law of the Court of Justice of the European Union (CJEU) on the use of negotiated procedures without prior publication.⁴

Reg.32(2)(c) PCR2015 allows for the direct award of contracts 'insofar as is strictly necessary where, for reasons of extreme urgency brought about by events unforeseeable by the contracting authority, the time limits for the open or restricted procedures or competitive procedures with negotiation cannot be complied with' (emphasis added).

This is an extremely limited exception to the obligation to tender the contract under a call for competition for cases where the object of the contract—that is, the emergency services or supplies—needs to be achieved in an immediate or almost immediate manner. This is clear from the CJEU case law, which 'has made it subject to three cumulative conditions, namely an unforeseeable event, extreme urgency rendering impossible the observance of the time-limits laid down for calls for

¹ <https://ted.europa.eu/TED/notice/udl?uri=TED:NOTICE:575971-2018:TEXT:EN:HTML&src=0>.

² <https://ted.europa.eu/udl?uri=TED:NOTICE:575963-2018:TEXT:EN:HTML&tabId=1>.

³ <https://ted.europa.eu/udl?uri=TED:NOTICE:575967-2018:TEXT:EN:HTML&src=0>.

⁴ For discussion, see Albert Sanchez-Graells & Pedro Telles, (2016) Commentary to the Public Contracts Regulations 2015, available at: www.pcr2015.uk.

tenders, and a causal link between the unforeseeable event and the extreme urgency resulting therefrom' (emphasis added).⁵

Additionally, it is consolidated CJEU case law that the requirements that control decisions to proceed to the direct award of contracts under this 'non-procedure' are subject to a strict assessment of whether the contracting authority 'acted diligently and whether it could legitimately hold that the conditions [for recourse to this procedure] were in fact satisfied'.⁶

Potential illegality of all awards under UK procurement law

The legality of the award of all three contracts under the 'extreme urgency' exception can be queried due to the foreseeability of a 'no-deal' Brexit and the degree of control that the UK Government exerts over this scenario after the CJEU ruled that it is possible for the UK to unilaterally withdraw its intention to leave the European Union.⁷ This seems to fall short of the requirement for the events that trigger the extreme urgency to be beyond the control of the contracting authority.

Additionally, the illegality of the award would more clearly result from the possibility of complying with the time-limits applicable to alternative, transparent competitive procedures with negotiation. Under the current rules, such procedures can be completed in 60 calendar days, which can be reduced to 55 calendar days if tender responses are submitted electronically.⁸ Given that the contracts were awarded more than 90 calendar days prior to UK leaving the EU on 29.3.2019, this in itself can deactivate the exemption under reg.32(2)(c) PCR2015.

It could be argued that shipping contracts cannot be implemented immediately and that the Department for Transport had to provide some buffer to providers of emergency shipping capacity, but an assessment of such a claim would require much more details than are publicly available. This particular issue would benefit from further investigation by the Transport Committee, as it affects all three contracts.

Further illegality of the Seaborne award

In addition to the issues discussed above, the Seaborne contract raises additional indications of illegality. In this case, even if it is accepted that the Department for Transport had to award the contracts more than 90 calendar days prior to 'Brexit day' due to some specificities of the shipping market, there are still important questions to be addressed surrounding the readiness of the awardee of the contract to provide emergency services, and whether this was the basis for the Department for Transport's award decision.

As mentioned above, it is in the nature of emergency awards that the object of the contract needs to be achieved in an immediate or almost immediate manner. Whether Seaborne would be in a position to do so has been queried in the media. Indeed, not only does the company not currently operate a ferry line, but the infrastructure of the UK port from which it plans to provide the emergency services requires adaptation.⁹ Even if the company is reported to have provided reassurances that the dredging

⁵ Judgment of 2 June 2005 in *Commission v Greece*, C-394/02, EU:C:2005:336, para 40.

⁶ Albert Sanchez-Graells, *Public procurement and the EU competition rules* (2nd edn, Hart 2015) 278.

⁷ Judgment of 10 December 2018 in *Wightman and Others*, C-621/18, EU:C:2018:999.

⁸ See eg <https://blog.tendersdirect.co.uk/2018/08/29/timescales-under-the-2015-public-contracts-regulations-updated/>.

⁹ Eg <https://www.theguardian.com/politics/2018/dec/30/no-deal-brexit-ferry-company-owns-no-ships-and-has-never-run-ferry-service>.

of the port will allow it to be ready by the end of March,¹⁰ the Department for Transport is unavoidably accepting a risk of unavailability of the emergency services if that is not the case. This element of risk is inconsistent with the logic and limited parameters controlling the award of the contract under the 'extreme urgency' exception.

Additionally, the Secretary of State for Transport, the Rt Hon Chris Grayling MP, has made public declarations that indicate a different—and illegal—rationale for the Seaborne award. Indeed, in a BBC Radio 4 *Today* interview, he expressed that he would 'make no apologies for supporting a new British business'. He further indicated that '[Seaborne is] a new start-up business, government is supporting new British business and there is nothing wrong with that'.¹¹

This is a clear indication that the Department for Transport may have illegally decided the Seaborne award as part of a post-Brexit industrial policy. This would breach the requirement for the contracting authority seeking to rely on the 'extreme urgency' exemption to act diligently and be in the position to legitimately hold that the conditions for recourse to this procedure were in fact satisfied. This particular issue would also benefit from further investigation by the Transport Committee.

Potential illegality under EU State aid rules

In addition to the likely breaches of the procurement rules discussed above, the contracts also raise a potential breach of EU State aid rules. Some public reports have indicated that the freight companies would retain part of the value of the contracts in case the emergency services are not necessary—ie in case No-Deal Brexit does not take place. Despite some clarifications provided by the Department for Transport, the situation is not clear. According to the BBC,

It was initially understood that the three firms were likely to retain a portion of their award even if their services were no longer needed, due to a Brexit deal being reached with Brussels. The DfT has now clarified that this will not be the case for Seaborne. The BBC understands that French firm Brittany Ferries will be entitled to retain some of the award in case its services are no longer required, as per its contract with the DfT. A spokesperson said: "Seaborne Freight is obliged to meet a number of stringent time-staged requirements to demonstrate that it can provide an effective service, with break clauses in the DfT's favour if it fails to meet them. "Taxpayer's money will only be transferred following the provision of an effective service."¹²

The nature of such an arrangement does not seem to align with the fact that Seaborne relies on 'City finance' to launch its operations and that significant upfront costs exist—for example, concerning the dredging of the port. There seems to be a significant lack of clarity of the contractual commitments towards Seaborne and its financiers, and what 'effective service' means in this context. Any undue advantage given to Seaborne—as a start-up, or otherwise—triggers a risk of illegal State aid.

More generally, the fact that at least the other two companies could retain part of the value of the contract despite not providing emergency ferry services raises additional State aid risks that require careful assessment.

¹⁰ Eg <https://www.theguardian.com/politics/2018/dec/31/brexit-ferry-firm-seaborne-says-it-will-be-up-and-running-before-end-of-march>.

¹¹ <https://www.independent.co.uk/news/uk/politics/chris-grayling-ferry-contract-no-deal-brexit-ships-seaborne-freight-uk-firm-start-up-dover-calais-a8707296.html>.

¹² <https://www.bbc.co.uk/news/business-46722229>.

It must be noted that compliance with EU State aid rules is a requirement of the current draft withdrawal agreement¹³ and that this is likely to remain a requirement for any future UK-EU trade deal. Equivalent constraints would also play a role in case of No-Deal Brexit, although in that scenario that would be channelled under relevant WTO provisions. This particular issue would thus benefit from further investigation by the Transport Committee.

Final remarks

The likely illegal award of the contracts for additional shipping freight capacity in breach of UK procurement rules should be a matter of concern for the Commons Transport Select Committee, and further inquiries should be undertaken as soon as possible.

This event indicates that the Government seems intent on pursuing a transport policy—and, possibly, a broader procurement policy—that runs against the core rules of EU law and policy. This is an unwelcome indication of potential roadblocks in the path towards reaching an agreement on a future UK-EU trade deal. The incompatibility of such an event with the close relationship with the EU that Government has declared it will seek also requires additional scrutiny.

Biographical information

Dr Albert Sanchez-Graells is a Reader in Economic Law at the University of Bristol Law School, a former Member of the European Commission Stakeholder Expert Group on Public Procurement (2015-18), a Member of the European Procurement Law Group, and a Member of the Procurement Lawyers Association Brexit Working Group. He is a specialist in European economic law, with a main focus on competition law and public procurement. He takes a law and economics approach to his research and is particularly keen on the analysis of the systems of incentives and enforcement mechanisms that law creates or facilitates.

His publications include the leading monograph *Public Procurement and the EU Competition Rules*, 2nd edn (Bloomsbury-Hart, 2015). He has recently co-authored *Shaping EU Public Procurement Law: A Critical Analysis of the CJEU Case Law 2015–2017* (Wolters-Kluwer, 2018), edited *Smart Public Procurement and Labour Standards. Pushing the Discussion after RegioPost* (Hart, 2018, forthcoming), and also coedited *Reformation or Deformation of the Public Procurement Rules* (Edward Elgar, 2016). Most of Albert's working papers are available at <http://ssrn.com/author=542893> and his analysis of current legal developments is published in his blog <http://www.howtocrackanut.com>.

Albert is a regular speaker at international conferences and has been repeatedly invited by the European Court of Auditors and European Commission as an expert academic in public procurement and competition matters. He has also advised the World Bank and other international institutions regarding public procurement reform.

¹³ https://ec.europa.eu/commission/publications/draft-agreement-withdrawal-united-kingdom-great-britain-and-northern-ireland-european-union-and-european-atomic-energy-community-agreed-negotiators-level-14-november-2018_en.